To: Daniel Jorjani[daniel_jorjani@ios.doi.gov]
From: Frost, Herbert
Sent: 2017-02-28T11:58:49-05:00
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FY 2016 Asset by Park State OB 2017_02_24.xlsx
NPS Briefing Statement - High Priority Assets DM - 02-27-2017.docx

Dan
Here are the high priority assets and associated DM for each assets along with a cover sheet explaining the categories and the overall DM process.

If you have questions, let me know.

Bert

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Herbert C. Frost, Ph.D.
Acting Deputy Director, Operations
National Park Service

202-208-3818 - Office

Briefing Statement

Bureau: **NPS**
Issue: **Deferred Maintenance (DM) of NPS' High Priority Facility Assets**
Park/Program: **Park Planning Facilities and Lands**
Date: **Feb 27, 2017**

Key Points

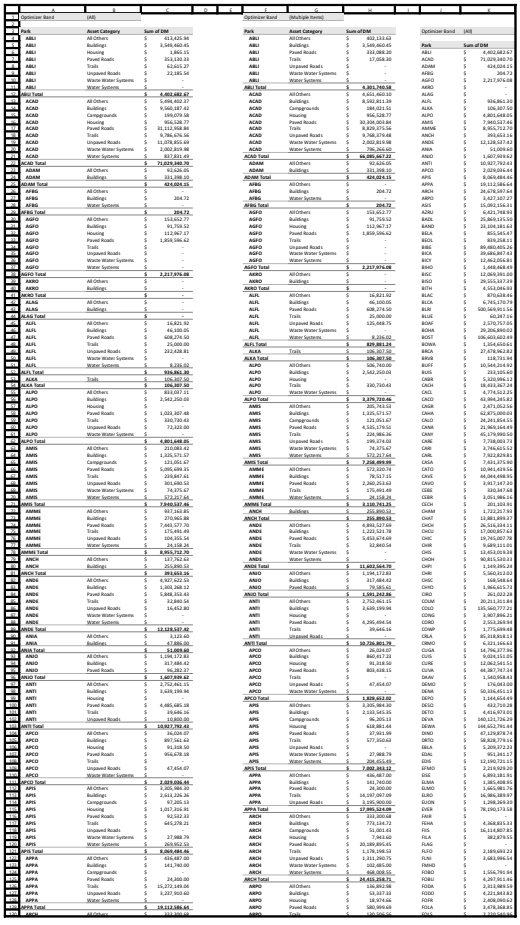
- The attached file details the High Priority (defined as Optimizer Band 1 and 2 assets) NPS Facility Assets with the following columns:

Field	Definition
Park	Park unit acronym/name
Description	Names/Describes the real property asset
State	State abbreviation
Asset Category	Defines the General Asset Type
CRV	Current Replacement Value (of the asset, in current dollars)
DM (Deferred Maintenance)	DM is maintenance of the assets that was not performed when it should have been and is delayed into the future. (The amounts represent the cost to repair the deficiency and do not represent the full project execution costs.)

- The ~$8.3B total DM of these high priority assets are a subset of the NPS' $11.3B total DM as of Sep. 30, 2016.
- The file does not include NPS' medium and lower priority assets (defined as optimizer bands 3, 4 and 5).
- The DM amounts are based on the work orders in the NPS' tracking system and do not include all costs related to correcting the deficiencies and executing a complete project. In order for these work orders to be completed, the individual work orders are bundled together into projects, are prioritized and compete for funding, and are designed, contracted, and constructed. Depending on the size, scope and complexity of the project, the process of entering work orders through completion and close out of the project could take several months to several years.

Background

- At the end of each fiscal year, the National Park Service (NPS) Park Facility Management Division takes a snapshot of maintenance data and generates final annual DM statistics for its portfolio of more than 75,000 constructed assets.
- Due to the continuously changing nature of facilities data, only final, year-end data is reported in response to information requests from the Department of the Interior, the Office of Management and Budget, the media, Congress, and other requestors. The NPS does not report "live" data and does not update reports on request. The statistics from the previous fiscal year are reported as consistent numbers throughout the current fiscal year.
- At the end of FY2016 (Sep 30, 2016), the total DM servicewide was $11.3B.



Optimizer Band	(All)

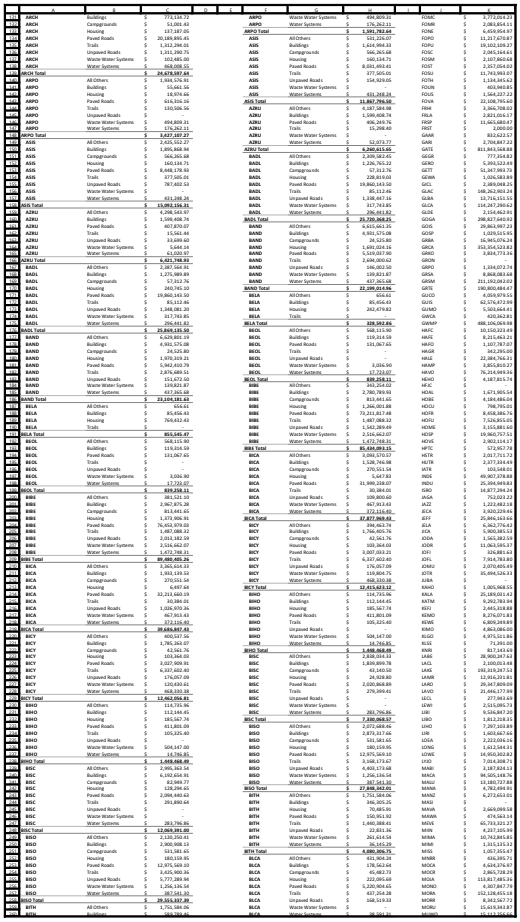
Park	Asset Category	Sum of DM
ABLI	All Others	$ 613,425.96
ABLI	Buildings	$ 1,549,460.45
ABLI	Housing	$ 1,865.15
ABLI	Paved Roads	$ 153,130.33
ABLI	Trails	$ 62,621.27
ABLI	Unpaved Roads	$ 22,185.54
ABLI	Waste Water Systems	$ -
ABLI	Water Systems	$ -
ABLI Total		**$ 4,403,682.67**
ACAD	All Others	$ 5,494,402.27
ACAD	Buildings	$ 9,560,187.42
ACAD	Campgrounds	$ 199,079.58
ACAD	Housing	$ 956,528.77
ACAD	Paved Roads	$ 31,112,958.84
ACAD	Trails	$ 9,786,476.56
ACAD	Unpaved Roads	$ 11,078,855.69
ACAD	Waste Water Systems	$ 2,002,819.98
ACAD	Water Systems	$ 817,831.69
ACAD Total		**$ 71,019,340.70**
ADAM	All Others	$ 92,626.05
ADAM	Buildings	$ 331,398.10
ADAM Total		**$ 424,024.15**
AFBG	All Others	$ -
AFBG	Buildings	$ 204.72
AFBG	Water Systems	$ -
AFBG Total		**$ 204.72**
AGFO	All Others	$ 153,652.77
AGFO	Buildings	$ 91,759.52
AGFO	Housing	$ 112,967.17
AGFO	Paved Roads	$ 1,859,596.62
AGFO	Trails	$ -
AGFO	Unpaved Roads	$ -
AGFO	Waste Water Systems	$ -
AGFO	Water Systems	$ -
AGFO Total		**$ 2,217,976.08**
AKBO	All Others	$ -
AKBO	Buildings	$ -
AKBO Total		**$ -**
ALAG	All Others	$ -
ALAG	Buildings	$ -
ALAG Total		**$ -**
ALFL	All Others	$ 16,821.92
ALFL	Buildings	$ 46,100.05
ALFL	Paved Roads	$ 608,274.50
ALFL	Trails	$ 25,000.00
ALFL	Unpaved Roads	$ 212,428.81
ALFL	Waste Water Systems	$ -
ALFL	Water Systems	$ 8,226.02
ALFL Total		**$ 916,851.30**
ALKA	Trails	$ 106,307.50
ALKA Total		**$ 106,307.50**
ALPO	All Others	$ 833,037.11
ALPO	Buildings	$ 2,541,250.59
ALPO	Housing	$ -
ALPO	Paved Roads	$ 1,023,307.48
ALPO	Trails	$ 330,730.43
ALPO	Unpaved Roads	$ 72,323.00
ALPO	Waste Water Systems	$ -
ALPO Total		**$ 4,801,648.05**
AMIS	All Others	$ 210,083.42
AMIS	Buildings	$ 1,325,171.57
AMIS	Campgrounds	$ 121,051.67
AMIS	Paved Roads	$ 5,095,699.35
AMIS	Trails	$ 219,847.61
AMIS	Unpaved Roads	$ 301,690.53
AMIS	Waste Water Systems	$ 74,375.67
AMIS	Water Systems	$ 572,017.66
AMIS Total		**$ 7,940,537.48**
AMME	All Others	$ 927,163.85
AMME	Buildings	$ 270,965.88
AMME	Paved Roads	$ 7,443,577.70
AMME	Trails	$ 173,491.49
AMME	Unpaved Roads	$ 104,355.54
AMME	Water Systems	$ 24,158.26
AMME Total		**$ 8,943,712.70**
ANCH	All Others	$ 137,762.62
ANCH	Buildings	$ 255,890.53
ANCH Total		**$ 393,653.16**
ANDE	All Others	$ 4,927,623.53
ANDE	Buildings	$ 1,303,268.12
ANDE	Paved Roads	$ 5,848,152.43
ANDE	Trails	$ 32,840.54
ANDE	Unpaved Roads	$ 14,452.80
ANDE	Waste Water Systems	$ -
ANDE	Water Systems	$ -
ANDE Total		**$ 12,128,537.42**
ANNA	All Others	$ 3,123.60
ANNA	Buildings	$ 47,886.00
ANNA Total		**$ 51,009.60**
ANOO	All Others	$ 1,198,172.83
ANOO	Buildings	$ 317,484.42
ANOO	Paved Roads	$ 56,282.27
ANOO Total		**$ 1,607,939.52**
ANTI	All Others	$ 2,752,461.15
ANTI	Buildings	$ 2,426,199.96
ANTI	Housing	$ -
ANTI	Paved Roads	$ 4,485,685.18
ANTI	Trails	$ 39,646.14
ANTI	Unpaved Roads	$ 10,800.00
ANTI Total		**$ 10,927,792.43**
APCO	All Others	$ 16,028.07
APCO	Buildings	$ 897,561.63
APCO	Housing	$ 91,338.50
APCO	Paved Roads	$ 954,678.18
APCO	Trails	$ -
APCO	Unpaved Roads	$ 47,454.07
APCO	Waste Water Systems	$ -
APCO Total		**$ 2,029,036.44**
APIS	All Others	$ 1,205,388.10
APIS	Buildings	$ 2,611,226.26
APIS	Campgrounds	$ 97,265.13
APIS	Housing	$ 1,017,356.91
APIS	Paved Roads	$ 92,542.33
APIS	Trails	$ 645,278.21
APIS	Unpaved Roads	$ -
APIS	Waste Water Systems	$ 27,988.79
APIS	Water Systems	$ 369,912.33
APIS Total		**$ 8,069,484.86**
APPA	All Others	$ 434,487.00
APPA	Buildings	$ 141,740.00
APPA	Campgrounds	$ -
APPA	Paved Roads	$ 24,300.00
APPA	Trails	$ 15,272,149.04
APPA	Unpaved Roads	$ 3,207,910.60
APPA	Water Systems	$ -
APPA Total		**$ 19,112,586.64**
APCA	All Others	$ 191,329.45

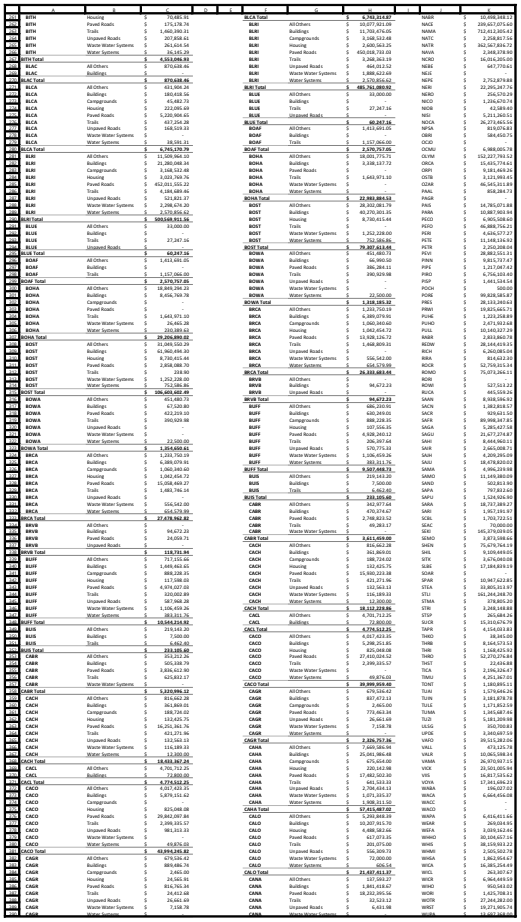
Optimizer Band	(Multiple Items)

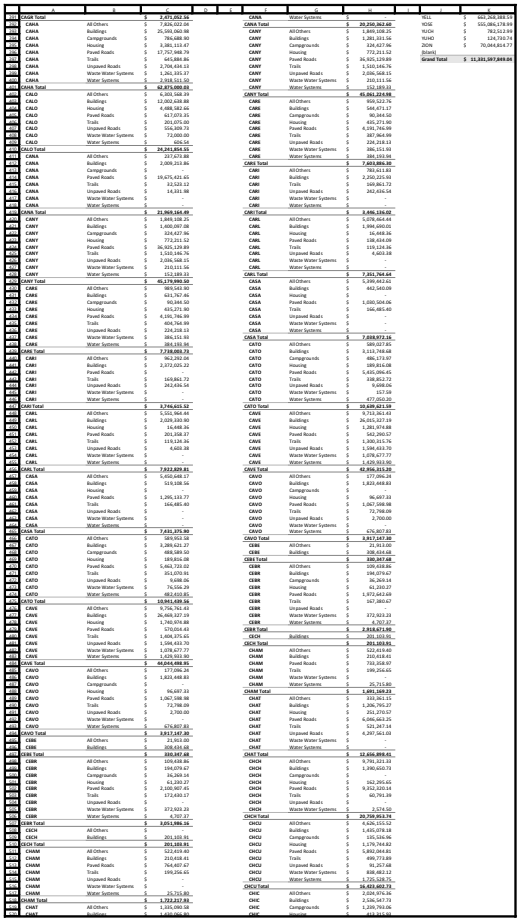
Park	Asset Category	Sum of DM
ABLI	All Others	$ 402,133.62
ABLI	Buildings	$ 1,549,460.45
ABLI	Paved Roads	$ 153,088.20
ABLI	Trails	$ 17,058.30
ABLI	Unpaved Roads	$ -
ABLI	Waste Water Systems	$ -
ABLI	Water Systems	$ -
ABLI Total		**$ 4,301,760.58**
ACAD	All Others	$ 4,651,460.10
ACAD	Buildings	$ 8,592,811.39
ACAD	Campgrounds	$ 184,021.51
ACAD	Housing	$ 956,528.77
ACAD	Paved Roads	$ 30,204,003.84
ACAD	Trails	$ 8,829,375.56
ACAD	Unpaved Roads	$ 9,768,379.68
ACAD	Waste Water Systems	$ 2,002,819.98
ACAD	Water Systems	$ 796,264.60
ACAD Total		**$ 66,085,667.22**
ADAM	All Others	$ 92,626.05
ADAM	Buildings	$ 331,398.10
ADAM Total		**$ 424,024.15**
AFBG	All Others	$ -
AFBG	Buildings	$ 204.72
AFBG	Water Systems	$ -
AFBG Total		**$ 204.72**
AGFO	All Others	$ 153,652.77
AGFO	Buildings	$ 91,759.52
AGFO	Housing	$ 112,967.17
AGFO	Paved Roads	$ 1,859,596.62
AGFO	Trails	$ -
AGFO	Unpaved Roads	$ -
AGFO	Waste Water Systems	$ -
AGFO	Water Systems	$ -
AGFO Total		**$ 2,217,976.08**
AKBO	All Others	$ -
AKBO	Buildings	$ -
AKBO Total		**$ -**
ALFL	All Others	$ 16,821.92
ALFL	Buildings	$ 46,100.05
ALFL	Paved Roads	$ 608,274.50
ALFL	Trails	$ 25,000.00
ALFL	Unpaved Roads	$ 125,468.75
ALFL	Waste Water Systems	$ -
ALFL	Water Systems	$ 8,226.02
ALFL Total		**$ 829,891.24**
ALKA	Trails	$ 106,307.50
ALKA Total		**$ 106,307.50**
ALPO	All Others	$ 506,740.00
ALPO	Buildings	$ 2,542,250.03
ALPO	Housing	$ -
ALPO	Trails	$ 330,730.43
ALPO	Waste Water Systems	$ -
ALPO Total		**$ 3,379,720.46**
AMIS	All Others	$ 205,743.53
AMIS	Buildings	$ 1,325,171.57
AMIS	Campgrounds	$ 121,051.67
AMIS	Paved Roads	$ 4,565,179.51
AMIS	Trails	$ 224,986.36
AMIS	Unpaved Roads	$ 199,374.03
AMIS	Waste Water Systems	$ 74,375.67
AMIS	Water Systems	$ 572,017.66
AMIS Total		**$ 7,288,899.99**
AMME	All Others	$ 572,320.78
AMME	Buildings	$ 76,517.15
AMME	Paved Roads	$ 2,260,253.63
AMME	Trails	$ 175,491.49
AMME	Water Systems	$ 24,158.26
AMME Total		**$ 3,110,741.25**
ANCH	Buildings	$ 255,890.53
ANCH Total		**$ 255,890.53**
ANDE	All Others	$ 4,859,127.68
ANDE	Buildings	$ 1,222,521.78
ANDE	Paved Roads	$ 5,453,674.68
ANDE	Trails	$ 32,840.54
ANDE	Waste Water Systems	$ -
ANDE	Water Systems	$ -
ANDE Total		**$ 11,603,564.70**
ANOO	All Others	$ 1,194,172.83
ANOO	Buildings	$ 317,484.42
ANOO	Paved Roads	$ 79,585.61
ANOO Total		**$ 1,591,242.86**
ANTI	All Others	$ 2,752,461.15
ANTI	Buildings	$ 1,634,199.98
ANTI	Housing	$ -
ANTI	Paved Roads	$ 4,295,494.54
ANTI	Trails	$ 39,646.14
ANTI	Unpaved Roads	$ -
ANTI Total		**$ 10,726,801.79**
APCO	All Others	$ 26,024.07
APCO	Buildings	$ 840,417.23
APCO	Housing	$ 91,318.50
APCO	Paved Roads	$ 803,438.15
APCO	Trails	$ -
APCO	Unpaved Roads	$ 47,454.07
APCO	Waste Water Systems	$ -
APCO Total		**$ 1,808,652.02**
APIS	All Others	$ 1,205,388.10
APIS	Buildings	$ 2,133,545.35
APIS	Campgrounds	$ 96,265.13
APIS	Housing	$ 618,881.44
APIS	Paved Roads	$ 37,931.99
APIS	Trails	$ 577,350.63
APIS	Unpaved Roads	$ -
APIS	Waste Water Systems	$ 27,988.79
APIS	Water Systems	$ 304,453.49
APIS Total		**$ 7,002,163.12**
APPA	All Others	$ 434,487.00
APPA	Buildings	$ 141,740.00
APPA	Paved Roads	$ 24,300.00
APPA	Trails	$ 14,197,097.09
APPA	Unpaved Roads	$ 3,195,900.00
APPA Total		**$ 17,993,524.09**
APCA	All Others	$ 191,329.45
ANOH	Buildings	$ 773,134.72
ANOH	Campgrounds	$ 51,001.43
ANOH	Housing	$ 7,963.60
ANOH	Paved Roads	$ 20,189,895.45
ANOH	Trails	$ 1,178,198.53
ANOH	Unpaved Roads	$ 1,211,260.75
ANOH	Waste Water Systems	$ 102,485.00
ANOH	Water Systems	$ 868,008.35
ANOH Total		**$ 24,415,258.71**
AMPO	All Others	$ 136,892.98
AMPO	Buildings	$ 51,117.33
AMPO	Housing	$ 18,974.66
AMPO	Paved Roads	$ 580,999.69
AMPO	Trails	$ 53,506.36

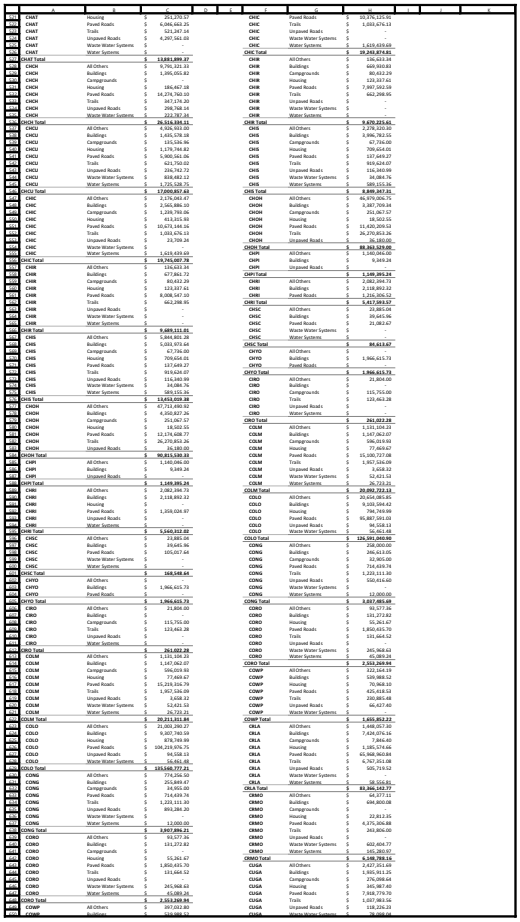
Optimizer Band	(All)

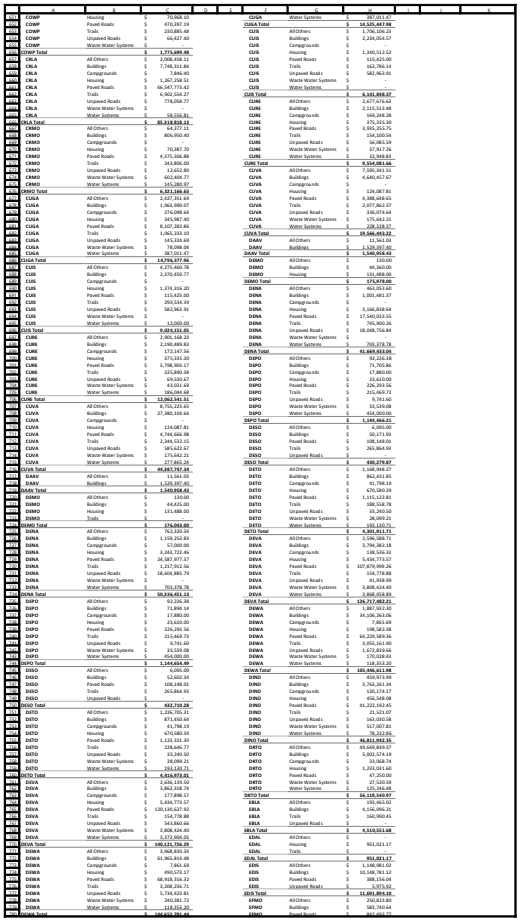
Park	Sum of DM
ABLI	$ 4,403,682.67
ACAD	$ 71,019,340.70
ADAM	$ 424,024.15
AFBG	$ 204.72
AGFO	$ 2,217,976.08
AKBO	$ -
ALAG	$ -
ALFL	$ 916,851.30
ALKA	$ 106,307.50
ALPO	$ 4,801,648.05
AMIS	$ 7,940,537.48
AMME	$ 8,943,712.70
ANCH	$ 393,653.16
ANDE	$ 12,128,537.42
ANNA	$ 51,009.60
ANOO	$ 1,607,939.52
ANTI	$ 10,927,792.43
APCO	$ 2,029,036.44
APIS	$ 8,069,484.86
APPA	$ 19,112,586.64
APCA	$ 191,329.45
ANOH	$ 24,415,258.71
AMPO	$ 841,891.02
AMPU	$ 1,556,791.94
ANPU	$ 4,297,551.66
AOPU	$ 2,313,989.59
AOOO	$ 4,221,843.82
AOPO	$ 2,458,060.62
AOLA	$ 2,478,368.85
AOLL	$ 410,107.81











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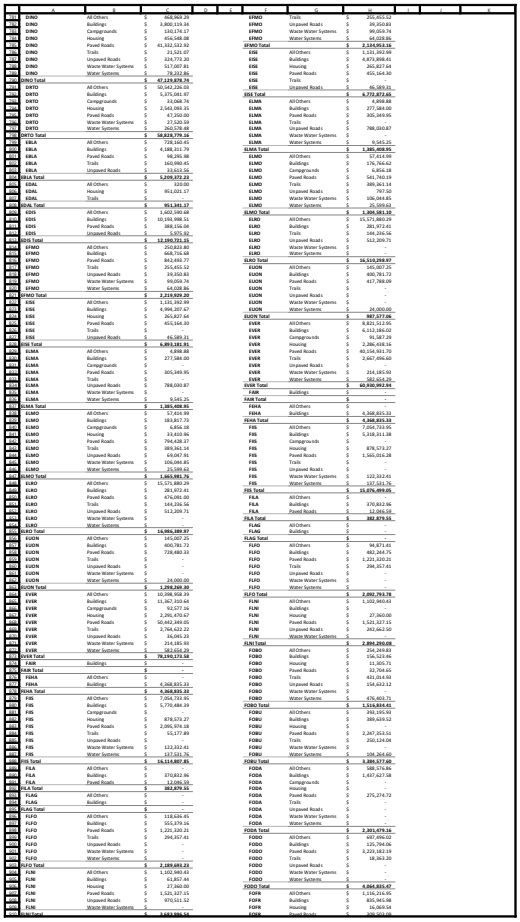

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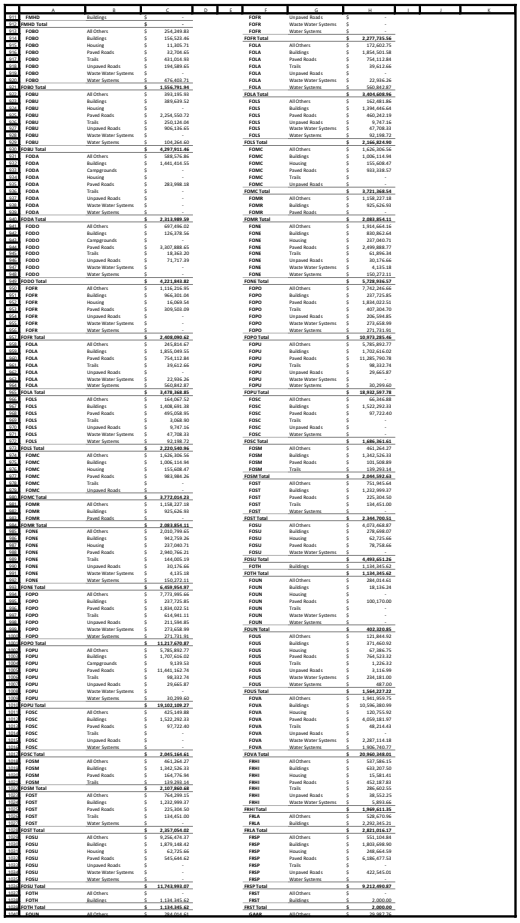

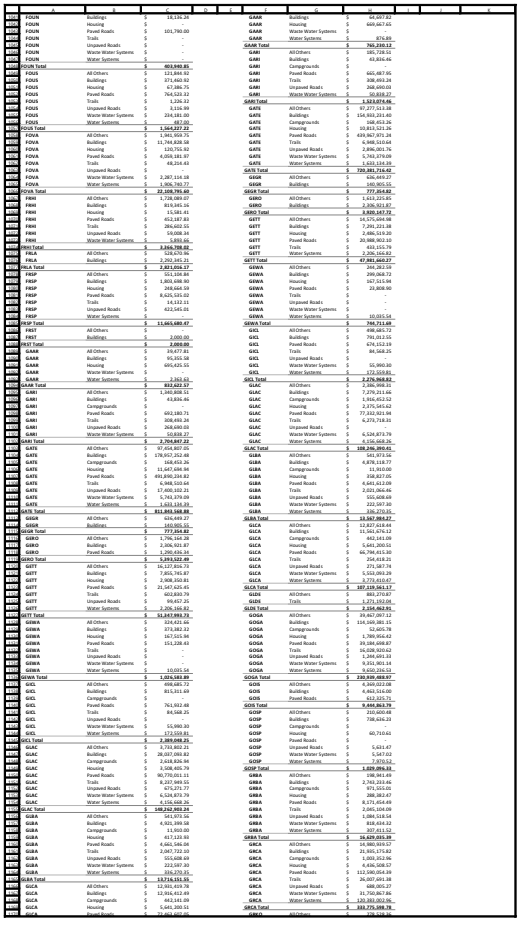

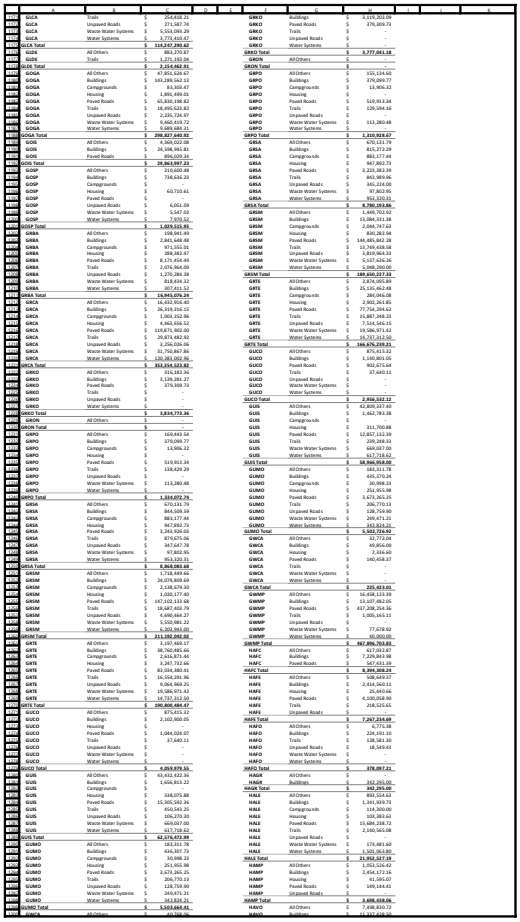

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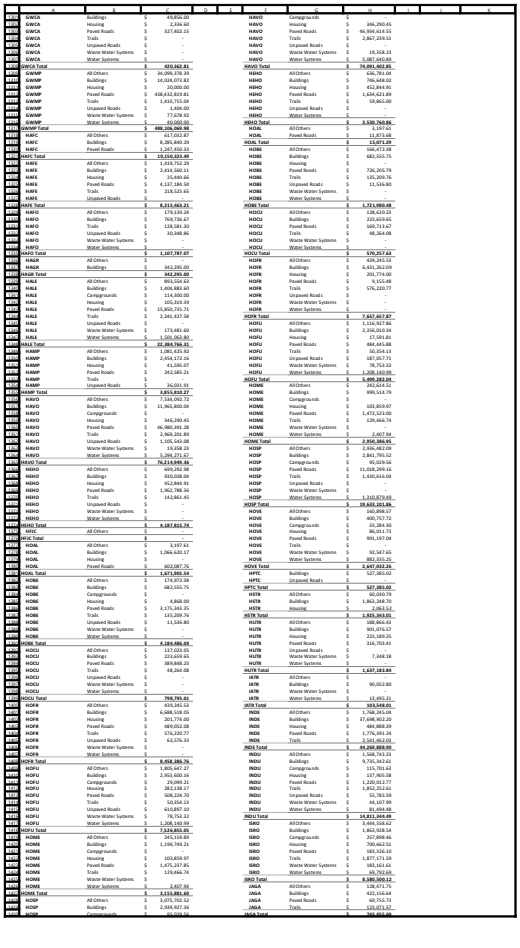
4157	**GICA**	Trails	$ 254,418.21			**GIRO**	Buildings	$ 3,133,203.66			
4158	**GICA**	Unpaved Roads	$ 271,587.74			**GIRO**	Paved Roads	$ 276,806.73			
4159	**GICA**	Waste Water Systems	$ 5,553,093.29			**GIRO**	Trails	$ -			
4160	**GICA**	Water Systems	$ 3,773,410.47			**GIRO**	Unpaved Roads	$ -			
4161	**GLCA Total**		**$ 114,247,290.62**			**GIRO**	Water Systems	$ -			
4162	**GLEN**	All Others	$ 983,270.87			**GIRO Total**		**$ 3,777,861.18**			
4163	**GLEN**	Trails	$ 1,271,192.06			**GIRON**	All Others	$ -			
4164	**GLEN Total**		**$ 2,154,462.93**			**GIRON Total**		$ -			
4165	**GOGA**	All Others	$ 47,851,424.67			**GIPO**	All Others	$ 155,134.60			
4166	**GOGA**	Buildings	$ 140,289,562.13			**GIPO**	Buildings	$ 274,069.77			
4167	**GOGA**	Campgrounds	$ 83,303.47			**GIPO**	Campgrounds	$ 13,906.32			
4168	**GOGA**	Housing	$ 1,891,499.01			**GIPO**	Housing	$ -			
4169	**GOGA**	Paved Roads	$ 65,830,198.82			**GIPO**	Paved Roads	$ 519,913.34			
4170	**GOGA**	Trails	$ 18,495,422.82			**GIPO**	Trails	$ 129,594.16			
4171	**GOGA**	Unpaved Roads	$ 2,155,724.97			**GIPO**	Unpaved Roads	$ -			
4172	**GOGA**	Waste Water Systems	$ 9,660,419.72			**GIPO**	Waste Water Systems	$ 113,280.68			
4173	**GOGA**	Water Systems	$ 9,689,684.31			**GIPO**	Water Systems	$ -			
4174	**GOGA Total**		**$ 298,827,449.92**			**GIPO Total**		**$ 1,310,928.67**			
4175	**GOIS**	All Others	$ 4,368,022.08			**GIRA**	All Others	$ 670,131.79			
4176	**GOIS**	Buildings	$ 24,598,945.81			**GIRA**	Buildings	$ 811,272.29			
4177	**GOIS**	Paved Roads	$ 896,029.34			**GIRA**	Campgrounds	$ 883,177.44			
4178	**GOIS Total**		**$ 29,863,997.23**			**GIRA**	Housing	$ 947,892.73			
4179	**GOSP**	All Others	$ 210,600.48			**GIRA**	Paved Roads	$ 3,220,382.39			
4180	**GOSP**	Buildings	$ 738,634.20			**GIRA**	Trails	$ 843,989.96			
4181	**GOSP**	Campgrounds	$ -			**GIRA**	Unpaved Roads	$ 345,224.00			
4182	**GOSP**	Housing	$ 60,710.61			**GIRA**	Waste Water Systems	$ 97,802.95			
4183	**GOSP**	Paved Roads	$ -			**GIRA**	Water Systems	$ 951,320.91			
4184	**GOSP**	Unpaved Roads	$ 6,051.09			**GIRA Total**		**$ 8,780,193.86**			
4185	**GOSP**	Waste Water Systems	$ 5,547.02			**GIRM**	All Others	$ 1,449,702.92			
4186	**GOSP**	Water Systems	$ 7,870.52			**GIRM**	Buildings	$ 13,084,191.18			
4187	**GOSP Total**		**$ 1,029,531.85**			**GIRM**	Campgrounds	$ 2,066,747.63			
4188	**GRBA**	All Others	$ 198,941.49			**GIRM**	Housing	$ 830,283.94			
4189	**GRBA**	Buildings	$ 2,881,488.48			**GIRM**	Paved Roads	$ 146,485,842.28			
4190	**GRBA**	Campgrounds	$ 971,551.01			**GIRM**	Trails	$ 12,749,438.58			
4191	**GRBA**	Housing	$ 288,382.47			**GIRM**	Unpaved Roads	$ 3,819,964.33			
4192	**GRBA**	Paved Roads	$ 8,171,454.49			**GIRM**	Waste Water Systems	$ 5,137,324.26			
4193	**GRBA**	Trails	$ 2,076,964.09			**GIRM**	Water Systems	$ 1,068,260.00			
4194	**GRBA**	Unpaved Roads	$ 1,270,284.38			**GRSM Total**		**$ 189,650,277.22**			
4195	**GRBA**	Waste Water Systems	$ 818,634.22			**GRTE**	All Others	$ 2,874,095.69			
4196	**GRBA**	Water Systems	$ 807,611.52			**GRTE**	Buildings	$ 25,135,462.68			
4197	**GRBA Total**		**$ 16,945,076.24**			**GRTE**	Campgrounds	$ 284,046.08			
4198	**GRCA**	All Others	$ 16,422,916.40			**GRTE**	Housing	$ 2,902,261.81			
4199	**GRCA**	Buildings	$ 26,319,316.15			**GRTE**	Paved Roads	$ 77,754,394.62			
4200	**GRCA**	Campgrounds	$ 1,003,152.96			**GRTE**	Trails	$ 15,887,248.23			
4201	**GRCA**	Housing	$ 4,463,455.52			**GRTE**	Unpaved Roads	$ 7,514,546.15			
4202	**GRCA**	Paved Roads	$ 119,871,462.00			**GRTE**	Waste Water Systems	$ 19,586,971.42			
4203	**GRCA**	Trails	$ 29,873,482.92			**GRTE**	Water Systems	$ 16,737,913.00			
4204	**GRCA**	Unpaved Roads	$ 2,256,436.96			**GRTE Total**		**$ 166,676,239.21**			
4205	**GRCA**	Waste Water Systems	$ 21,750,867.86			**GUCO**	All Others	$ 875,415.22			
4206	**GRCA**	Water Systems	$ 120,483,002.96			**GUCO**	Buildings	$ 1,140,801.05			
4207	**GRCA Total**		**$ 353,354,523.82**			**GUCO**	Paved Roads	$ 902,675.64			
4208	**GREO**	All Others	$ 314,182.34			**GUCO**	Trails	$ 37,649.11			
4209	**GREO**	Buildings	$ 3,139,281.27			**GUCO**	Unpaved Roads	$ -			
4210	**GREO**	Paved Roads	$ 379,309.73			**GUCO**	Waste Water Systems	$ -			
4211	**GREO**	Trails	$ -			**GUCO**	Water Systems	$ -			
4212	**GREO**	Unpaved Roads	$ -			**GUCO Total**		**$ 2,956,122.12**			
4213	**GREO**	Water Systems	$ -			**GUIS**	All Others	$ 42,806,107.60			
4214	**GREO Total**		**$ 3,834,773.34**			**GUIS**	Buildings	$ 1,462,783.38			
4215	**GRON**	All Others	$ -			**GUIS**	Campgrounds	$ -			
4216	**GRON Total**		$ -			**GUIS**	Housing	$ 311,700.88			
4217	**GRPO**	All Others	$ 169,643.54			**GUIS**	Paved Roads	$ 12,857,132.39			
4218	**GRPO**	Buildings	$ 379,099.77			**GUIS**	Trails	$ 209,268.33			
4219	**GRPO**	Campgrounds	$ 13,906.32			**GUIS**	Waste Water Systems	$ 669,037.00			
4220	**GRPO**	Housing	$ -			**GUIS**	Water Systems	$ 617,718.62			
4221	**GRPO**	Paved Roads	$ 519,913.34			**GUIS Total**		**$ 58,966,958.00**			
4222	**GRPO**	Trails	$ 118,429.29			**GUMO**	All Others	$ 183,311.78			
4223	**GRPO**	Unpaved Roads	$ -			**GUMO**	Buildings	$ 435,370.24			
4224	**GRPO**	Waste Water Systems	$ 113,280.68			**GUMO**	Campgrounds	$ 30,998.23			
4225	**GRPO**	Water Systems	$ -			**GUMO**	Housing	$ 251,955.98			
4226	**GRPO Total**		**$ 1,314,672.74**			**GUMO**	Paved Roads	$ 2,474,265.25			
4227	**GRSA**	All Others	$ 670,131.79			**GUMO**	Trails	$ 206,770.13			
4228	**GRSA**	Buildings	$ 844,509.59			**GUMO**	Unpaved Roads	$ 138,759.90			
4229	**GRSA**	Campgrounds	$ 883,177.44			**GUMO**	Waste Water Systems	$ 249,671.21			
4230	**GRSA**	Housing	$ 947,892.73			**GUMO**	Water Systems	$ 342,824.21			
4231	**GRSA**	Paved Roads	$ 3,243,926.03			**GUMO Total**		**$ 5,163,726.92**			
4232	**GRSA**	Trails	$ 879,675.06			**GWCA**	All Others	$ 31,772.04			
4233	**GRSA**	Unpaved Roads	$ 347,647.78			**GWCA**	Buildings	$ 49,854.00			
4234	**GRSA**	Waste Water Systems	$ 97,802.95			**GWCA**	Housing	$ 2,334.60			
4235	**GRSA**	Water Systems	$ 953,320.31			**GWCA**	Paved Roads	$ 140,458.37			
4236	**GRSA Total**		**$ 8,868,083.68**			**GWCA**	Trails	$ -			
4237	**GRSM**	All Others	$ 1,718,449.66			**GWCA**	Waste Water Systems	$ -			
4238	**GRSM**	Buildings	$ 24,079,809.69			**GWCA**	Water Systems	$ -			
4239	**GRSM**	Campgrounds	$ 2,138,679.30			**GWCA Total**		**$ 225,419.01**			
4240	**GRSM**	Housing	$ 1,020,177.93			**GWMP**	All Others	$ 16,458,123.39			
4241	**GRSM**	Paved Roads	$ 147,102,133.68			**GWMP**	Buildings	$ 13,107,482.05			
4242	**GRSM**	Trails	$ 18,687,403.79			**GWMP**	Paved Roads	$ 637,208,354.36			
4243	**GRSM**	Unpaved Roads	$ 4,690,464.27			**GWMP**	Trails	$ 1,005,165.11			
4244	**GRSM**	Waste Water Systems	$ 5,516,981.22			**GWMP**	Unpaved Roads	$ -			
4245	**GRSM**	Water Systems	$ 6,203,961.00			**GWMP**	Waste Water Systems	$ 77,678.62			
4246	**GRSM Total**		**$ 211,592,062.22**			**GWMP**	Water Systems	$ 40,000.00			
4247	**GRTE**	All Others	$ 3,197,469.17			**GWMP Total**		**$ 667,886,703.83**			
4248	**GRTE**	Buildings	$ 38,760,485.46			**HAFC**	All Others	$ 617,202.87			
4249	**GRTE**	Campgrounds	$ 2,414,871.84			**HAFC**	Buildings	$ 7,229,863.98			
4250	**GRTE**	Housing	$ 3,247,732.66			**HAFC**	Paved Roads	$ 547,431.28			
4251	**GRTE**	Paved Roads	$ 83,034,380.41			**HAFC Total**		**$ 8,394,498.14**			
4252	**GRTE**	Trails	$ 16,314,291.96			**HAFE**	All Others	$ 508,649.37			
4253	**GRTE**	Unpaved Roads	$ 9,064,969.25			**HAFE**	Buildings	$ 2,414,540.13			
4254	**GRTE**	Waste Water Systems	$ 19,586,971.42			**HAFE**	Housing	$ 25,469.66			
4255	**GRTE**	Water Systems	$ 14,727,312.50			**HAFE**	Paved Roads	$ 4,100,058.90			
4256	**GRTE Total**		**$ 190,800,484.47**			**HAFE**	Trails	$ 218,525.65			
4257	**GUCO**	All Others	$ 875,415.22			**HAFE**	Unpaved Roads	$ -			
4258	**GUCO**	Buildings	$ 2,102,369.05			**HAFE Total**		**$ 7,267,234.69**			
4259	**GUCO**	Housing	$ -			**HAFO**	All Others	$ 6,775.38			
4260	**GUCO**	Paved Roads	$ 1,044,024.07			**HAFO**	Buildings	$ 224,191.10			
4261	**GUCO**	Trails	$ 37,649.11			**HAFO**	Trails	$ 128,581.30			
4262	**GUCO**	Unpaved Roads	$ -			**HAFO**	Unpaved Roads	$ 18,549.43			
4263	**GUCO**	Waste Water Systems	$ -			**HAFO**	Waste Water Systems	$ -			
4264	**GUCO**	Water Systems	$ -			**HAFO**	Water Systems	$ -			
4265	**GUCO Total**		**$ 4,059,979.55**			**HAFO Total**		**$ 378,097.21**			
4266	**GUIS**	All Others	$ 43,432,412.16			**HAGA**	All Others	$ -			
4267	**GUIS**	Buildings	$ 1,434,813.22			**HAGA**	Buildings	$ 342,295.00			
4268	**GUIS**	Campgrounds	$ -			**HAGA Total**		**$ 342,295.00**			
4269	**GUIS**	Housing	$ 318,075.88			**HALE**	All Others	$ 894,514.63			
4270	**GUIS**	Paved Roads	$ 15,305,182.36			**HALE**	Buildings	$ 1,341,939.73			
4271	**GUIS**	Trails	$ 450,543.25			**HALE**	Campgrounds	$ 114,300.00			
4272	**GUIS**	Unpaved Roads	$ 106,270.30			**HALE**	Housing	$ 101,383.63			
4273	**GUIS**	Waste Water Systems	$ 669,037.00			**HALE**	Paved Roads	$ 15,686,218.72			
4274	**GUIS**	Water Systems	$ 617,718.62			**HALE**	Trails	$ 2,166,565.08			
4275	**GUIS Total**		**$ 62,374,472.99**			**HALE**	Unpaved Roads	$ -			
4276	**GUMO**	All Others	$ 183,311.78			**HALE**	Waste Water Systems	$ 173,481.60			
4277	**GUMO**	Buildings	$ 434,307.74			**HALE**	Water Systems	$ 1,501,063.80			
4278	**GUMO**	Campgrounds	$ 30,998.23			**HALE Total**		**$ 21,953,327.19**			
4279	**GUMO**	Housing	$ 251,955.98			**HAMP**	All Others	$ 1,054,526.42			
4280	**GUMO**	Paved Roads	$ 2,471,265.25			**HAMP**	Buildings	$ 2,454,172.14			
4281	**GUMO**	Trails	$ 206,770.13			**HAMP**	Housing	$ 41,595.07			
4282	**GUMO**	Unpaved Roads	$ 128,759.90			**HAMP**	Paved Roads	$ 185,144.41			
4283	**GUMO**	Waste Water Systems	$ 249,671.21			**HAMP**	Unpaved Roads	$ -			
4284	**GUMO**	Water Systems	$ 342,824.21			**HAMP Total**		**$ 3,699,458.06**			
4285	**GUMO Total**		**$ 5,303,664.43**			**HANO**	All Others	$ 7,498,830.72			
4286	**GWCA**	All Others	$ 49,726.25			**HANO**	Buildings	$ 11,412,478.05			



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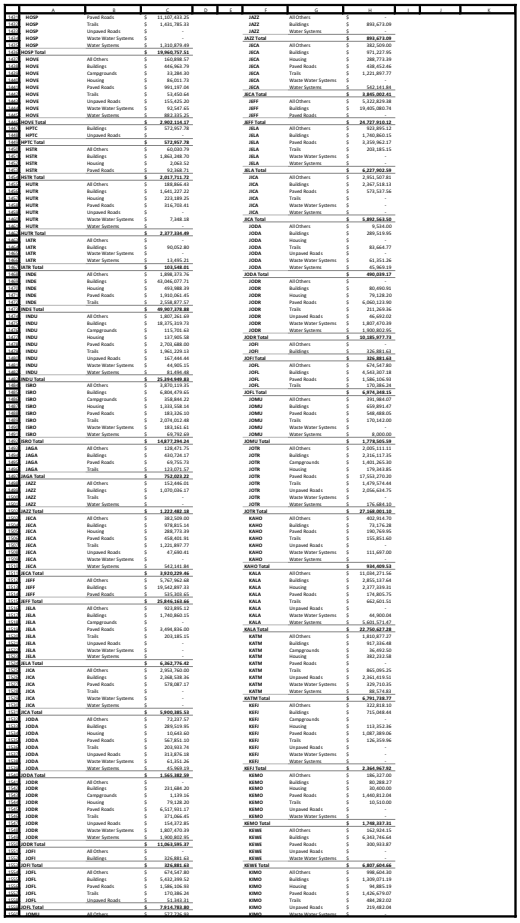

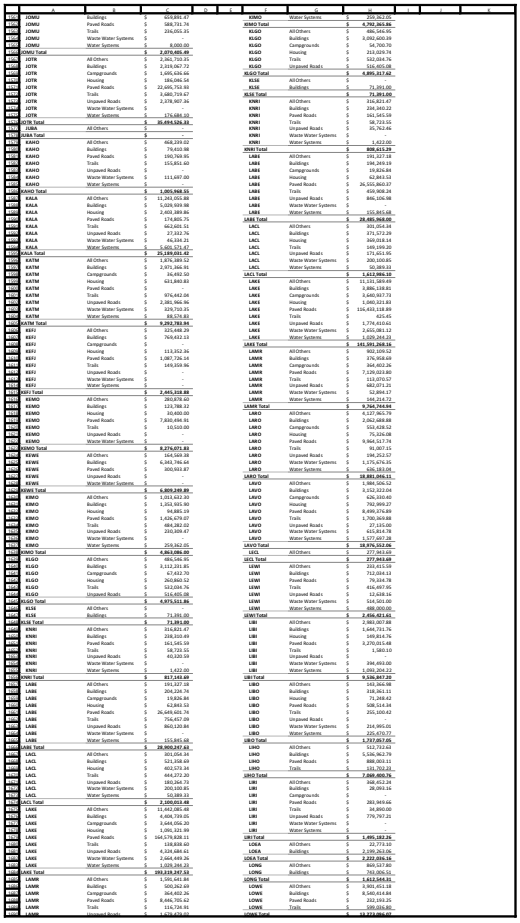

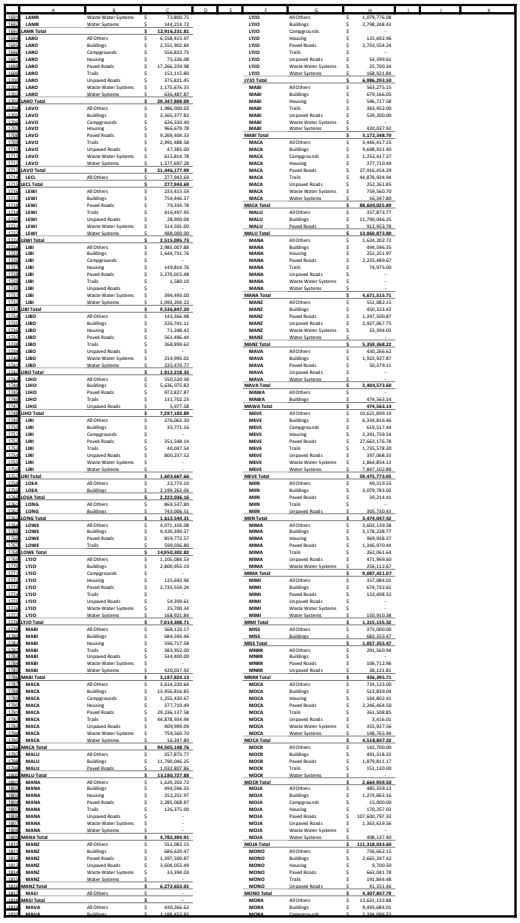

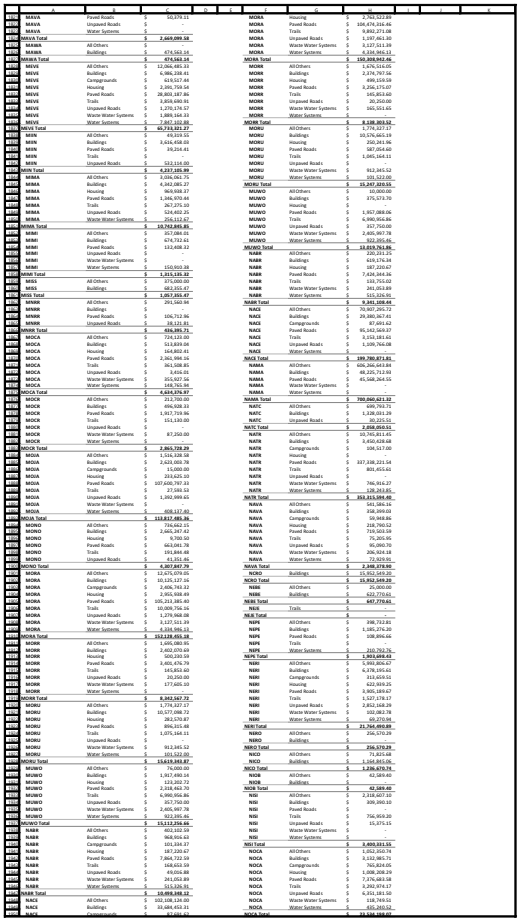

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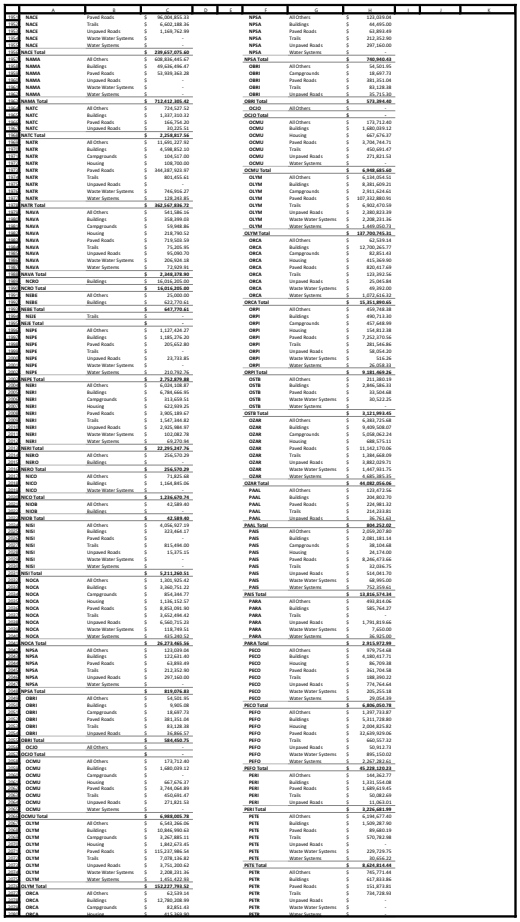

1	A	B	C	D	E	F	G	H	I	J	K
2	NACE	Paved Roads	$ 96,008,855.33			NPSA	All Others	$ 122,039.66			
3	NACE	Trails	$ 6,602,188.34			NPSA	Buildings	$ 44,495.00			
4	NACE	Unpaved Roads	$ 1,168,762.99			NPSA	Paved Roads	$ 62,893.49			
5	NACE	Waste Water Systems	$ -			NPSA	Trails	$ 212,352.90			
6	NACE	Water Systems	$ -			NPSA	Unpaved Roads	$ 297,160.00			
7	**NACE Total**		**$ 239,657,075.60**			NPSA	Water Systems	$ -			
8	NAMA	All Others	$ 608,836,445.67			**NPSA Total**		**$ 740,940.43**			
9	NAMA	Buildings	$ 49,626,496.47			OBRI	All Others	$ 54,501.95			
10	NAMA	Paved Roads	$ 53,936,363.28			OBRI	Campgrounds	$ 18,697.73			
11	NAMA	Unpaved Roads	$ -			OBRI	Paved Roads	$ 281,351.04			
12	NAMA	Waste Water Systems	$ -			OBRI	Trails	$ 83,128.38			
13	NAMA	Water Systems	$ -			OBRI	Unpaved Roads	$ 35,713.90			
14	**NAMA Total**		**$ 712,412,305.42**			**OBRI Total**		**$ 573,394.00**			
15	NATC	All Others	$ 724,527.52			OCLO	All Others	$ -			
16	NATC	Buildings	$ 1,107,310.32			**OCLO Total**		**$ -**			
17	NATC	Paved Roads	$ 166,754.30			OCMU	All Others	$ 173,712.40			
18	NATC	Unpaved Roads	$ 20,225.51			OCMU	Buildings	$ 1,680,039.12			
19	**NATC Total**		**$ 2,018,817.64**			OCMU	Housing	$ 667,674.27			
20	NATR	All Others	$ 11,601,227.92			OCMU	Paved Roads	$ 3,706,744.71			
21	NATR	Buildings	$ 4,588,852.10			OCMU	Trails	$ 450,691.47			
22	NATR	Campgrounds	$ 104,517.00			OCMU	Unpaved Roads	$ 271,821.53			
23	NATR	Housing	$ 108,700.00			OCMU	Water Systems	$ -			
24	NATR	Paved Roads	$ 344,187,923.97			**OCMU Total**		**$ 6,948,685.60**			
25	NATR	Trails	$ 801,450.41			OLYM	All Others	$ 6,134,054.51			
26	NATR	Unpaved Roads	$ -			OLYM	Buildings	$ 8,381,609.21			
27	NATR	Waste Water Systems	$ 746,916.27			OLYM	Campgrounds	$ 2,911,624.63			
28	NATR	Water Systems	$ 128,241.81			OLYM	Paved Roads	$ 107,332,880.91			
29	**NATR Total**		**$ 362,667,830.72**			OLYM	Trails	$ 6,902,470.59			
30	NAVA	All Others	$ 541,586.14			OLYM	Unpaved Roads	$ 2,380,823.39			
31	NAVA	Buildings	$ 658,399.03			OLYM	Waste Water Systems	$ 2,208,231.36			
32	NAVA	Campgrounds	$ 59,948.86			OLYM	Water Systems	$ 1,489,050.73			
33	NAVA	Housing	$ 218,760.52			**OLYM Total**		**$ 137,709,745.31**			
34	NAVA	Paved Roads	$ 719,503.59			ORCA	All Others	$ 62,529.14			
35	NAVA	Trails	$ 75,205.95			ORCA	Buildings	$ 12,700,261.77			
36	NAVA	Unpaved Roads	$ 95,090.70			ORCA	Campgrounds	$ 82,851.43			
37	NAVA	Waste Water Systems	$ 206,604.18			ORCA	Housing	$ 615,369.90			
38	NAVA	Water Systems	$ 72,929.31			ORCA	Paved Roads	$ 820,417.69			
39	**NAVA Total**		**$ 2,648,078.98**			ORCA	Trails	$ 120,392.54			
40	NOKO	Buildings	$ 16,016,205.00			ORCA	Unpaved Roads	$ 25,065.84			
41	**NOKO Total**		**$ 16,016,205.00**			ORCA	Waste Water Systems	$ 49,392.00			
42	NRRE	All Others	$ 25,000.00			ORCA	Water Systems	$ 1,077,616.32			
43	NRRE	Buildings	$ 622,770.61			**ORCA Total**		**$ 15,353,895.63**			
44	**NRRE Total**		**$ 647,770.61**			ORPI	All Others	$ 459,748.38			
45	NSIS	Trails	$ -			ORPI	Buildings	$ 490,713.30			
46	**NSIS Total**		**$ -**			ORPI	Campgrounds	$ 457,648.99			
47	NSPE	All Others	$ 1,127,424.27			ORPI	Housing	$ 154,812.38			
48	NSPE	Buildings	$ 1,185,276.20			ORPI	Paved Roads	$ 7,252,370.56			
49	NSPE	Paved Roads	$ 265,652.80			ORPI	Trails	$ 281,546.86			
50	NSPE	Trails	$ -			ORPI	Unpaved Roads	$ 58,054.20			
51	NSPE	Unpaved Roads	$ 23,733.85			ORPI	Waste Water Systems	$ 514.26			
52	NSPE	Waste Water Systems	$ -			ORPI	Water Systems	$ 26,058.33			
53	NSPE	Water Systems	$ 210,792.76			**ORPI Total**		**$ 9,381,469.25**			
54	**NSPE Total**		**$ 2,752,879.88**			OSTB	All Others	$ 211,380.19			
55	NSRI	All Others	$ 6,224,108.87			OSTB	Buildings	$ 2,846,584.33			
56	NSRI	Buildings	$ 6,784,666.95			OSTB	Paved Roads	$ 33,504.68			
57	NSRI	Campgrounds	$ 313,659.51			OSTB	Waste Water Systems	$ 30,522.25			
58	NSRI	Housing	$ 623,939.25			OSTB	Water Systems	$ -			
59	NSRI	Paved Roads	$ 3,905,189.67			**OSTB Total**		**$ 3,121,993.45**			
60	NSRI	Trails	$ 1,547,344.82			OZAR	All Others	$ 6,383,725.68			
61	NSRI	Unpaved Roads	$ 2,925,484.97			OZAR	Buildings	$ 9,409,508.07			
62	NSRI	Waste Water Systems	$ 102,082.78			OZAR	Campgrounds	$ 5,058,062.24			
63	NSRI	Water Systems	$ 69,270.96			OZAR	Housing	$ 688,575.11			
64	**NSRI Total**		**$ 22,295,247.76**			OZAR	Paved Roads	$ 11,142,170.06			
65	NSRO	All Others	$ 256,570.29			OZAR	Trails	$ 1,384,668.09			
66	NSRO	Buildings	$ -			OZAR	Unpaved Roads	$ 3,882,029.71			
67	**NSRO Total**		**$ 256,570.29**			OZAR	Waste Water Systems	$ 1,447,911.75			
68	NSCO	All Others	$ 71,825.68			OZAR	Water Systems	$ 4,685,385.35			
69	NSCO	Buildings	$ 1,144,845.06			**OZAR Total**		**$ 44,082,056.06**			
70	NSCO	Waste Water Systems	$ -			PAAL	All Others	$ 123,472.56			
71	**NSCO Total**		**$ 1,216,670.74**			PAAL	Buildings	$ 204,802.70			
72	NSOB	All Others	$ 42,589.80			PAAL	Paved Roads	$ 224,981.32			
73	NSOB	Buildings	$ -			PAAL	Trails	$ 214,233.81			
74	**NSOB Total**		**$ 42,589.80**			PAAL	Unpaved Roads	$ 26,751.63			
75	NISI	All Others	$ 4,056,927.19			**PAAL Total**		**$ 804,252.02**			
76	NISI	Buildings	$ 323,464.17			PAIS	All Others	$ 2,058,207.80			
77	NISI	Paved Roads	$ -			PAIS	Buildings	$ 2,081,181.14			
78	NISI	Trails	$ 815,494.00			PAIS	Campgrounds	$ 38,104.68			
79	NISI	Unpaved Roads	$ 15,375.15			PAIS	Housing	$ 24,174.00			
80	NISI	Waste Water Systems	$ -			PAIS	Paved Roads	$ 8,246,473.64			
81	NISI	Water Systems	$ -			PAIS	Trails	$ 32,004.75			
82	**NISI Total**		**$ 5,211,260.51**			PAIS	Unpaved Roads	$ 514,041.70			
83	NOCA	All Others	$ 1,301,925.42			PAIS	Waste Water Systems	$ 68,995.00			
84	NOCA	Buildings	$ 3,360,751.22			PAIS	Water Systems	$ 752,359.61			
85	NOCA	Campgrounds	$ 814,344.77			**PAIS Total**		**$ 13,816,574.99**			
86	NOCA	Housing	$ 1,136,152.57			PAWA	All Others	$ 493,814.06			
87	NOCA	Paved Roads	$ 8,811,091.30			PAWA	Buildings	$ 585,764.27			
88	NOCA	Trails	$ 2,652,494.42			PAWA	Trails	$ -			
89	NOCA	Unpaved Roads	$ 6,560,715.23			PAWA	Unpaved Roads	$ 1,791,819.66			
90	NOCA	Waste Water Systems	$ 118,769.51			PAWA	Waste Water Systems	$ 7,450.00			
91	NOCA	Water Systems	$ 615,383.52			PAWA	Water Systems	$ 36,503.00			
92	**NOCA Total**		**$ 26,273,442.36**			**PAWA Total**		**$ 2,915,972.99**			
93	NPSA	All Others	$ 123,039.66			PECO	All Others	$ 974,754.68			
94	NPSA	Buildings	$ 122,631.80			PECO	Buildings	$ 4,180,417.71			
95	NPSA	Paved Roads	$ 62,893.49			PECO	Housing	$ 96,709.38			
96	NPSA	Trails	$ 212,352.90			PECO	Paved Roads	$ 361,704.58			
97	NPSA	Unpaved Roads	$ 297,160.00			PECO	Trails	$ 188,399.22			
98	NPSA	Water Systems	$ -			PECO	Unpaved Roads	$ 774,764.64			
99	**NPSA Total**		**$ 819,076.83**			PECO	Waste Water Systems	$ 205,255.18			
100	OBRI	All Others	$ 54,501.95			PECO	Water Systems	$ 29,054.39			
101	OBRI	Buildings	$ 9,901.08			**PECO Total**		**$ 6,896,059.78**			
102	OBRI	Campgrounds	$ 18,697.73			PEFO	All Others	$ 1,397,733.87			
103	OBRI	Paved Roads	$ 281,351.04			PEFO	Buildings	$ 5,311,728.80			
104	OBRI	Trails	$ 83,128.38			PEFO	Housing	$ 2,004,825.82			
105	OBRI	Unpaved Roads	$ 35,855.57			PEFO	Paved Roads	$ 32,639,929.06			
106	**OBRI Total**		**$ 584,450.75**			PEFO	Trails	$ 660,517.12			
107	OCAS	All Others	$ -			PEFO	Unpaved Roads	$ 50,912.73			
108	**OCAS Total**		**$ -**			PEFO	Waste Water Systems	$ 895,150.02			
109	OCMU	All Others	$ 173,712.40			PEFO	Water Systems	$ 2,267,282.60			
110	OCMU	Buildings	$ 1,680,039.12			**PEFO Total**		**$ 45,228,129.22**			
111	OCMU	Campgrounds	$ -			PERI	All Others	$ 144,362.77			
112	OCMU	Housing	$ 667,674.27			PERI	Buildings	$ 1,331,524.08			
113	OCMU	Paved Roads	$ 3,706,564.89			PERI	Paved Roads	$ 1,689,619.45			
114	OCMU	Trails	$ 450,691.47			PERI	Trails	$ 50,062.69			
115	OCMU	Unpaved Roads	$ 271,821.53			PERI	Unpaved Roads	$ 13,263.01			
116	OCMU	Water Systems	$ -			**PERI Total**		**$ 3,228,681.99**			
117	**OCMU Total**		**$ 6,948,065.79**			PETE	All Others	$ 4,196,477.60			
118	OLYM	All Others	$ 6,543,266.06			PETE	Buildings	$ 1,509,287.90			
119	OLYM	Buildings	$ 10,846,990.63			PETE	Paved Roads	$ 89,680.19			
120	OLYM	Campgrounds	$ 3,267,885.11			PETE	Trails	$ 570,782.58			
121	OLYM	Housing	$ 1,842,673.45			PETE	Unpaved Roads	$ -			
122	OLYM	Paved Roads	$ 115,237,986.54			PETE	Waste Water Systems	$ 229,729.75			
123	OLYM	Trails	$ 7,078,134.82			PETE	Water Systems	$ 30,406.27			
124	OLYM	Unpaved Roads	$ 2,751,200.62			**PETE Total**		**$ 6,626,814.66**			
125	OLYM	Waste Water Systems	$ 2,208,231.36			PETR	All Others	$ 785,771.44			
126	OLYM	Water Systems	$ 1,451,432.30			PETR	Buildings	$ 617,833.86			
127	**OLYM Total**		**$ 152,827,783.52**			PETR	Paved Roads	$ 151,873.81			
128	ORCA	All Others	$ 62,529.14			PETR	Trails	$ 734,728.59			
129	ORCA	Buildings	$ 12,780,208.99			PETR	Unpaved Roads	$ -			
130	ORCA	Campgrounds	$ 82,851.43			PETR	Waste Water Systems	$ -			
131	ORCA	Housing	$ 615,369.90			PETR	Water Systems	$ -			

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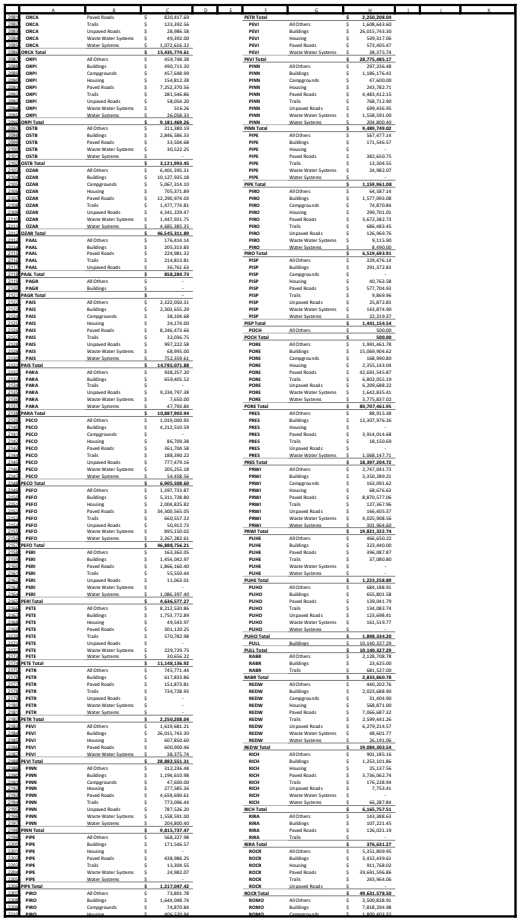
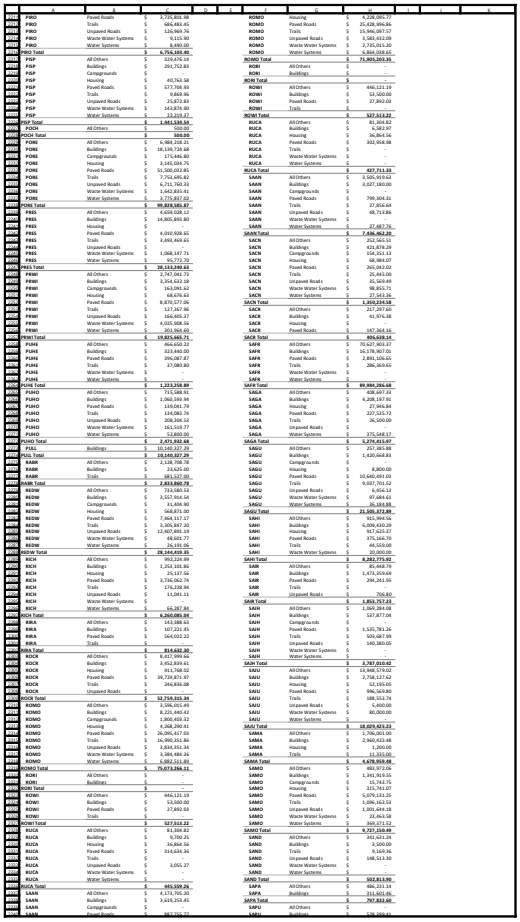
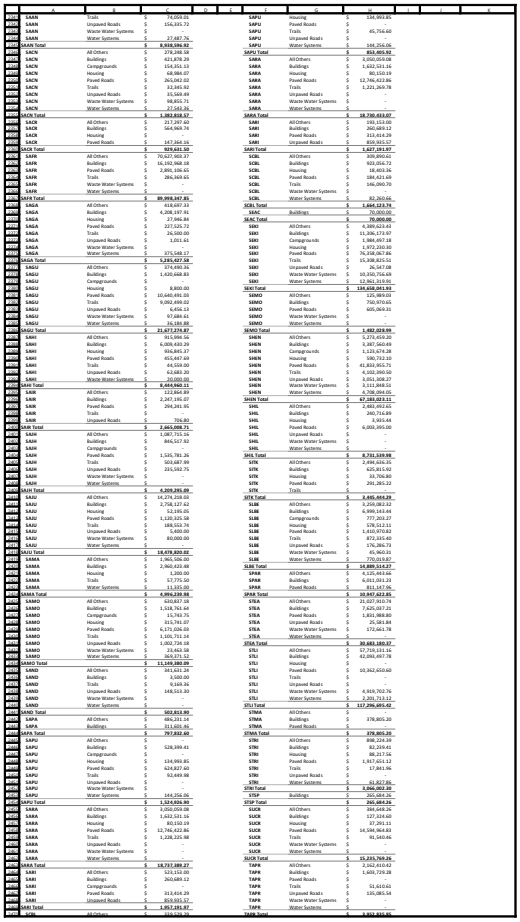
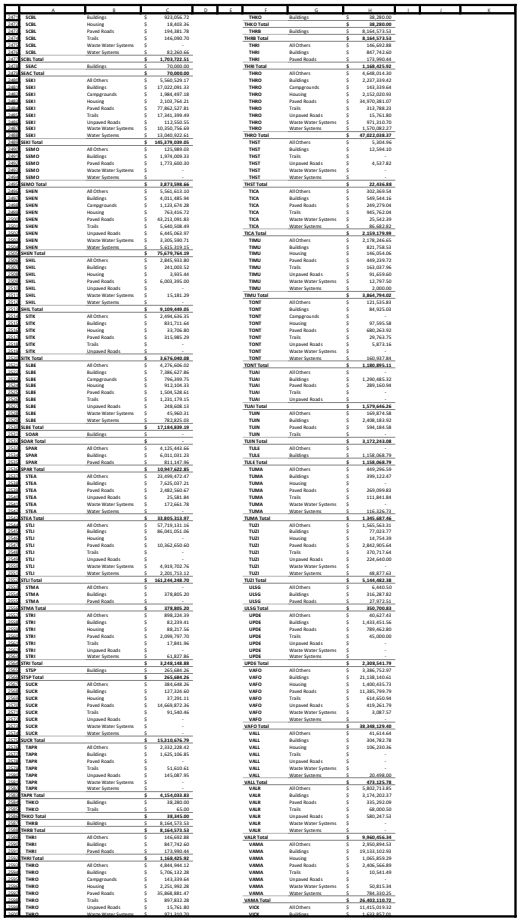
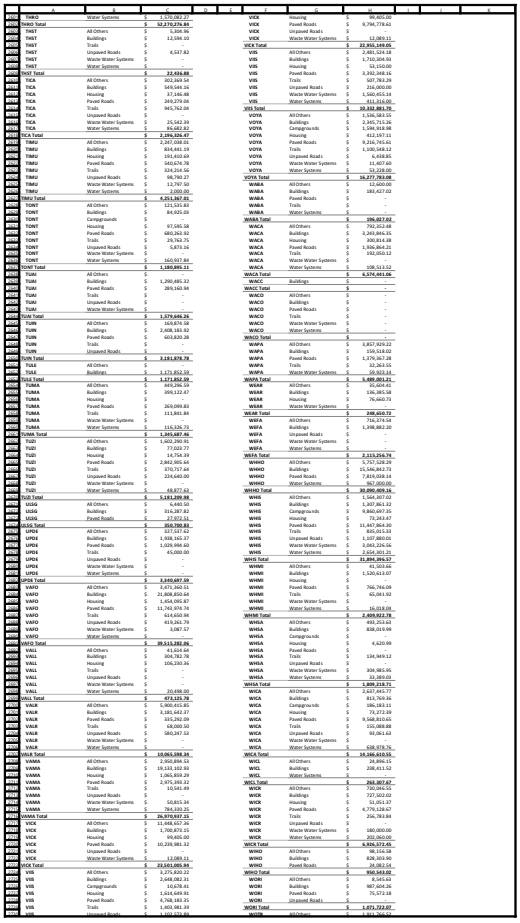


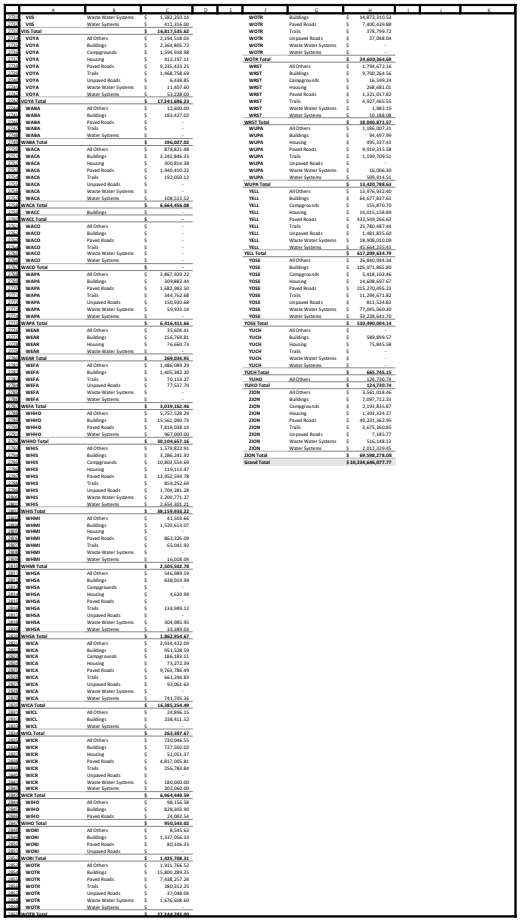


	A	B	C	D	E	F	G	H	I	J	K
4919	PBO	Paved Roads	$ 3,725,801.98			ROMO	Housing	$ 4,228,095.77			
4920	PBO	Trails	$ 681,482.41			ROMO	Paved Roads	$ 21,428,996.66			
4921	PBO	Unpaved Roads	$ 126,969.76			ROMO	Trails	$ 15,986,097.57			
4922	PBO	Waste Water Systems	$ 9,115.90			ROMO	Unpaved Roads	$ 2,583,412.09			
4923	PBO	Water Systems	$ 8,490.00			ROMO	Waste Water Systems	$ 2,735,015.20			
4924	PBO Total		$ 4,756,559.80			ROMO	Water Systems	$ 6,864,038.65			
4925	PSP	All Others	$ 329,476.14			ROMO Total		$ 71,865,203.35			
4926	PSP	Buildings	$ 291,752.83			ROBI	All Others	$ -			
4927	PSP	Campgrounds	$ -			ROBI	Buildings	$ -			
4928	PSP	Housing	$ 40,762.58			ROBI Total		$ -			
4929	PSP	Paved Roads	$ 577,706.93			ROWI	All Others	$ 446,121.19			
4930	PSP	Trails	$ 9,860.96			ROWI	Buildings	$ 51,500.00			
4931	PSP	Unpaved Roads	$ 25,872.83			ROWI	Paved Roads	$ 27,892.03			
4932	PSP	Waste Water Systems	$ 143,874.90			ROWI	Trails	$ -			
4933	PSP	Water Systems	$ 22,015.27			ROWI Total		$ 527,513.22			
4934	PSP Total		$ 1,461,326.54			RUCA	All Others	$ 81,164.62			
4935	POCH	All Others	$ 500.00			RUCA	Buildings	$ 6,582.97			
4936	POCH Total		$ 500.00			RUCA	Housing	$ 36,964.56			
4937	PORE	All Others	$ 6,984,318.21			RUCA	Paved Roads	$ 302,958.98			
4938	PORE	Buildings	$ 18,119,734.68			RUCA	Trails	$ -			
4939	PORE	Campgrounds	$ 175,496.80			RUCA	Waste Water Systems	$ -			
4940	PORE	Housing	$ 3,145,034.75			RUCA	Water Systems	$ -			
4941	PORE	Paved Roads	$ 51,500,032.85			RUCA Total		$ 427,711.33			
4942	PORE	Trails	$ 7,711,695.82			SAAN	All Others	$ 1,595,919.63			
4943	PORE	Unpaved Roads	$ 6,711,760.33			SAAN	Buildings	$ 3,027,180.00			
4944	PORE	Waste Water Systems	$ 1,642,835.41			SAAN	Campgrounds	$ -			
4945	PORE	Water Systems	$ 2,775,827.02			SAAN	Paved Roads	$ 799,304.31			
4946	PORE Total		$ 99,824,585.87			SAAN	Trails	$ 27,854.64			
4947	PRES	All Others	$ 4,659,028.12			SAAN	Unpaved Roads	$ 48,713.86			
4948	PRES	Buildings	$ 14,805,893.80			SAAN	Waste Water Systems	$ -			
4949	PRES	Housing	$ -			SAAN	Water Systems	$ 27,487.76			
4950	PRES	Paved Roads	$ 4,010,928.65			SAAN Total		$ 7,636,462.20			
4951	PRES	Trails	$ 3,693,469.65			SACN	All Others	$ 252,565.51			
4952	PRES	Unpaved Roads	$ -			SACN	Buildings	$ 421,878.29			
4953	PRES	Waste Water Systems	$ 1,068,147.71			SACN	Campgrounds	$ 154,351.13			
4954	PRES	Water Systems	$ 65,772.70			SACN	Housing	$ 68,984.07			
4955	PRES Total		$ 28,133,240.63			SACN	Paved Roads	$ 265,062.02			
4956	PRWI	All Others	$ 2,747,581.73			SACN	Trails	$ 25,445.00			
4957	PRWI	Buildings	$ 3,354,632.18			SACN	Unpaved Roads	$ 35,569.49			
4958	PRWI	Campgrounds	$ 163,092.62			SACN	Waste Water Systems	$ 98,855.71			
4959	PRWI	Housing	$ 68,676.61			SACN	Water Systems	$ 27,563.96			
4960	PRWI	Paved Roads	$ 8,870,377.06			SACN Total		$ 1,350,254.18			
4961	PRWI	Trails	$ 127,367.96			SACR	All Others	$ 217,297.60			
4962	PRWI	Unpaved Roads	$ 166,455.37			SACR	Buildings	$ 41,976.58			
4963	PRWI	Waste Water Systems	$ 4,025,908.56			SACR	Housing	$ -			
4964	PRWI	Water Systems	$ 201,964.60			SACR	Paved Roads	$ 147,364.16			
4965	PRWI Total		$ 19,821,665.71			SACR Total		$ 406,638.34			
4966	PUHE	All Others	$ 464,650.22			SAFR	All Others	$ 70,627,903.17			
4967	PUHE	Buildings	$ 323,440.00			SAFR	Buildings	$ 14,178,907.01			
4968	PUHE	Paved Roads	$ 306,087.87			SAFR	Paved Roads	$ 2,891,106.65			
4969	PUHE	Trails	$ 37,080.80			SAFR	Trails	$ 286,369.65			
4970	PUHE	Waste Water Systems	$ -			SAFR	Waste Water Systems	$ -			
4971	PUHE	Water Systems	$ -			SAFR	Water Systems	$ -			
4972	PUHE Total		$ 1,223,258.89			SAFR Total		$ 89,984,286.48			
4973	PUHO	All Others	$ 715,588.91			SAGA	All Others	$ 408,697.33			
4974	PUHO	Buildings	$ 1,060,183.94			SAGA	Buildings	$ 4,208,197.91			
4975	PUHO	Paved Roads	$ 119,041.79			SAGA	Housing	$ 27,946.84			
4976	PUHO	Trails	$ 134,083.74			SAGA	Paved Roads	$ 227,525.72			
4977	PUHO	Unpaved Roads	$ 208,306.53			SAGA	Trails	$ 26,500.00			
4978	PUHO	Waste Water Systems	$ 161,519.77			SAGA	Unpaved Roads	$ -			
4979	PUHO	Water Systems	$ 12,800.00			SAGA	Water Systems	$ 271,548.17			
4980	PUHO Total		$ 2,671,532.68			SAGA Total		$ 5,270,415.97			
4981	PUSL	Buildings	$ 10,140,327.29			SAGU	All Others	$ 217,385.88			
4982	PUSL Total		$ 10,140,327.29			SAGU	Buildings	$ 1,430,668.83			
4983	RABR	All Others	$ 2,128,708.78			SAGU	Campgrounds	$ -			
4984	RABR	Buildings	$ 23,625.00			SAGU	Housing	$ 8,800.00			
4985	RABR	Trails	$ 681,527.00			SAGU	Paved Roads	$ 10,640,691.03			
4986	RABR Total		$ 2,833,860.78			SAGU	Trails	$ 9,007,701.52			
4987	REDW	All Others	$ 733,580.53			SAGU	Unpaved Roads	$ 6,456.13			
4988	REDW	Buildings	$ 2,527,914.54			SAGU	Waste Water Systems	$ 97,684.61			
4989	REDW	Campgrounds	$ 31,404.90			SAGU	Water Systems	$ 26,184.88			
4990	REDW	Housing	$ 548,871.00			SAGU Total		$ 21,505,372.88			
4991	REDW	Paved Roads	$ 7,464,117.17			SAHI	All Others	$ 915,994.56			
4992	REDW	Trails	$ 1,305,847.20			SAHI	Buildings	$ 6,009,410.29			
4993	REDW	Unpaved Roads	$ 12,407,891.19			SAHI	Housing	$ 917,625.37			
4994	REDW	Waste Water Systems	$ 48,601.77			SAHI	Paved Roads	$ 275,164.70			
4995	REDW	Water Systems	$ 26,191.26			SAHI	Trails	$ 66,559.00			
4996	REDW Total		$ 28,544,419.35			SAHI	Waste Water Systems	$ 20,000.00			
4997	RICH	All Others	$ 962,224.99			SAHI Total		$ 8,263,775.92			
4998	RICH	Buildings	$ 1,251,101.86			SAIR	All Others	$ 85,468.79			
4999	RICH	Housing	$ 25,137.56			SAIR	Buildings	$ 1,473,358.69			
5000	RICH	Paved Roads	$ 3,736,062.76			SAIR	Paved Roads	$ 294,361.95			
5001	RICH	Trails	$ 174,228.94			SAIR	Trails	$ -			
5002	RICH	Unpaved Roads	$ 11,041.11			SAIR	Unpaved Roads	$ 706.80			
5003	RICH	Waste Water Systems	$ -			SAIR Total		$ 1,853,757.23			
5004	RICH	Water Systems	$ 66,287.84			SAIH	All Others	$ 1,069,284.08			
5005	RICH Total		$ 6,260,085.06			SAIH	Buildings	$ 527,877.04			
5006	RIRA	All Others	$ 143,388.63			SAIH	Campgrounds	$ -			
5007	RIRA	Buildings	$ 107,221.45			SAIH	Paved Roads	$ 1,525,781.26			
5008	RIRA	Paved Roads	$ 564,022.22			SAIH	Trails	$ 503,687.98			
5009	RIRA	Trails	$ -			SAIH	Unpaved Roads	$ 140,380.05			
5010	RIRA Total		$ 814,632.30			SAIH	Waste Water Systems	$ -			
5011	ROCR	All Others	$ 8,417,999.64			SAIH	Water Systems	$ -			
5012	ROCR	Buildings	$ 2,452,839.61			SAIH Total		$ 3,787,010.42			
5013	ROCR	Housing	$ 911,768.02			SAJU	All Others	$ 13,948,179.02			
5014	ROCR	Paved Roads	$ 39,729,871.97			SAJU	Buildings	$ 2,758,127.62			
5015	ROCR	Trails	$ 246,836.08			SAJU	Housing	$ 52,195.05			
5016	ROCR	Unpaved Roads	$ -			SAJU	Paved Roads	$ 996,569.80			
5017	ROCR Total		$ 52,759,315.34			SAJU	Trails	$ 188,553.74			
5018	ROMO	All Others	$ 3,596,053.89			SAJU	Unpaved Roads	$ 5,400.00			
5019	ROMO	Buildings	$ 8,221,440.42			SAJU	Waste Water Systems	$ 80,000.00			
5020	ROMO	Campgrounds	$ 1,800,459.32			SAJU	Water Systems	$ -			
5021	ROMO	Housing	$ 4,268,290.81			SAJU Total		$ 18,029,425.23			
5022	ROMO	Paved Roads	$ 26,095,457.05			SAMA	All Others	$ 1,784,203.00			
5023	ROMO	Trails	$ 16,990,351.86			SAMA	Buildings	$ 2,940,423.48			
5024	ROMO	Unpaved Roads	$ 3,834,152.16			SAMA	Housing	$ 1,200.00			
5025	ROMO	Waste Water Systems	$ 3,384,484.36			SAMA	Trails	$ 11,355.00			
5026	ROMO	Water Systems	$ 6,802,111.85			SAMA Total		$ 4,676,959.48			
5027	ROMO Total		$ 75,073,266.11			SAMO	All Others	$ 681,972.06			
5028	ROBI	All Others	$ -			SAMO	Buildings	$ 1,341,919.55			
5029	ROBI	Buildings	$ -			SAMO	Campgrounds	$ 15,743.75			
5030	ROBI Total		$ -			SAMO	Housing	$ 215,741.07			
5031	ROWI	All Others	$ 446,121.19			SAMO	Paved Roads	$ 5,079,131.25			
5032	ROWI	Buildings	$ 53,500.00			SAMO	Trails	$ 1,096,163.53			
5033	ROWI	Paved Roads	$ 27,892.03			SAMO	Unpaved Roads	$ 1,001,664.18			
5034	ROWI	Trails	$ -			SAMO	Waste Water Systems	$ 25,463.58			
5035	ROWI Total		$ 527,513.22			SAMO	Water Systems	$ 369,371.52			
5036	RUCA	All Others	$ 81,164.62			SAMO Total		$ 9,737,169.69			
5037	RUCA	Buildings	$ 6,582.97			SAND	All Others	$ 341,621.24			
5038	RUCA	Housing	$ 36,964.56			SAND	Buildings	$ 1,000.00			
5039	RUCA	Paved Roads	$ 314,634.36			SAND	Trails	$ 9,569.36			
5040	RUCA	Trails	$ -			SAND	Unpaved Roads	$ 148,513.30			
5041	RUCA	Unpaved Roads	$ 3,055.27			SAND	Waste Water Systems	$ -			
5042	RUCA	Waste Water Systems	$ -			SAND	Water Systems	$ -			
5043	RUCA	Water Systems	$ -			SAND Total		$ 502,813.90			
5044	RUCA Total		$ 445,559.26			SAPA	All Others	$ 486,211.14			
5045	SAAN	All Others	$ 4,173,705.20			SAPA	Buildings	$ 311,665.46			
5046	SAAN	Buildings	$ 2,419,252.45			SAPA Total		$ 797,876.60			
5047	SAAN	Campgrounds	$ -			SAPU	All Others	$ -			
5048	SAAN	Paved Roads	$ 882,705.27			SAPU	Buildings	$ 538,366.41			









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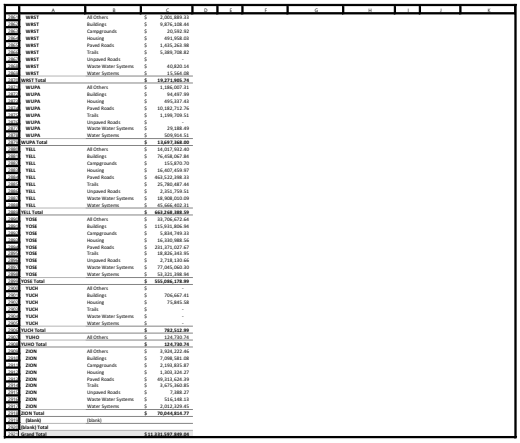

	A	B	C	D	E	F	G	H	I	J	K
4000	WRST	All Others	$ 2,005,889.33								
4001	WRST	Buildings	$ 9,876,108.44								
4002	WRST	Campgrounds	$ 20,592.92								
4003	WRST	Housing	$ 491,958.02								
4004	WRST	Paved Roads	$ 1,435,262.98								
4005	WRST	Trails	$ 5,389,708.82								
4006	WRST	Unpaved Roads	$ -								
4007	WRST	Waste Water Systems	$ 43,820.14								
4008	WRST	Water Systems	$ 15,564.08								
4009	WRST Total		$ 19,271,905.79								
4010	WUPA	All Others	$ 1,186,057.31								
4011	WUPA	Buildings	$ 64,447.99								
4012	WUPA	Housing	$ 495,327.42								
4013	WUPA	Paved Roads	$ 10,182,712.76								
4014	WUPA	Trails	$ 1,198,709.51								
4015	WUPA	Unpaved Roads	$ -								
4016	WUPA	Waste Water Systems	$ 29,188.49								
4017	WUPA	Water Systems	$ 509,914.11								
4018	WUPA Total		$ 13,667,360.80								
4019	YELL	All Others	$ 14,017,917.69								
4020	YELL	Buildings	$ 76,458,067.84								
4021	YELL	Campgrounds	$ 151,870.70								
4022	YELL	Housing	$ 16,407,459.97								
4023	YELL	Paved Roads	$ 463,522,398.33								
4024	YELL	Trails	$ 25,780,487.44								
4025	YELL	Unpaved Roads	$ 2,011,759.51								
4026	YELL	Waste Water Systems	$ 18,908,010.09								
4027	YELL	Water Systems	$ 45,666,452.31								
4028	YELL Total		$ 663,268,389.39								
4029	YOSE	All Others	$ 33,706,472.64								
4030	YOSE	Buildings	$ 115,931,806.94								
4031	YOSE	Campgrounds	$ 5,834,749.33								
4032	YOSE	Housing	$ 16,330,988.54								
4033	YOSE	Paved Roads	$ 231,271,027.67								
4034	YOSE	Trails	$ 18,826,243.95								
4035	YOSE	Unpaved Roads	$ 2,718,130.66								
4036	YOSE	Waste Water Systems	$ 77,045,060.30								
4037	YOSE	Water Systems	$ 53,221,398.96								
4038	YOSE Total		$ 555,086,178.99								
4039	YUCH	All Others	$ -								
4040	YUCH	Buildings	$ 706,667.41								
4041	YUCH	Housing	$ 75,845.58								
4042	YUCH	Trails	$ -								
4043	YUCH	Waste Water Systems	$ -								
4044	YUCH	Water Systems	$ -								
4045	YUCH Total		$ 782,512.99								
4046	YUHO	All Others	$ 124,730.76								
4047	YUHO Total		$ 124,730.76								
4048	ZION	All Others	$ 3,924,222.46								
4049	ZION	Buildings	$ 7,048,581.08								
4050	ZION	Campgrounds	$ 2,193,835.87								
4051	ZION	Housing	$ 1,303,104.27								
4052	ZION	Paved Roads	$ 49,311,624.29								
4053	ZION	Trails	$ 3,675,360.85								
4054	ZION	Unpaved Roads	$ 7,388.27								
4055	ZION	Waste Water Systems	$ 514,188.33								
4056	ZION	Water Systems	$ 2,012,209.45								
4057	ZION Total		$ 70,044,914.77								
4058	(blank)	(blank)									
4059	(blank) Total										
4060	Grand Total		$ 11,121,127,889.85								

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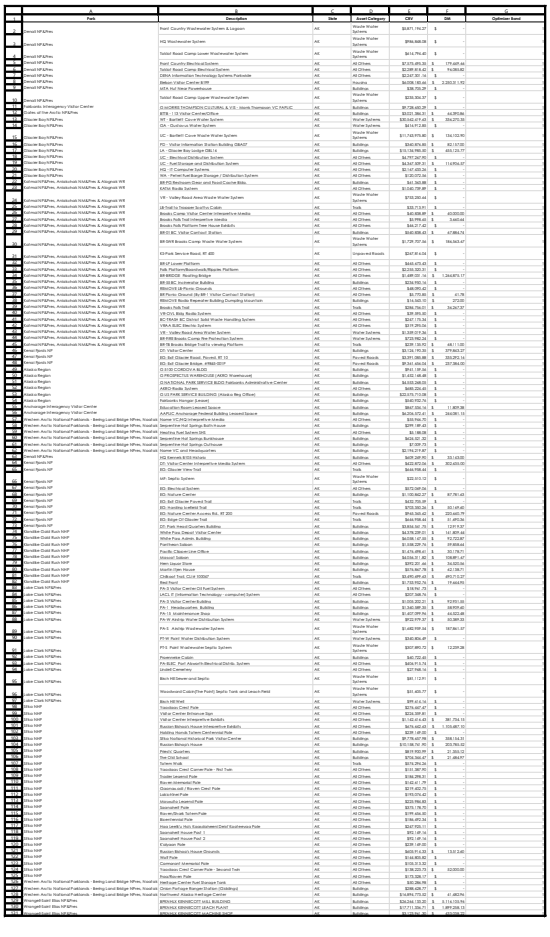

	A	B	C	D	E	F	G
1	Path	Description	State	Asset Category	CSV	DM	Optimizer Band
2							
3	Denali NPARes	Point Country Wastewater System & Lagoon	AK	Waste Water Systems	$8,871,194.27	$ -	
4	Denali NPARes	HQ Wastewater System	AK	Waste Water Systems	$956,568.09	$ -	
5	Denali NPARes	Tetlolt Road Camp Lower Wastewater System	AK	Waste Water Systems	$414,756.87	$ -	
6	Denali NPARes	Point Country Electrical System	AK	All Others	$7,575,455.39	$ 179,605.44	
7	Denali NPARes	Tetlolt Road Camp Electrical System	AK	All Others	$2,289,616.42	$ 54,550.80	
8	Denali NPARes	DBNA Information Technology Systems Parkeside	AK	All Others	$2,547,957.19	$ -	
9	Denali NPARes	Reburn Visitor Center & RR	AK	Hvac/Ha	$4,008,183.84	$ 2,200,01 1.82	
10	Denali NPARes	DEX Hut West Powerhouse	AK	Waste Water Systems	$38,705.28	$ -	
11	Denali NPARes	Tetlolt Road Camp Upper Wastewater System	AK	Waste Water Systems	$255,304.37	$ -	
12	Fairbanks Emergency Visitor Center	CLASSIFIED INFORMATION CLOSURES, & VIS - Interior Thermosyen VC PARVC	AK	Buildings	$7,726,465.29	$ -	
13	Dalton, at the Arctic NPARes	BTB - 1 D Visitor Center/Office	AK	Buildings	$3,021,386.31	$ 44,970.86	
14	Glacier Bay NPARes	WF - Bartlett Cove Potable Water System	AK	Water Systems	$20,042,477.45	$ 354,075.30	
15	Glacier Bay NPARes	DA - Dudevoi Water System	AK	Water Systems	$414,712.85	$ -	
16	Glacier Bay NPARes	LC - Bartlett Cove Waste Water System	AK	Waste Water Systems	$17,742,975.80	$ 134,112.90	
17	Glacier Bay NPARes	FC - Visitor Information Station Building DBAST	AK	Buildings	$340,674.86	$ 62,137.00	
18	Glacier Bay NPARes	LA - Glacier Bay Lodge CBLL's	AK	Buildings	$13,736,766.37	$ 433,135.77	
19	Glacier Bay NPARes	UC - Electrical Distribution System	AK	All Others	$4,797,047.80	$ -	
20	Glacier Bay NPARes	UC - Fuel Storage and Distribution System	AK	All Others	$4,547,597.21	$ 114,954.37	
21	Glacier Bay NPARes	HQ - IT Computer Systems	AK	All Others	$2,147,420.34	$ -	
22	Glacier Bay NPARes	WA - Ferrum Fuel Barge Storage / Distribution System	AK	All Others	$139,072.34	$ -	
23	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BB-FD Bedroom Dorm and Food Cache Bldg.	AK	Buildings	$41,563.86	$ -	
24	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	KAVA Bottle System	AK	All Others	$2,540,739.87	$ -	
25	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	V4 - Valley Kaput Area Waste Water System	AK	Waste Water Systems	$703,260.44	$ -	
26	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	28 Well for Nonpotable Sup/Fire Cistern	AK	Tanks	$39,713.81	$ -	
27	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Brooks Camp Visitor Center Interpretive Media	AK	All Others	$40,688.87	$ 40,000.00	
28	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Brooks Falls Trail Interpretive Media	AK	All Others	$9,999.40	$ 9,665.40	
29	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Brooks Falls Platform Tree House Rehab's	AK	All Others	$46,217.42	$ -	
30	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BB-D BC, Visitor Contract Station	AK	Buildings	$640,699.40	$ 47,864.74	
31	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BB-SWS Brooks Camp Waste Water System	AK	Waste Water Systems	$1,729,707.84	$ 184,543.47	
32	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	K3-Park Service Resid. #1 400	AK	Grapes-red Reeds	$347,414.54	$ -	
33	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BR-F Lower Platform	AK	All Others	$648,675.25	$ -	
34	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Falls Platform/Boardwalk/Ripples Platform	AK	All Others	$2,059,020.31	$ -	
35	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BR-BRIDGE Rustling Bridge	AK	All Others	$1,489,031.14	$ 1,244,874.17	
36	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BR-SEAC Incinerator Building	AK	Buildings	$239,760.34	$ -	
37	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	RBACH-B Picnic Grounds	AK	All Others	$48,995.42	$ -	
38	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BR Picnic Ground (By BR / Visitor Contract Station)	AK	All Others	$5,772.86	$ 41.76	
39	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	RBACH-B Bottle Replenish Building Dumpling Mountain	AK	Buildings	$14,560.10	$ 377.00	
40	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Brooks Falls Trail	AK	Trails	$266,756.01	$ 34,347.37	
41	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BB-SWS Brooks Falls Trail System	AK	Waste Water Systems	$38,705.28	$ -	
42	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	VC-TWHA #2, Partial Solid Waste Handling System	AK	All Others	$41,715.56	$ 48 1.00	
43	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	V8A-A SUIC Electric System	AK	All Others	$171,255.04	$ -	
44	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	V8 - Valley Kaput Area Water System	AK	Water Systems	$2,338,214.34	$ -	
45	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BB-RBB Brooks Camp Rm Recreation System	AK	Water Systems	$729,992.24	$ -	
46	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	BR TB Brooks Bridge Trail's viewing Platform	AK	Trails	$238,136.93	$ 48 1.00	
47	Kenai Spods NP	D1- Visitor Center	AK	Buildings	$3,134,161.50	$ 379,843.37	
48	Kenai Spods NP	BD- Bat Glacier Resid. Rovmd. #1 10	AK	Poured Reads	$5,971,380.86	$ 333,953.14	
49	Kenai Spods NP	BD- Bat Glacier Bridge #TBD DEIF	AK	Poured Reads	$7,541,489.04	$ 237,964.00	
50	Kenai Spods NP	BD- Bat Glacier Shop	AK	Buildings	$1,435,148.48	$ -	
51	Alaska Region	O-FIDONCTUC KHARMOUSE (AERO Warehouse)	AK	Buildings	$1,435,148.48	$ -	
52	Alaska Region	O-NA SCHOOL PARK SERVICE BLDG Fairbanks Administrative Center	AK	Buildings	$4,935,098.05	$ -	
53	Alaska Region	AERO Radio System	AK	All Others	$466,230.80	$ -	
54	Alaska Region	O-15 PARK SERVICE BUILDING (Alaska Reg Office)	AK	Buildings	$23,575,713.06	$ -	
55	Alaska Region	Fairbanks Hangar (Lessee)	AK	Buildings	$540,552.74	$ -	
56	Anchorage Interagency Visitor Center	Education Room Leased Space	AK	Buildings	$847,104.14	$ 11,809.38	
57	Anchorage Interagency Visitor Center	AVPVC Anchorage Portland Building Leased Space	AK	Buildings	$4,204,972.41	$ 242,081.13	
58	Wrangell- Saint Elias NP&Pres	Name YC,PVD Interpretive Media	AK	All Others	$39,746.70	$ -	
59	Wrangell- Saint Elias NP&Pres	Serpentine Hot Springs Bath House	AK	All Others	$979,191.20	$ -	
60	Wrangell- Saint Elias NP&Pres	Serpentine Hot Springs Bunkhouse	AK	All Others	$4,189.06	$ -	
61	Wrangell- Saint Elias NP&Pres	Serpentine Hot Springs Cookhouse	AK	All Others	$4,189.06	$ -	
62	Wrangell- Saint Elias NP&Pres	Serpentine Hot Springs Outhouse	AK	Buildings	$7,595.72	$ -	
63	Wrangell- Saint Elias NP&Pres	Name YC and Headquarters	AK	Buildings	$2,779,217.87	$ -	
64	Denali NPS/Pres	HQ Generals BOD Kitchen	AK	Buildings	$409,198.90	$ 33,143.00	
65	Kenai Spods NP	D1- Visitor Center Interpretive Media System	AK	All Others	$422,972.04	$ 302,433.00	
66	Kenai Spods NP	BD- Glacier View Trail	AK	Trails	$444,958.44	$ -	
67	Kenai Spods NP	MF- Septic System	AK	Waste Water Systems	$20,610.12	$ -	
68	Kenai Spods NP	BD- Electrical System	AK	All Others	$570,597.54	$ -	
69	Kenai Spods NP	BD- Bat Glacier Shop	AK	Buildings	$1,435,148.48	$ 87,781.43	
70	Kenai Spods NP	BD- Bat Glacier Paved Trail	AK	Trails	$1,172,752.97	$ -	
71	Kenai Spods NP	BD- Hardtop Icefield Trail	AK	Trails	$709,080.24	$ 83,145.60	
72	Kenai Spods NP	BD- Natural Caches Access Rd., 87 200	AK	Paved Reads	$916,560.42	$ 220,665.79	
73	Kenai Spods NP	BD- Bridge Of Glacier Trail	AK	Trails	$648,958.44	$ 61,470.34	
74	Kenai Spods NP	D1- Park Head Quarters Building	AK	Buildings	$3,834,842.75	$ 1,919.37	
75	Klondike Gold Rush NHP	White Pass Depot Visitor Center	AK	Buildings	$4,578,328.01	$ 141,805.40	
76	Klondike Gold Rush NHP	White Pass Admin. Building	AK	Buildings	$4,038,147.25	$ 72,733.87	
77	Klondike Gold Rush NHP	Fort Seward Saloon	AK	Buildings	$1,936,229.74	$ 91,858.44	
78	Klondike Gold Rush NHP	Chilkoot Trail Ranger Office	AK	Buildings	$1,435,148.48	$ 39,676.27	
79	Klondike Gold Rush NHP	Depot Saloon	AK	Buildings	$1,435,148.48	$ 253,945.42	
80	Klondike Gold Rush NHP	Fern Lower Store	AK	Buildings	$970,251.46	$ 54,520.56	
81	Klondike Gold Rush NHP	Alaska Gen Store House	AK	Buildings	$974,947.78	$ 42,138.71	
82	Klondike Gold Rush NHP	Chilkoot Trail, CLV 10092*	AK	Trails	$3,470,481.40	$ 460,713.37	
83	Klondike Gold Rush NHP	Red Trail	AK	Buildings	$1,730,952.74	$ 19,668.70	
84	Lake Clark NP&Pres	PA-3 Visitor Center,Oil Fuel System	AK	All Others	$18,741.75	$ -	
85	Lake Clark NP&Pres	LACS, IT Information Technology - computer/ Systems	AK	All Others	$207,598.74	$ -	
86	Lake Clark NP&Pres	PA-3 Visitor Center Building	AK	Buildings	$1,009,222.21	$ 72,972.00	
87	Lake Clark NP&Pres	PA-1 Headquarters Building	AK	Buildings	$1,345,997.95	$ 38,870.80	
88	Lake Clark NP&Pres	PA-13, Maintenance Area	AK	Buildings	$1,407,099.94	$ 44,000.00	
89	Lake Clark NP&Pres	PA-W Airstrip Water Distribution System	AK	Water Systems	$732,579.27	$ 83,987.33	
90	Lake Clark NP&Pres	PA-5 Airstrip Wastewater System	AK	Waste Water Systems	$1,482,497.94	$ 167,961.97	
91	Lake Clark NP&Pres	PT-W Point Water Distribution System	AK	Water Systems	$540,804.47	$ -	
92	Lake Clark NP&Pres	PT-5 Point Wastewater Septic System	AK	Waste Water Systems	$307,880.72	$ 12,208.38	
93	Lake Clark NP&Pres	Powerwater Cusac	AK	Buildings	$40,722.45	$ -	
94	Lake Clark NP&Pres	PA-SUIC, Port Alsworth Electrical Distrib. System	AK	All Others	$474,413.74	$ -	
95	Lake Clark NP&Pres	Airstrip Cemetery	AK	All Others	$47,998.34	$ -	
96	Lake Clark NP&Pres	Beck Hill Sewer and Septic	AK	Waste Water Systems	$81,113.91	$ -	
97	Lake Clark NP&Pres	Woodward Cusac (Fee Point) Septic Tank and Leach Field	AK	Waste Water Systems	$91,405.77	$ -	
98	Lake Clark NP&Pres	Beck Hill Well	AK	Water Systems	$99,414.54	$ -	
99	Atlas NHP	Transitions Crest Pole	AK	All Others	$279,987.47	$ -	
100	Atlas NHP	Visitor Center Entrance Sign	AK	All Others	$234,597.91	$ -	
101	Atlas NHP	Visitor Center Interpretive Exhibits	AK	All Others	$1,130,414.83	$ 381,754.15	
102	Atlas NHP	Ruskin Bishop's House Interpretive Exhibits	AK	All Others	$676,642.45	$ 1,109,467.10	
103	Atlas NHP	Ruskin Bishop's House Commercial Pole	AK	All Others	$179,497.41	$ -	
104	Atlas NHP	Atlas Residential Historic Park Visitor Center	AK	Buildings	$1,779,447.99	$ 338,134.31	
105	Atlas NHP	Ruskin Bishop's House	AK	Buildings	$1,139,791.80	$ 203,761.42	
106	Atlas NHP	Plaza Quarters	AK	Buildings	$819,592.84	$ 21,369.31	
107	Atlas NHP	The Old School	AK	Buildings	$706,560.47	$ 21,484.97	
108	Atlas NHP	Tavern Walk	AK	Trails	$579,284.24	$ -	
109	Atlas NHP	Transitions Crest Cranner Pole - Red Trail	AK	All Others	$131,387.91	$ -	
110	Atlas NHP	Trestle Lessmid Pole	AK	All Others	$156,259.21	$ -	
111	Atlas NHP	Bayview Interpretive Pole	AK	All Others	$142,421.78	$ -	
112	Atlas NHP	Transitions Crest Cranner Crest Pole	AK	All Others	$131,387.91	$ -	
113	Atlas NHP	Lakeshore Pole	AK	All Others	$179,074.42	$ -	
114	Atlas NHP	Mooseflo Lessmid Pole	AK	All Others	$229,994.80	$ -	
115	Atlas NHP	Seamanhill Pole	AK	All Others	$279,178.70	$ -	
116	Atlas NHP	Bayview Brush Tunnel Pole	AK	All Others	$199,456.00	$ -	
117	Atlas NHP	Bowmanmid Pole	AK	All Others	$196,483.34	$ -	
118	Atlas NHP	Hoss Lewis's Hutt, Kaloudatheen Crest Southmoss Pole	AK	All Others	$247,935.11	$ -	
119	Atlas NHP	Seamanhill House Pad 1	AK	All Others	$51,187.04	$ -	
120	Atlas NHP	Seamanhill House Pad 2	AK	All Others	$51,187.04	$ -	
121	Atlas NHP	Bayview Pole	AK	All Others	$197,714.20	$ -	
122	Atlas NHP	Ruskin Bishop's House Grounds	AK	All Others	$207,714.20	$ 13,012.40	
123	Atlas NHP	Mail Pole	AK	All Others	$164,805.82	$ -	
124	Atlas NHP	Commercial Interpretive Pole	AK	All Others	$156,513.30	$ -	
125	Atlas NHP	Transitions Crest Cranner Pole - Second Trail	AK	All Others	$138,223.75	$ 10,000.00	
126	Atlas NHP	Pass Museum Pole	AK	All Others	$175,338.17	$ -	
127	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Headquarter Cranner Fuel Storage Tank	AK	All Others	$30,286.96	$ -	
128	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Cinder Park Ranger Ranger Station (Cinderlop)	AK	Buildings	$596,426.77	$ -	
129	Katmai NPS/Pres, Aniakchak NM&Pres, & Alagnak Wil	Northwest Alaska Heritage Center	AK	Buildings	$14,994,773.33	$ 61,462.74	
130	Wrangell- Saint Elias NP&Pres	BREAKS GENERATOR HALL BUILDING	AK	Buildings	$24,514,139.20	$ 5,114,159.76	
131	Wrangell- Saint Elias NP&Pres	BREAKS GENERATOR GARAGE Rehab*	AK	Buildings	$17,511,994.31	$ 869,258.13	
132	Wrangell- Saint Elias NP&Pres	BREAKS GENERATOR SHOP	AK	Buildings	$7,787,782.40	$ 1,000,000.00	

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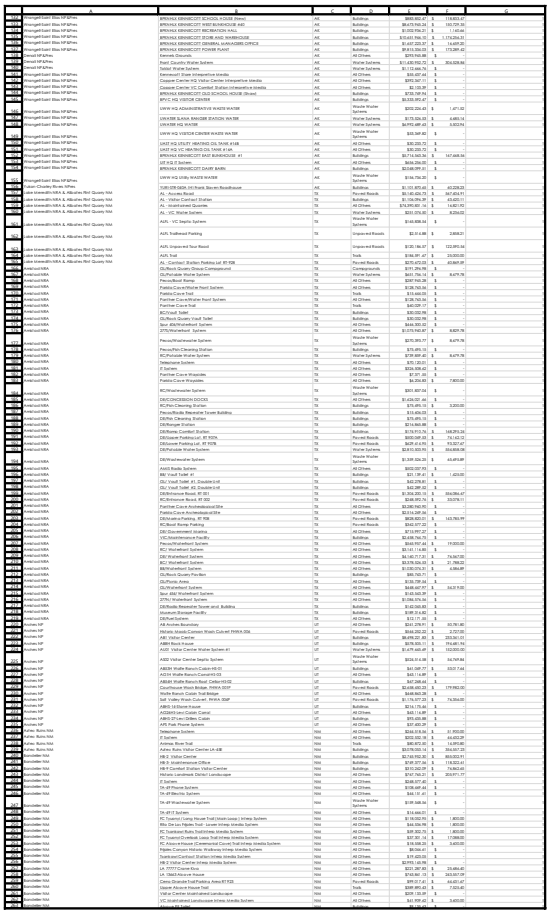

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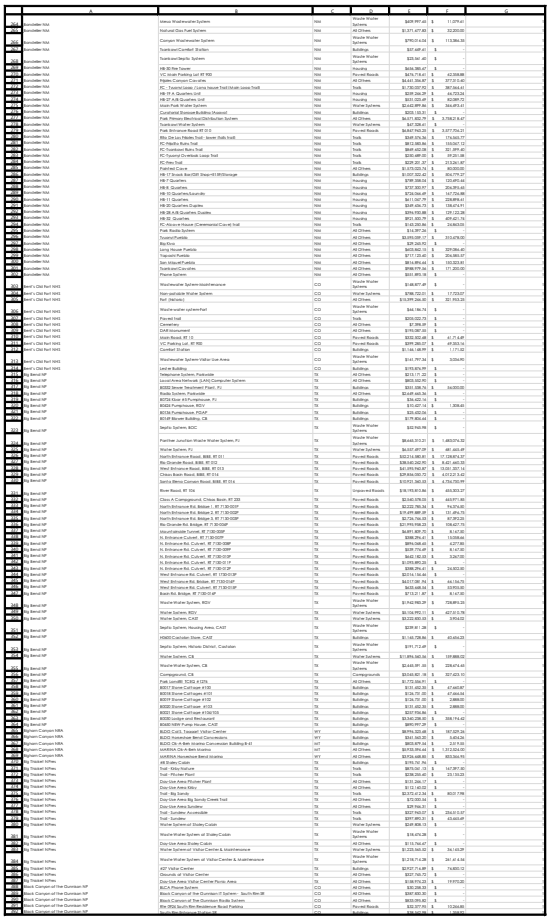

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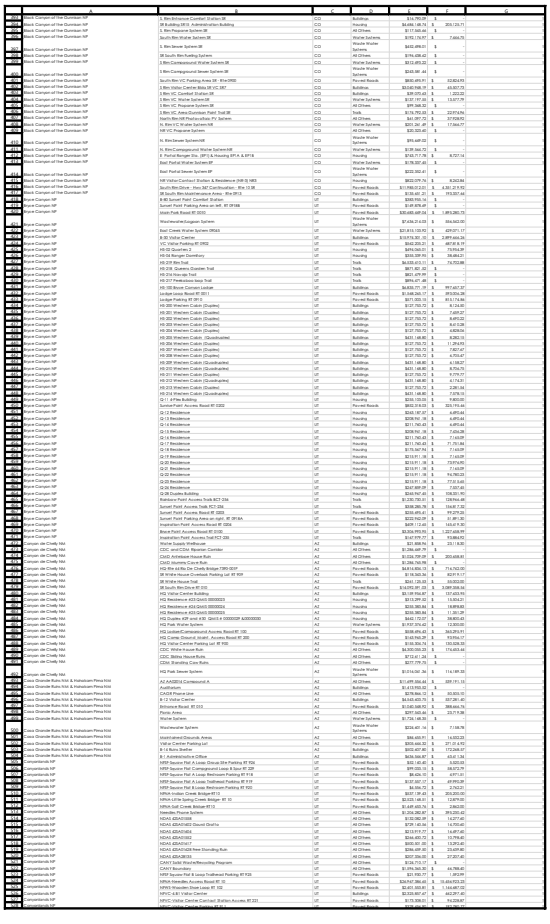

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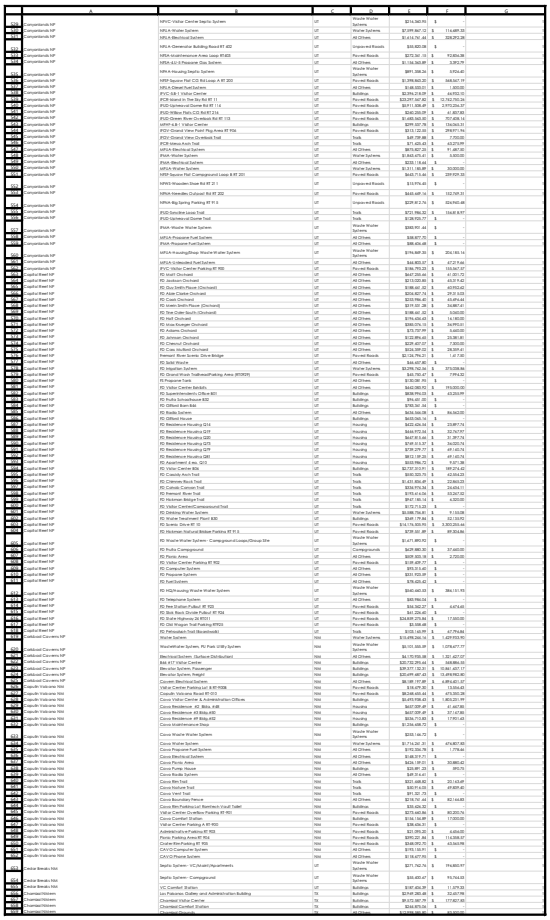

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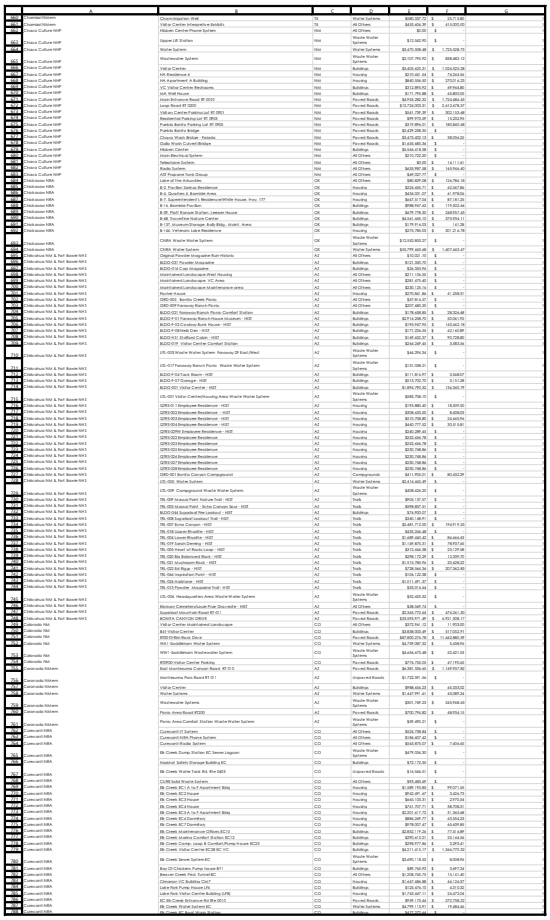

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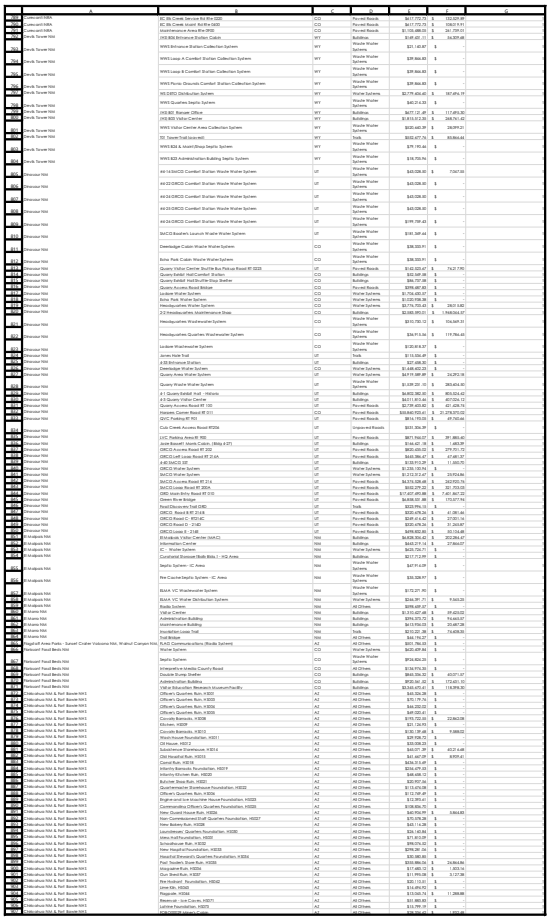

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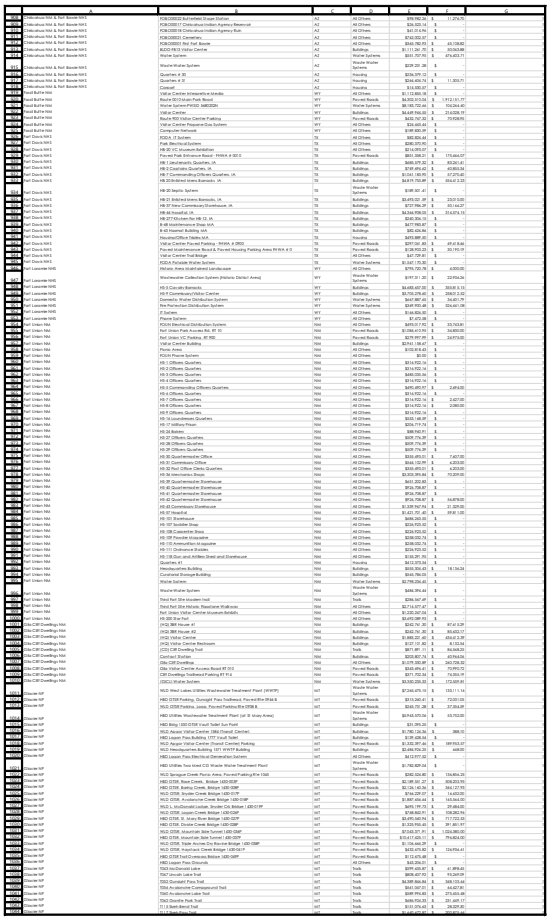

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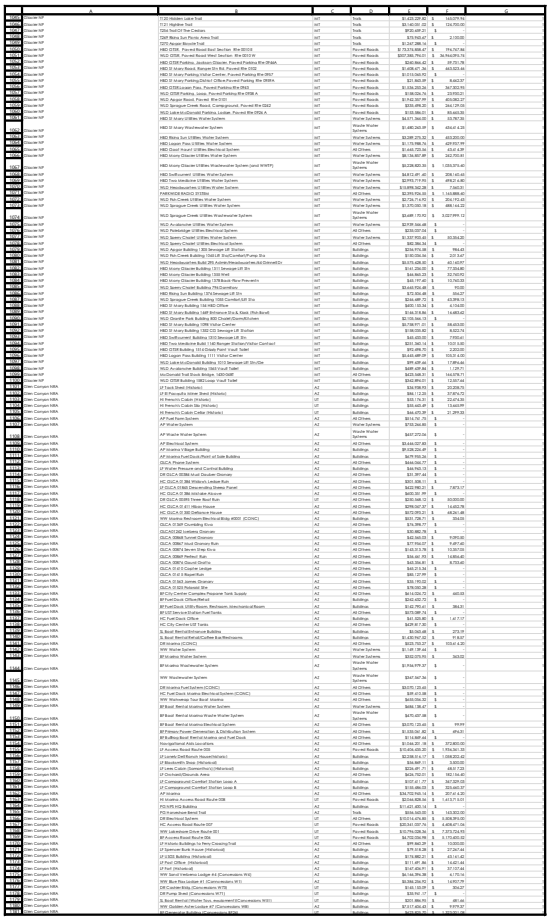

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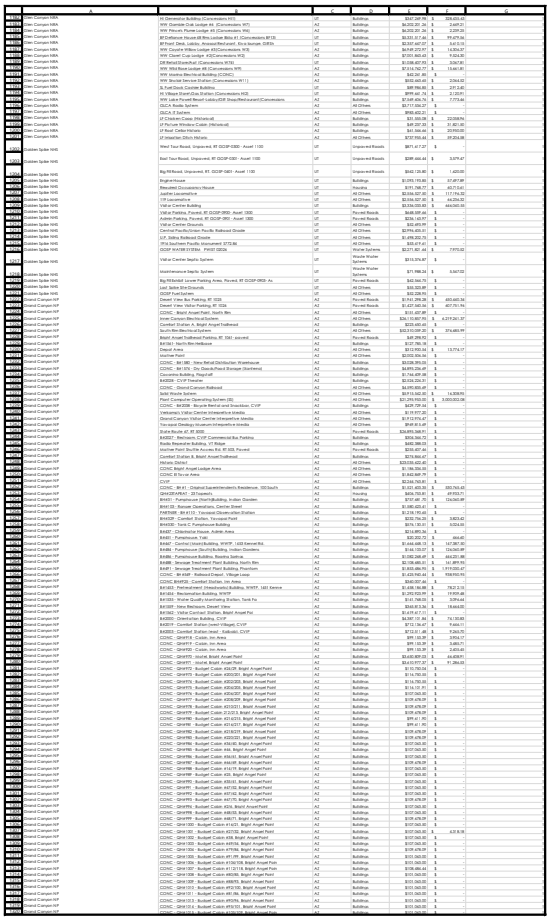

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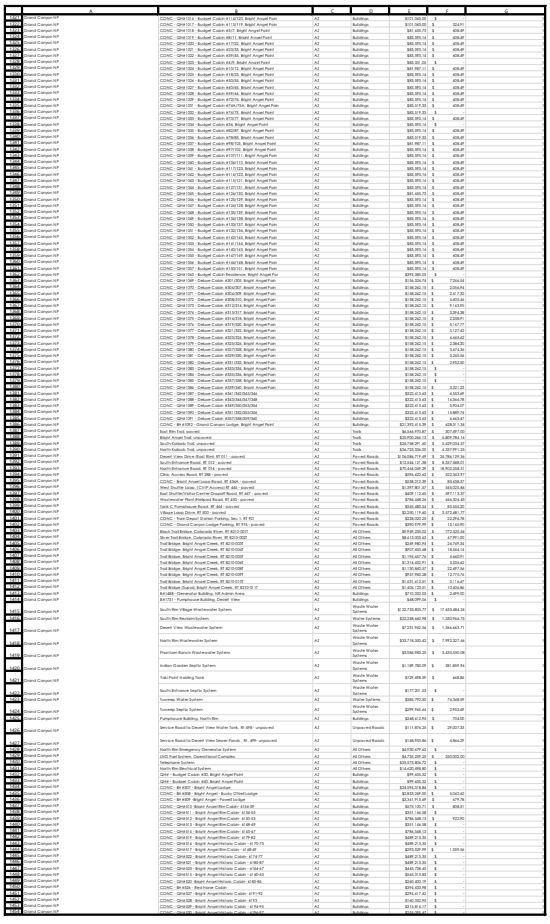

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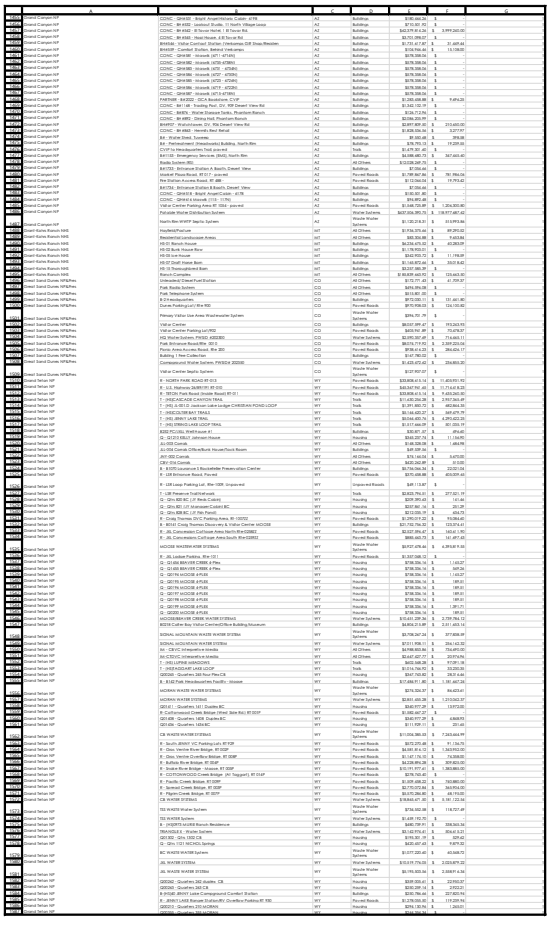

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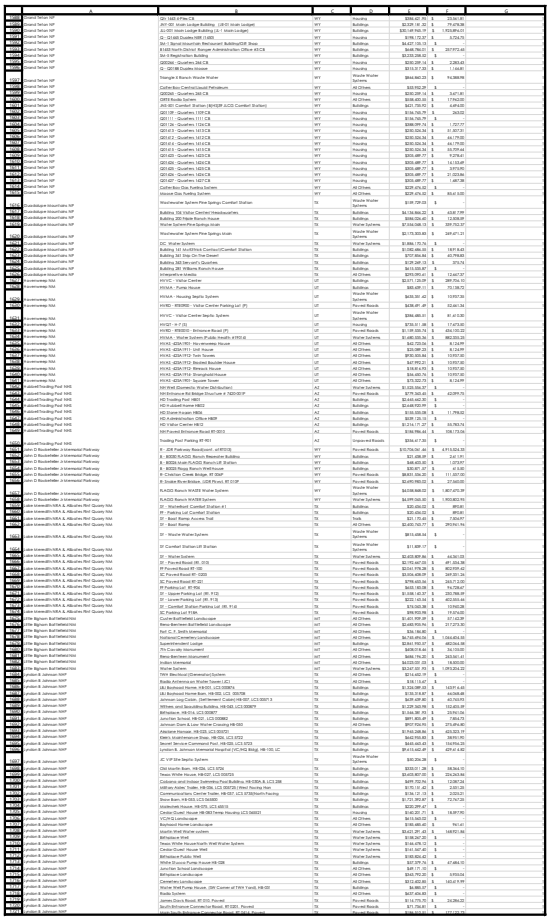

	A	B	C	D	E	F	G
016736	Grand Teton NP	GV-1443-A Fire Ck	WY	Housing	$268,421.70	$ 33,561.21	
016736	Grand Teton NP	GV-1501 Moiah Lodge Building - LS-01 Moiah Lodge)	WY	Buildings	$2,531,145.32	$ 77,419.36	
016736	Grand Teton NP	JLI-001 Moiah Lodge Building (JLI / Moiah Lodge)	WY	Buildings	$30,149,940.78	$ 1,103,884.01	
016736	Grand Teton NP	GJ - GV-685 Duplex NBR (1-685)	WY	Housing	$786,172.87	$ 3,724.70	
016736	Grand Teton NP	SH 1- Signal Mountain Restaurant/ Building/Cliff Shop	WY	Buildings	$4,437,139.15	$ -	
016736	Grand Teton NP	E-685 North District Ranger Administration Office #3CCB	WY	Buildings	$448,790.01	$ 297,972.40	
016736	Grand Teton NP	SH-1 Regulation Building	WY	Buildings	$3,535,398.00	$ -	
016736	Grand Teton NP	GR0044 - Quarters 344 CB	WY	Housing	$230,295.14	$ 2,263.43	
016736	Grand Teton NP	GJ - GV-96 Duplex Mower	WY	Housing	$215,517.29	$ 1,144.85	
016736	Grand Teton NP	Triangle X Ranch Waste Water	WY	Waste Water Systems	$844,960.29	$ 19,388.56	
016736	Grand Teton NP	Cutler Box Creek Liquid Petroleum	WY	All Others	$30,552.28	$ -	
016736	Grand Teton NP	GR0045 - Quarters 345 CB	WY	Housing	$230,295.14	$ 3,421.81	
016736	Grand Teton NP	GR5 Radio System	WY	All Others	$598,403.55	$ 17,743.00	
016736	Grand Teton NP	JNA-001 Cornfoot Station (NEW)(SE JLCO Cornfoot Station)	WY	Buildings	$471,750.70	$ 4,415.00	
016736	Grand Teton NP	GO1 139 - Quarters 1139 CB	WY	Housing	$134,745.75	$ 29.53	
016736	Grand Teton NP	GO1 1 - Quarters 1111 CB	WY	Housing	$134,745.75	$ -	
016736	Grand Teton NP	GO1 124 - Quarters 1124 CB	WY	Housing	$268,077.74	$ 1,227.17	
016736	Grand Teton NP	GO1 125 - Quarters 1125 CB	WY	Housing	$268,077.74	$ 1,227.17	
016736	Grand Teton NP	GO1 412 - Quarters 1412 CB	WY	Housing	$230,534.34	$ 44,179.82	
016736	Grand Teton NP	GO1 413 - Quarters 1413 CB	WY	Housing	$230,534.34	$ 44,179.82	
016736	Grand Teton NP	GO1 415 - Quarters 1415 CB	WY	Housing	$230,534.34	$ 53,705.44	
016736	Grand Teton NP	GO1 420 - Quarters 1420 CB	WY	Housing	$268,497.77	$ 9,276.41	
016736	Grand Teton NP	GO1 424 - Quarters 1424 CB	WY	Housing	$268,497.77	$ 14,130.87	
016736	Grand Teton NP	GO1 425 - Quarters 1425 CB	WY	Housing	$268,497.77	$ 3,573.65	
016736	Grand Teton NP	GO1 426 - Quarters 1426 CB	WY	Housing	$268,497.77	$ 21,333.86	
016736	Grand Teton NP	GO1 427 - Quarters 1427 CB	WY	Housing	$268,497.77	$ 1,487.38	
016736	Grand Teton NP	Cutler Box Elks Sattley Sattem	WY	All Others	$238,474.53	$ -	
016736	Grand Teton NP	Moose Elks Sattley Sattem	WY	All Others	$238,474.53	$ 69.41 0.00	
016736	Grand Teton NP	Wastewater Sattem Pine Springs Comfort Station	TX	Waste Water Systems	$139,729.20	$ -	
016736	Guadalupe Mountains NP	Building 106 Visitor Center/ Headquarters	TX	Buildings	$4,739,864.22	$ 43,87 7.99	
016736	Guadalupe Mountains NP	Building 200 Pinche Ranch House	TX	Buildings	$994,534.40	$ 13,806.91	
016736	Guadalupe Mountains NP	Water Sattem Pine Springs Wash	TX	Water Systems	$7,554,598.33	$ 359,752.37	
016736	Guadalupe Mountains NP	Wastewater Sattem Pine Springs Wash	TX	Waste Water Systems	$2,173,933.80	$ 249,471.21	
016736	Guadalupe Mountains NP	DC Water Sattem	TX	Water Systems	$1,884,170.76	$ -	
016736	Guadalupe Mountains NP	Building 107 Ant/Wine Cantina/Comfort Station	TX	Buildings	$1,082,489.30	$ 19,01 9.43	
016736	Guadalupe Mountains NP	Building 501 Ship On The Desert	TX	Buildings	$707,494.84	$ 43,79 8.83	
016736	Guadalupe Mountains NP	Building 300 Geraldi's Quarters	TX	Buildings	$128,248.13	$ 370.74	
016736	Guadalupe Mountains NP	Building 301 Williams Ranch House	TX	Buildings	$419,555.87	$ 5,12 9.99	
016736	Guadalupe Mountains NP	Interpretive Kiosks	TX	All Others	$370,395.41	$ 12,647.37	
016736	Kaskaskia Nwg	HVAC - Visitor Center	UT	Buildings	$2,071,129.08	$ 389,753.10	
016736	Kaskaskia Nwg	HVAC - Public House	UT	Buildings	$95,697.11	$ 70,136.72	
016736	Kaskaskia Nwg	HVAC - Housing Septic System	UT	Waste Water Systems	$439,591.42	$ 10,957.56	
016736	Kaskaskia Nwg	HVAC - 6552802 - Visitor Center Parking Lot (P)	UT	Paved Roads	$238,267.28	$ 22,641.54	
016736	Kaskaskia Nwg	HVAC - Visitor Center Septic System	UT	Waste Water Systems	$566,485.01	$ 61,41 0.00	
016736	Kaskaskia Nwg	HVAC - H (1)	UT	Housing	$730,61 1.39	$ 17,473.60	
016736	Kaskaskia Nwg	HVAC - 6552801 - Entrance Road (P)	UT	Paved Roads	$1,138,332.74	$ 454,150.32	
016736	Kaskaskia Nwg	HVAC - Water System (Public Health) -4700 (I)	UT	Water Systems	$1,486,103.34	$ 662,303.20	
016736	Kaskaskia Nwg	HVAC -4204-1701 - Nw Interpretive House	UT	All Others	$42,733.54	$ 8,124.99	
016736	Kaskaskia Nwg	HVAC -4204-1711 - Unit House	UT	All Others	$29,589.20	$ 8,124.99	
016736	Kaskaskia Nwg	HVAC -4204-1712 - Tack Toilets	UT	All Others	$836,809.84	$ 13,957.60	
016736	Kaskaskia Nwg	HVAC -4204-1713 - Stocked Backdoor House	UT	All Others	$47,952.21	$ 13,957.60	
016736	Kaskaskia Nwg	HVAC -4204-1714 - Stocked Backdoor	UT	All Others	$47,952.21	$ 13,957.60	
016736	Kaskaskia Nwg	HVAC -4204-1715 - Stronghold House	UT	All Others	$36,455.75	$ 13,957.60	
016736	Kaskaskia Nwg	HVAC -4204-1700 - Squaw Tavern	UT	All Others	$75,022.75	$ 8,124.99	
016736	Lakeshore/Trucking Pool NWS	NW Well (Elements) - Water Distribution	AZ	Water Systems	$1,020,556.37	$ -	
016736	Lakeshore/Trucking Pool NWS	NW Entrance Rd Bridge Structure # 7420-001P	AZ	Paved Roads	$775,340.45	$ 42,979.75	
016736	Lakeshore/Trucking Pool NWS	HQ Trucking Pool -4801	AZ	Buildings	$2,640,442.90	$ -	
016736	Lakeshore/Trucking Pool NWS	HQ-Lakeshore House 4802	AZ	Buildings	$2,648,920.99	$ -	
016736	Lakeshore/Trucking Pool NWS	HQ Storm Sustain 4804	AZ	Buildings	$139,559.08	$ 11,799.02	
016736	Lakeshore/Trucking Pool NWS	HQ-Lakeshore/Gallery Office 4809	AZ	Buildings	$928,126.19	$ -	
016736	Lakeshore/Trucking Pool NWS	HQ-Yellow Cantina 4812	AZ	Buildings	$1,214,717.37	$ 69,763.74	
016736	Lakeshore/Trucking Pool NWS	NW Paved Entrance Road #P-6013	AZ	Paved Roads	$1,566,789.44	$ 508,170.56	
016736	Lakeshore/Trucking Pool NWS	Trucking Pool Parking #P-901	AZ	Unpaved Roads	$334,417.80	$ -	
016736	John D Rockefeller Jr Memorial Parkway	R - JDR Parkway Road(cont. of #7013)	WY	Paved Roads	$10,704,741.84	$ 4,913,924.30	
016736	John D Rockefeller Jr Memorial Parkway	R - 80008 PLACID Ranch/ Watercolor Building	WY	Buildings	$11,438.08	$ 2,412.91	
016736	John D Rockefeller Jr Memorial Parkway	R - 80004 Utah PLACID Ranch/ JR Stallion	WY	Buildings	$48,403.80	$ 1,073.67	
016736	John D Rockefeller Jr Memorial Parkway	R - 80003 Rising Ranch/ Well House	WY	Buildings	$30,871.37	$ 613.80	
016736	John D Rockefeller Jr Memorial Parkway	R Chenlan Creek Bridge, RT 55xP	WY	Paved Roads	$8,831,104.20	$ 111,057.00	
016736	John D Rockefeller Jr Memorial Parkway	R Snake River Bridge - Unit RT 51 NP	WY	Paved Roads	$2,455,950.53	$ 27,540.60	
016736	John D Rockefeller Jr Memorial Parkway	PLACID Ranch/ WATER Water Sattem	WY	Water Systems	$4,038,668.02	$ 1,807,470.39	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	PLACID Ranch/ WATER Sattem	WY	Water Systems	$4,099,540.30	$ 1,403,402.70	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	37 - Maintenance Comfort Station #1	TX	Buildings	$20,454.02	$ 850.81	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	71 - Parking Lot (Comfort Station	TX	Buildings	$20,454.02	$ 850.81	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 - Boat Ramp Access Trail	TX	Trails	$21,170.40	$ 7,534.97	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 - Boat Ramp	TX	All Others	$2,472,705.77	$ 299,743.76	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 - Waste Water Sytems	TX	Waste Water Systems	$815,498.54	$ -	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 Comfort Station Lift Station	TX	Waste Water Systems	$11,609.17	$ -	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 - Water System	TX	Water Systems	$2,422,837.80	$ 44,561.05	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	32 - Paved Road (95 - 313)	TX	Paved Roads	$2,755,447.29	$ 481,354.39	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	34 Paved Road #7-150	TX	Paved Roads	$2,541,179.39	$ 802,939.42	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	32 Paved Road #7-1200	TX	Paved Roads	$3,934,439.09	$ 349,351.34	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	32 Paved Road #7-321	TX	Paved Roads	$756,493.34	$ 249,71 0.00	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 Parking Lot #7-95A	TX	Paved Roads	$430,183.08	$ 74,726.47	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 - Upper Parking Lot (95 -313)	TX	Paved Roads	$1,035,145.61	$ 253,788.89	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 - Lower Parking Lot (95 -313)	TX	Paved Roads	$338,143.61	$ 253,788.89	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	31 - Comfort Station/ Parking Lot (95 -313)	TX	Paved Roads	$79,065.96	$ 19,766.49	
016736	Lake Mead/Mohave/Mtn & Alluvians Rint/ Quarry NAA	32 Parking Lot #7-95	TX	Paved Roads	$99,553.96	$ 31,674.83	
016736	Little Bighorn Battlefield NNM	Custer Battlefield Landscape	NT	All Others	$1,431,191.91	$ 67,142.91	
016736	Little Bighorn Battlefield NNM	Reno-Benteen Battlefield Landscape	NT	All Others	$2,469,953.74	$ 217,373.30	
016736	Little Bighorn Battlefield NNM	Nat. C. T. Smith Memorial	NT	All Others	$36,1 80.80	$ -	
016736	Little Bighorn Battlefield NNM	National Cemetery Landscape	NT	All Others	$4,734,915.24	$ 1,044,454.10	
016736	Little Bighorn Battlefield NNM	Superintendent Lodge	NT	Buildings	$2,841,165.37	$ 483,04 6.99	
016736	Little Bighorn Battlefield NNM	7th Cavalry Monument	NT	All Others	$478,514.44	$ 34,139.83	
016736	Little Bighorn Battlefield NNM	Reno-Benteen Monument	NT	All Others	$486,174.20	$ 243,941.41	
016736	Little Bighorn Battlefield NNM	Custer Monument	NT	All Others	$1,000,000.00	$ 19,000.00	
016736	Little Bighorn Battlefield NNM	Water System	NT	Water Systems	$2,537,337.77	$ 975,204.32	
016736	Lyndon B. Johnson NHP	TWX Electrical (Commercial) System	TX	All Others	$214,462.19	$ -	
016736	Lyndon B. Johnson NHP	Radio Antenna on Water Tower (JC)	TX	All Others	$18,1 13.67	$ -	
016736	Lyndon B. Johnson NHP	J&I Boulevard Homes 14-001, LCS 002961A	TX	Buildings	$1,224,088.20	$ 14,97 4.40	
016736	Lyndon B. Johnson NHP	J&I Boulevard Homes Barn, HB-002, LCS 002758	TX	Buildings	$139,318.87	$ 44,96 6.88	
016736	Lyndon B. Johnson NHP	Johnson Log Cabin, (Settlement Cabin) HB-007, LCS 53201 X	TX	Buildings	$439,428.86	$ 43,743.73	
016736	Lyndon B. Johnson NHP	Offices and Sanatoria Building, HB-008, LCS 000877	TX	Buildings	$1,229,382.76	$ 122,403.97	
016736	Lyndon B. Johnson NHP	Birthplace, HB-014, LCS 000907	TX	Buildings	$1,544,381.70	$ 29,74 0.39	
016736	Lyndon B. Johnson NHP	Johnson Settlement Cemetery, HB-015, LCS 003862	TX	Buildings	$1,144,381.70	$ 29,74 0.39	
016736	Lyndon B. Johnson NHP	Johnson Dairy & Loan Worker Cowsing HB-022	TX	All Others	$837,703.70	$ 273,494.80	
016736	Lyndon B. Johnson NHP	Abelanan Homsen, HB-028, LCS 003072	TX	Buildings	$1,743,398.84	$ 429,323.17	
016736	Lyndon B. Johnson NHP	Allen's Inlet/American Shop, HB-029, LCS 07212	TX	Buildings	$442,703.80	$ 39,51 0.80	
016736	Lyndon B. Johnson NHP	Secret Service Commercial Pool, HB-029, LCS 07213	TX	Buildings	$445,440.45	$ 114,764.20	
016736	Lyndon B. Johnson NHP	Lyndon B. Johnson Memorial Hospital (VC/HQ Bldg), HB-100, LC	TX	Buildings	$7,413,447.87	$ 429,41 4.82	
016736	Lyndon B. Johnson NHP	JC VIP Site Septic System	TX	Waste Water Systems	$90,254.39	$ -	
016736	Lyndon B. Johnson NHP	Old Martin Barn, HB-004, LCS 4004	TX	Buildings	$209,01 1.39	$ 59,34 4.10	
016736	Lyndon B. Johnson NHP	Old Martin Barn, HB-004, LCS 004703	TX	Buildings	$209,011.39	$ 59,34 4.10	
016736	Lyndon B. Johnson NHP	Cisterns and Indoor Swimming Pool Building, HB-006A & LCS 286	TX	Buildings	$2,455,752.76	$ 23,09 7.24	
016736	Lyndon B. Johnson NHP	Military Aides' Trailer, HB-006, LCS 000729 (West Nursing Hom	TX	Buildings	$170,1 91.40	$ 2,651.28	
016736	Lyndon B. Johnson NHP	Communications Center Trailer, HB-007, LCS 073574(with Fencing	TX	Buildings	$134,1 31.15	$ 2,525.21	
016736	Lyndon B. Johnson NHP	Stone Barn, HB-003, LCS 004000	TX	Buildings	$1,731,397.87	$ 72,747.26	
016736	Lyndon B. Johnson NHP	Wattlework House, HB-005, LCS 4003 B	TX	Buildings	$226,395.47	$ -	
016736	Lyndon B. Johnson NHP	Cedar Guest House HB-063 Temp Housing LCS 040021	TX	Housing	$140,351.71	$ 18,997.80	
016736	Lyndon B. Johnson NHP	TCP/IS Landscape	TX	All Others	$615,940.33	$ -	
016736	Lyndon B. Johnson NHP	Boyhood Home Landscape	TX	All Others	$190,485.40	$ 741.41	
016736	Lyndon B. Johnson NHP	Maintenance Area outlets	TX	Water Systems	$4,431,347.20	$ 148,951.86	
016736	Lyndon B. Johnson NHP	Birthplace Well	TX	Water Systems	$149,047.40	$ -	
016736	Lyndon B. Johnson NHP	Texas White House North Well Water Sytems	TX	Water Systems	$149,478.72	$ -	
016736	Lyndon B. Johnson NHP	Cedar Guest House Well	TX	Water Systems	$141,547.40	$ -	
016736	Lyndon B. Johnson NHP	Birthplace Public Well	TX	Water Systems	$189,624.42	$ -	
016736	Lyndon B. Johnson NHP	White Elevator Pump House HB-026	TX	Buildings	$47,979.74	$ 47,464.12	
016736	Lyndon B. Johnson NHP	Junction School Landscape	TX	All Others	$49,171.30	$ -	
016736	Lyndon B. Johnson NHP	Birthplace Landscape	TX	All Others	$549,792.20	$ 9,950.04	
016736	Lyndon B. Johnson NHP	Cemetery Landscape	TX	All Others	$212,403.86	$ 143,41 9.99	
016736	Lyndon B. Johnson NHP	Visitor Center/Texas House, (SW Corner of TWX Tunnel), HB-00	TX	Buildings	$1,000,000.00	$ -	
016736	Lyndon B. Johnson NHP	Radio Shed	TX	All Others	$49,955.97	$ -	
016736	Lyndon B. Johnson NHP	James Dora's Road, RT-003, Paved	TX	Paved Roads	$114,775.70	$ 34,264.33	
016736	Lyndon B. Johnson NHP	South Entrance Commercial Road, RT-0001, Paved	TX	Paved Roads	$71,758.81	$ 21,415.21	
016736	Lyndon B. Johnson NHP	Radio Tank Entrance Comfort Station Road, RT-004, Paved	TX	Paved Roads	$429,104.81	$ 127,979.70	

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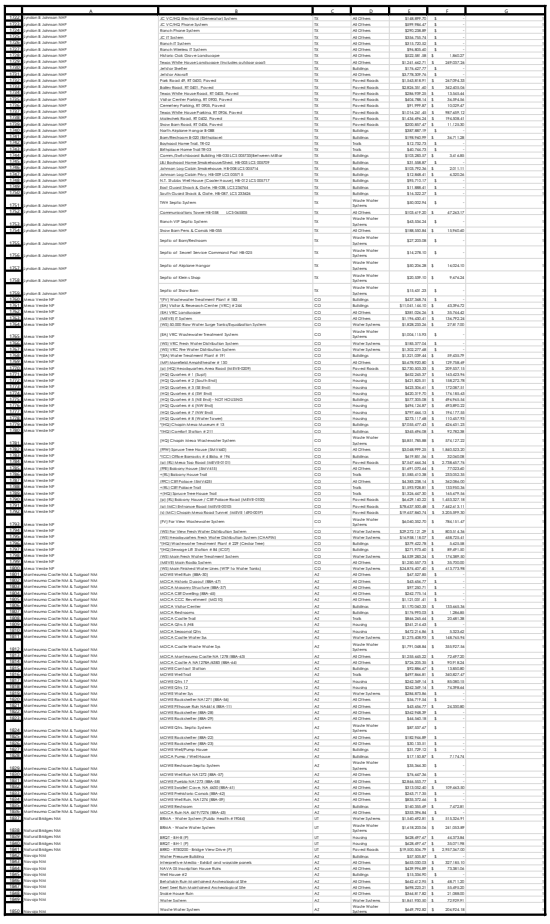

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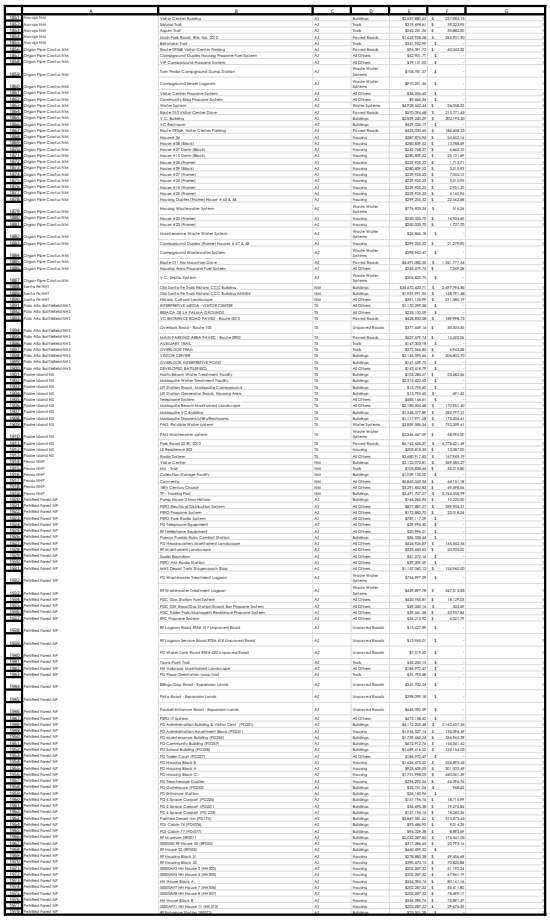

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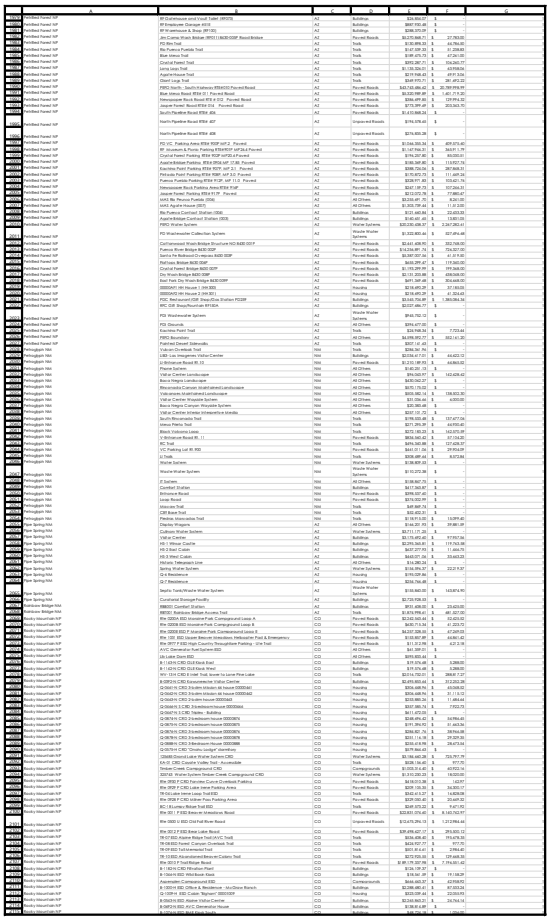

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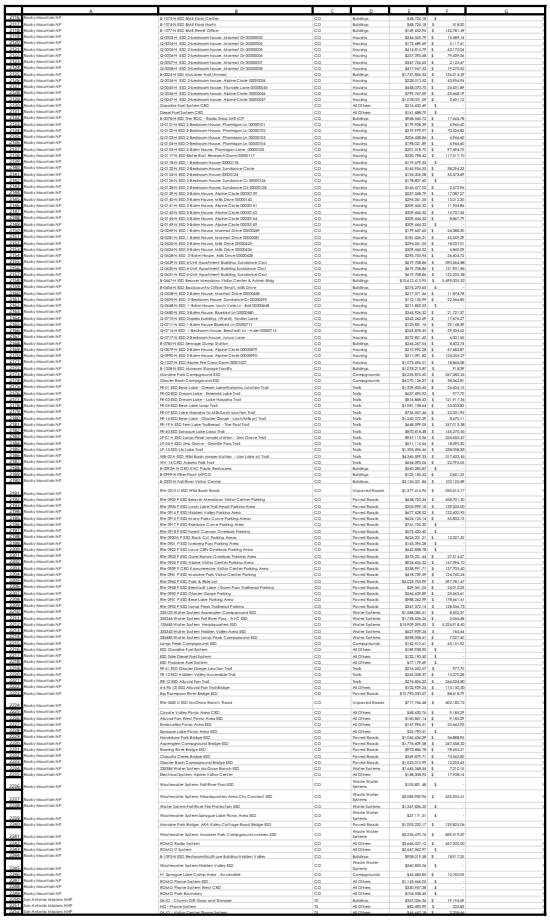

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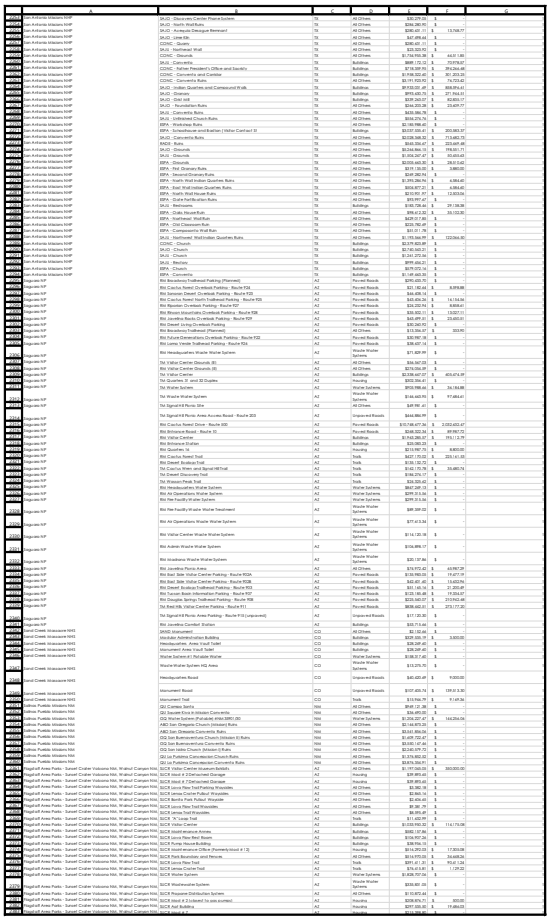

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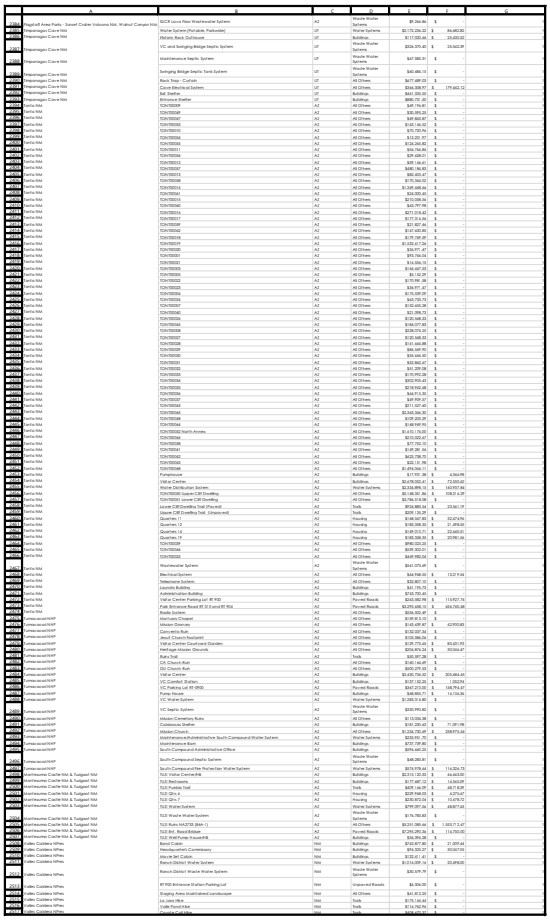

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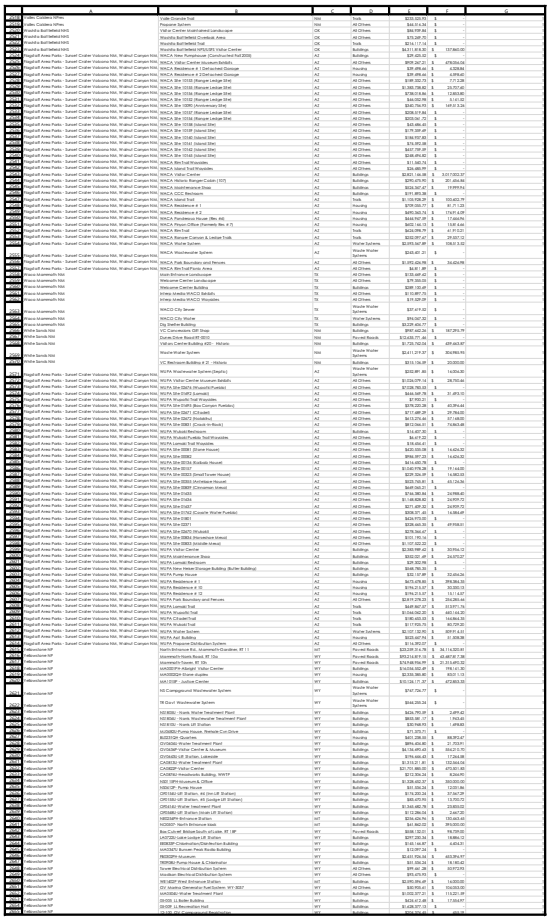

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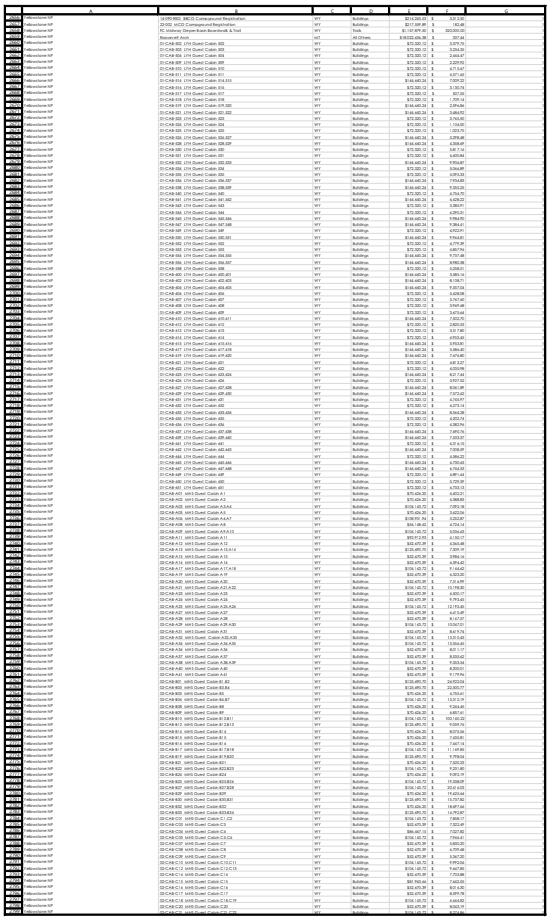

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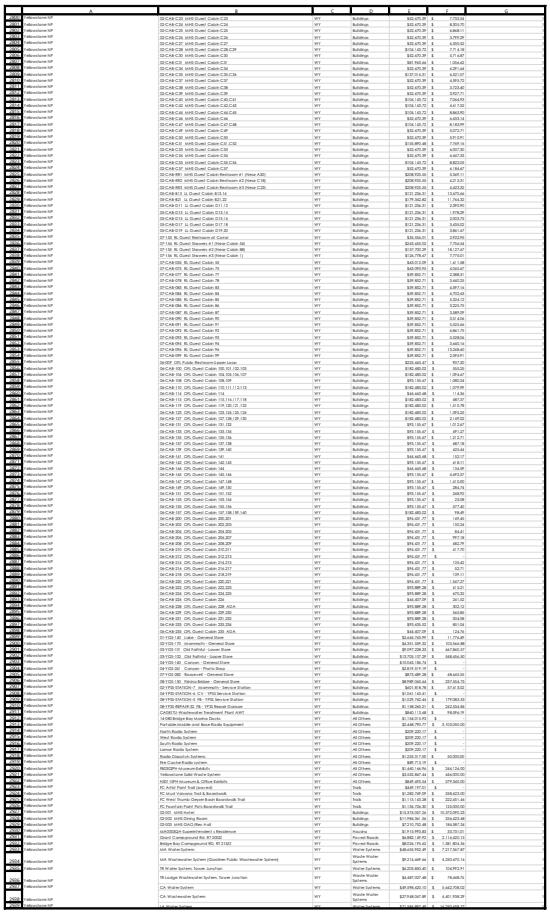

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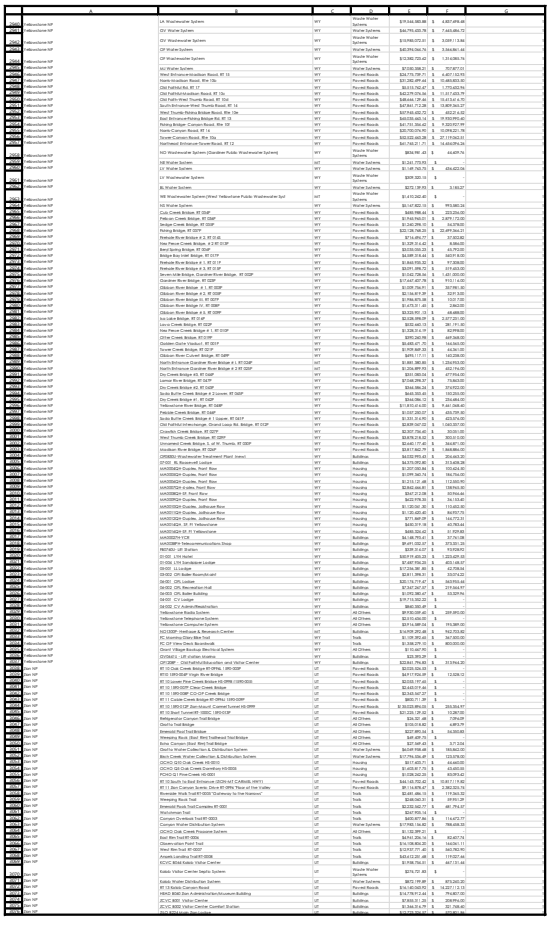

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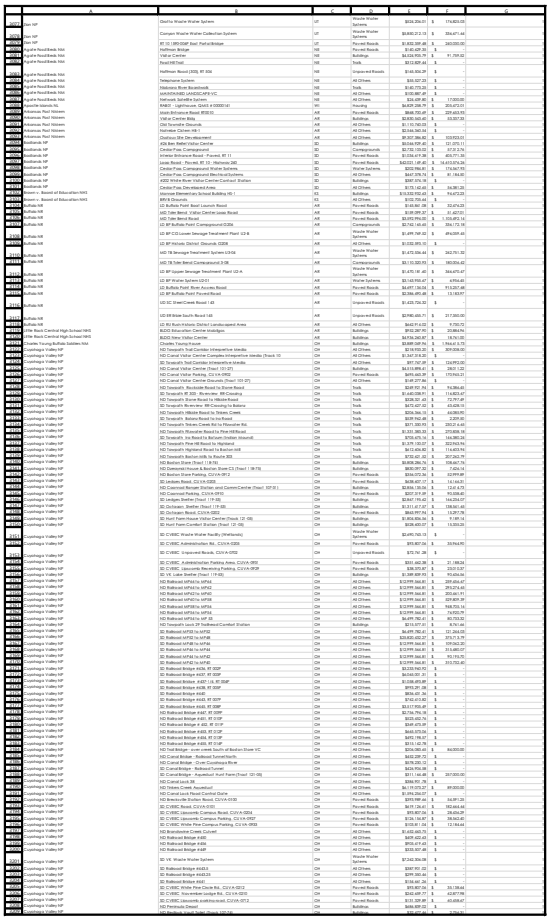

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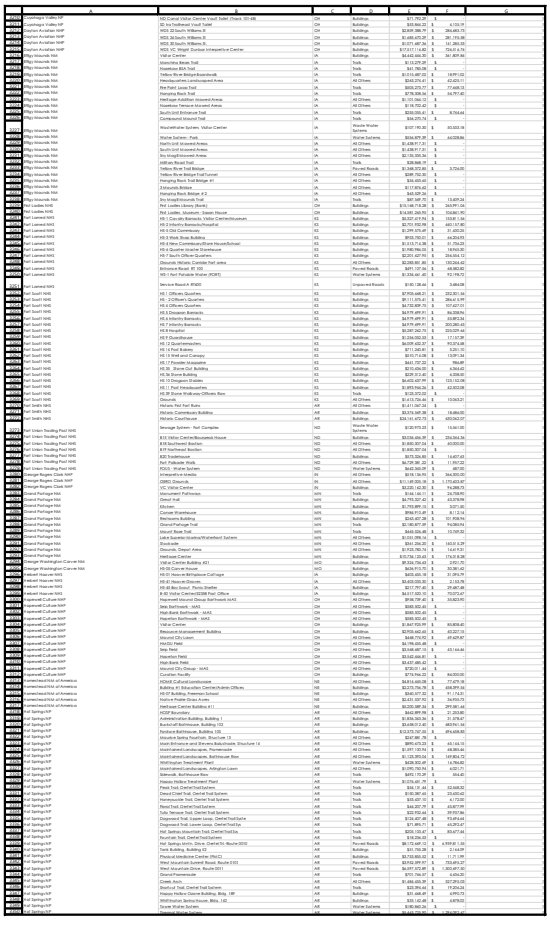

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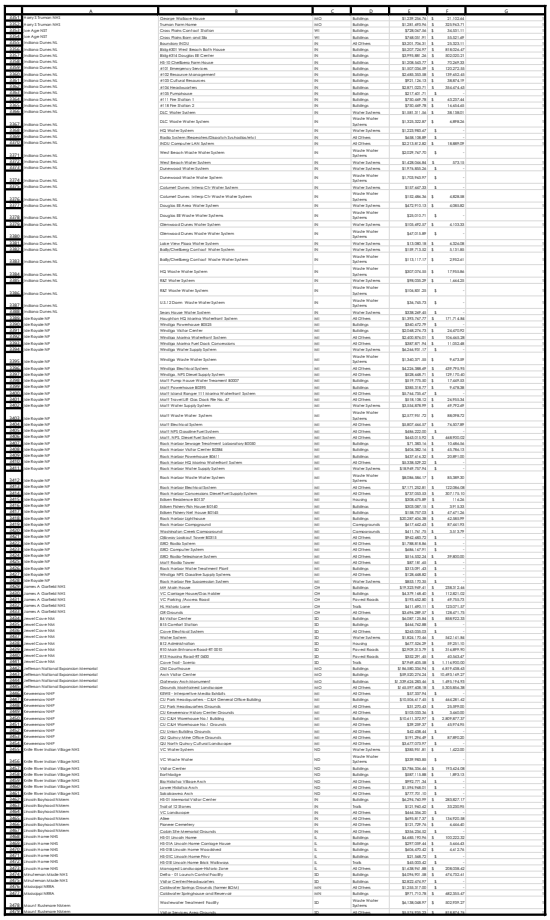

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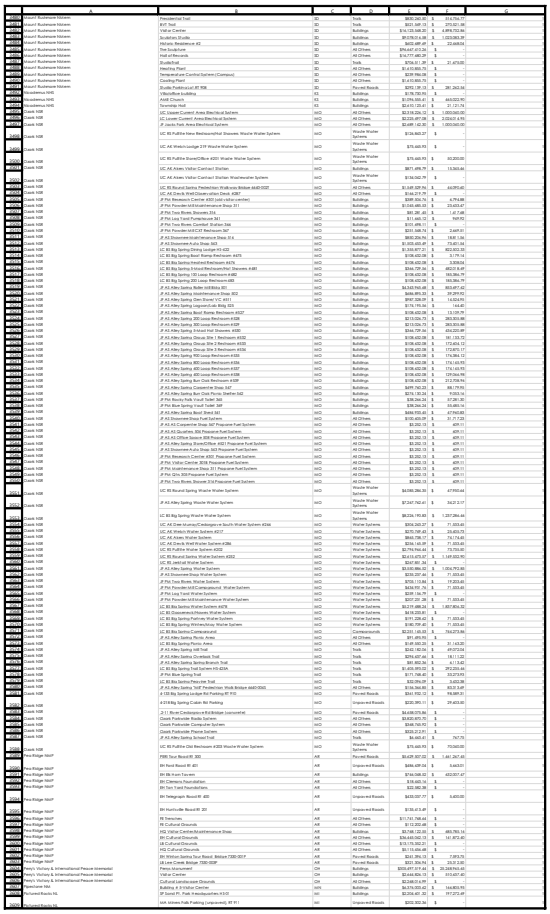

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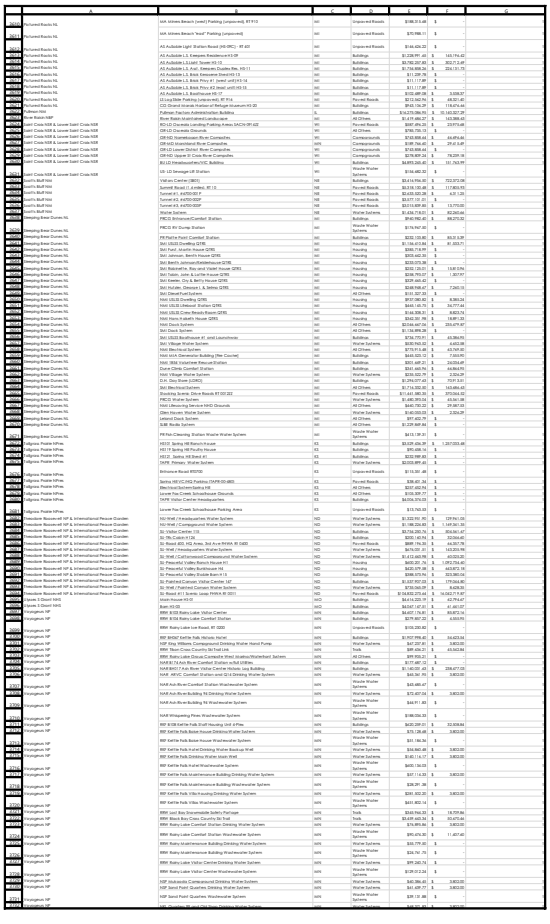

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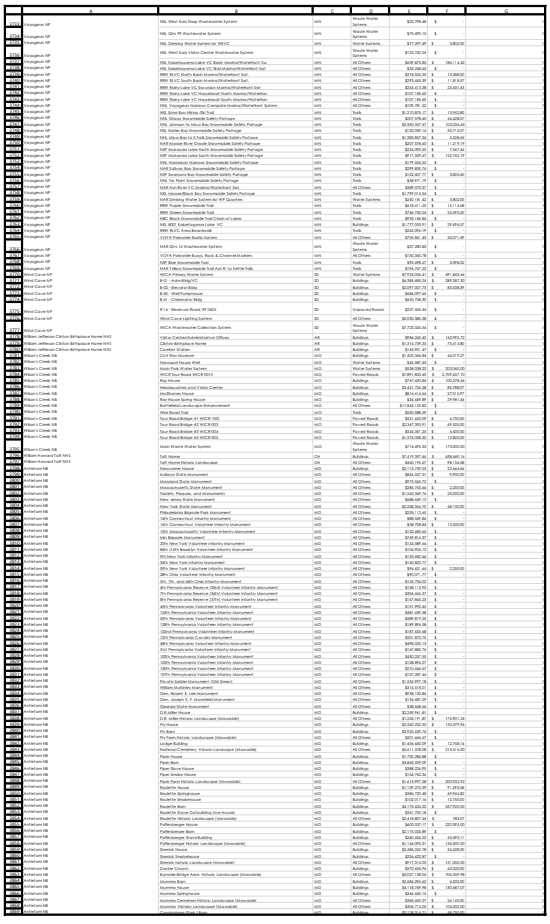

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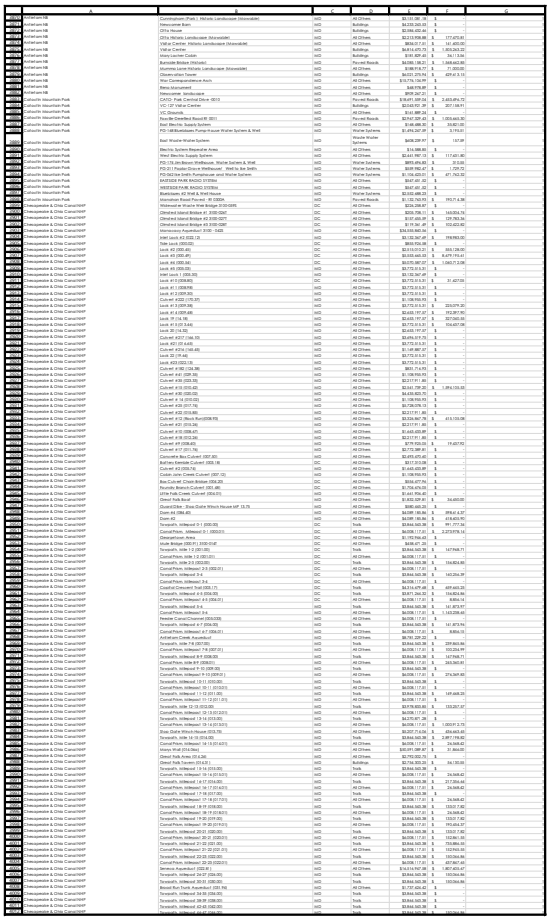

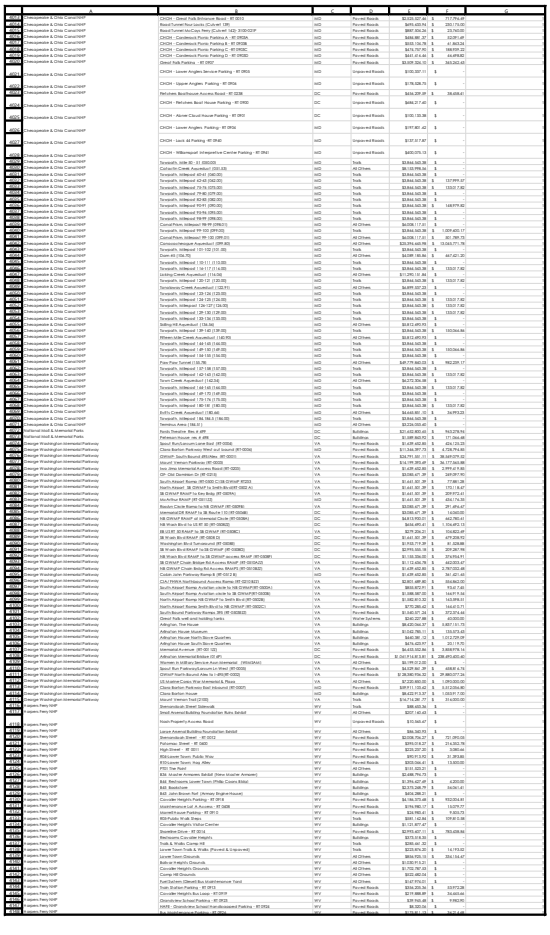

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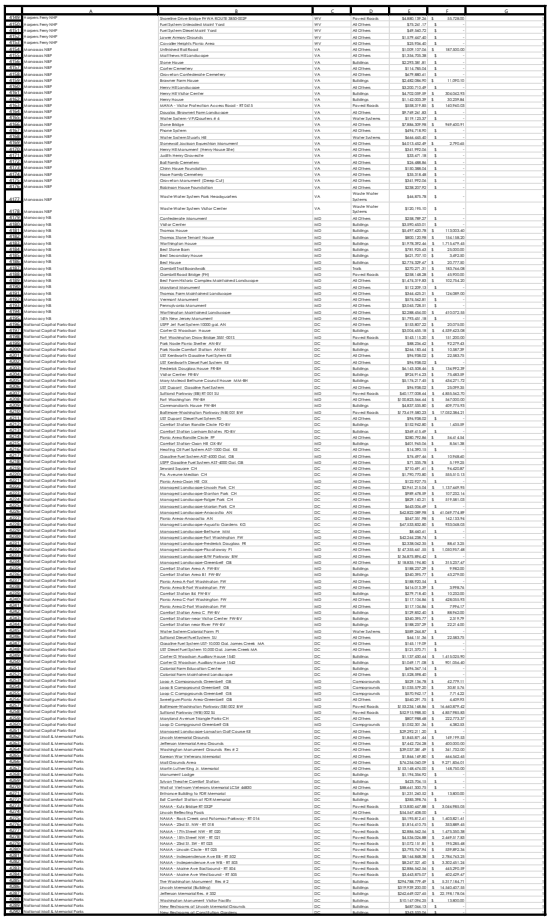

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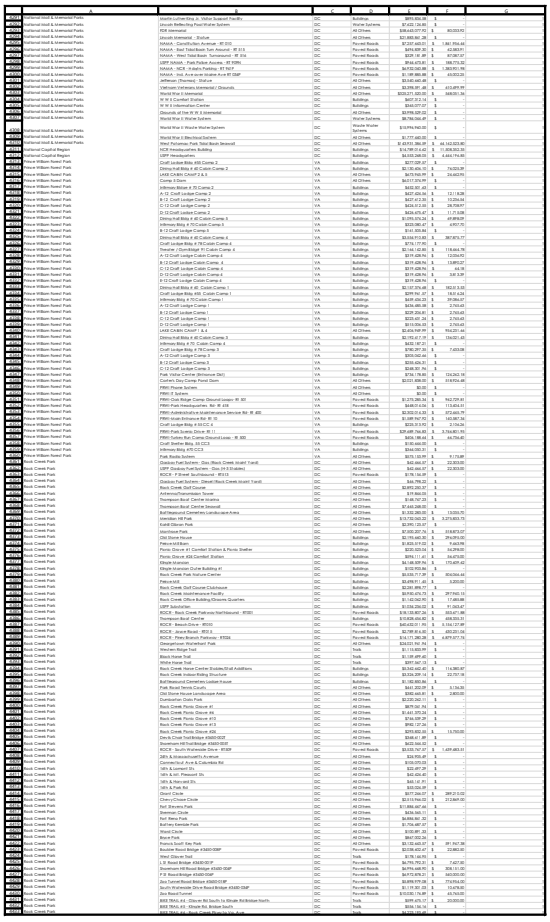

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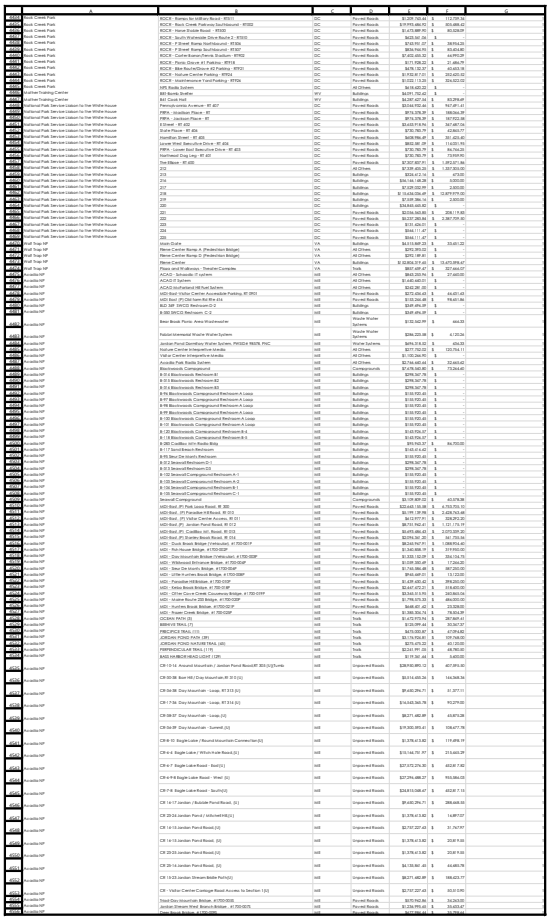

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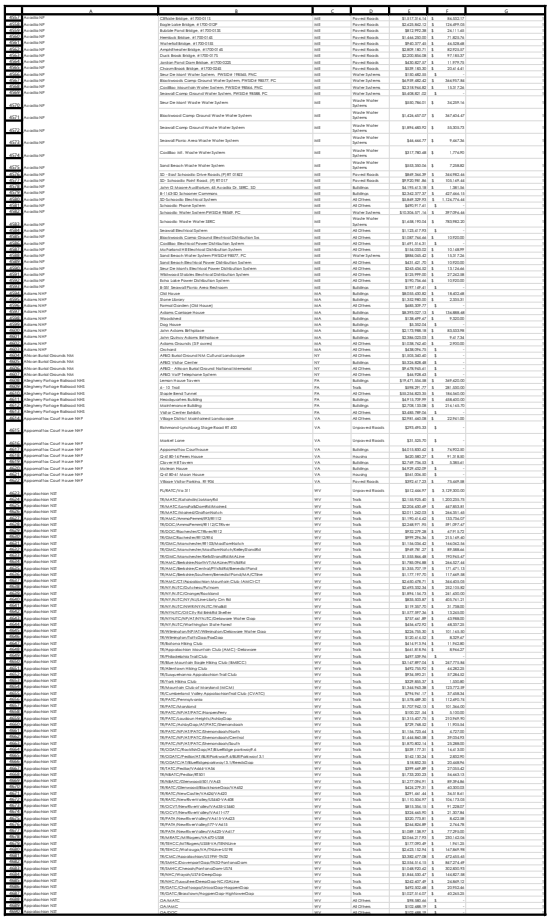

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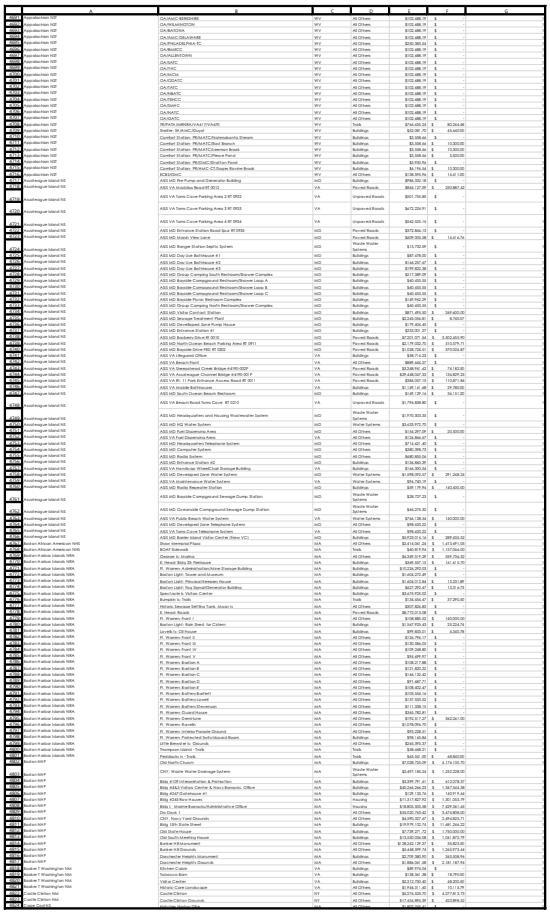

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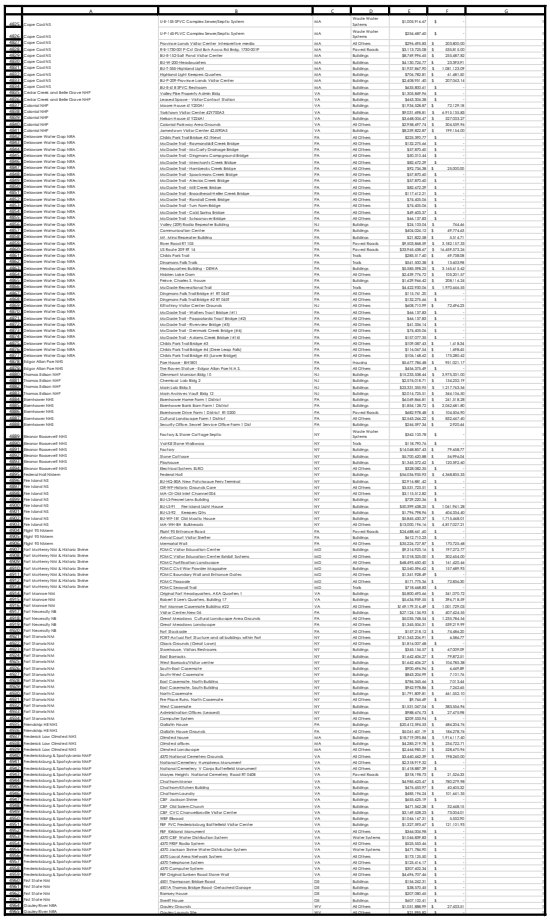

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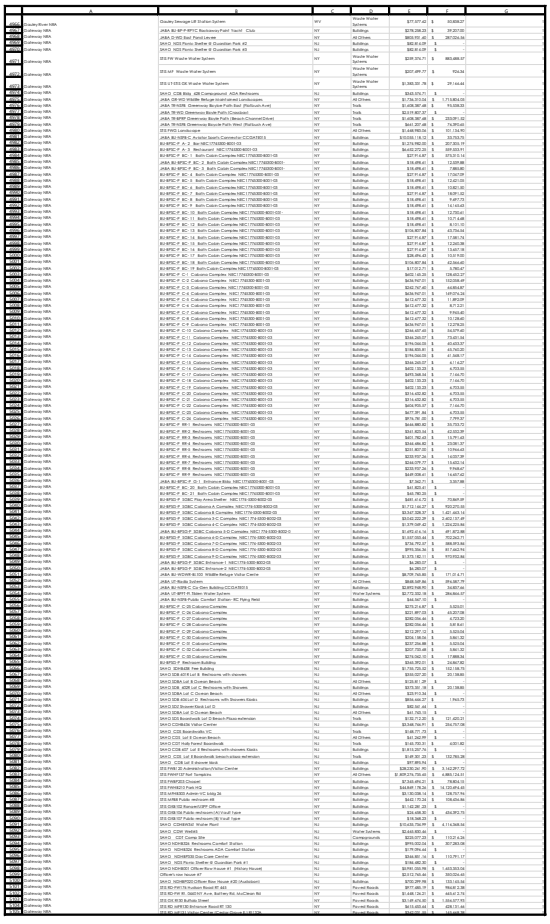

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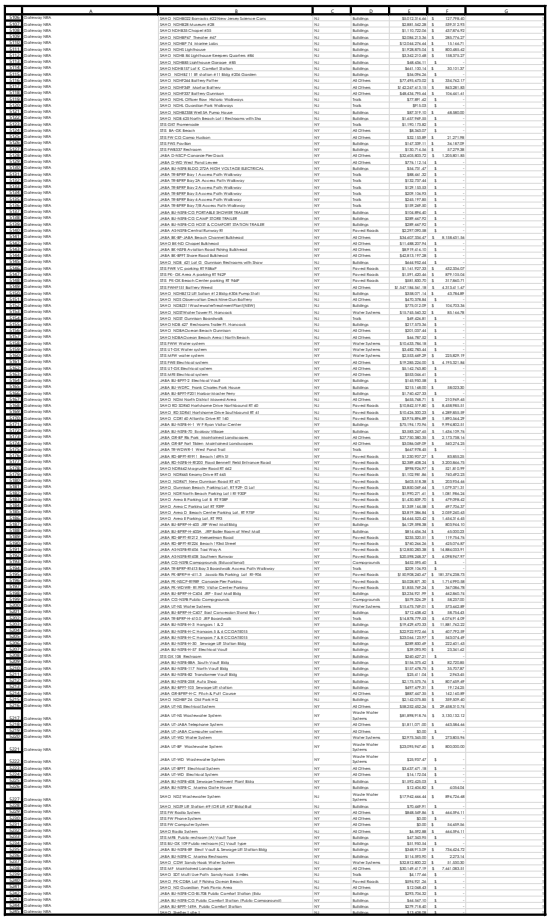

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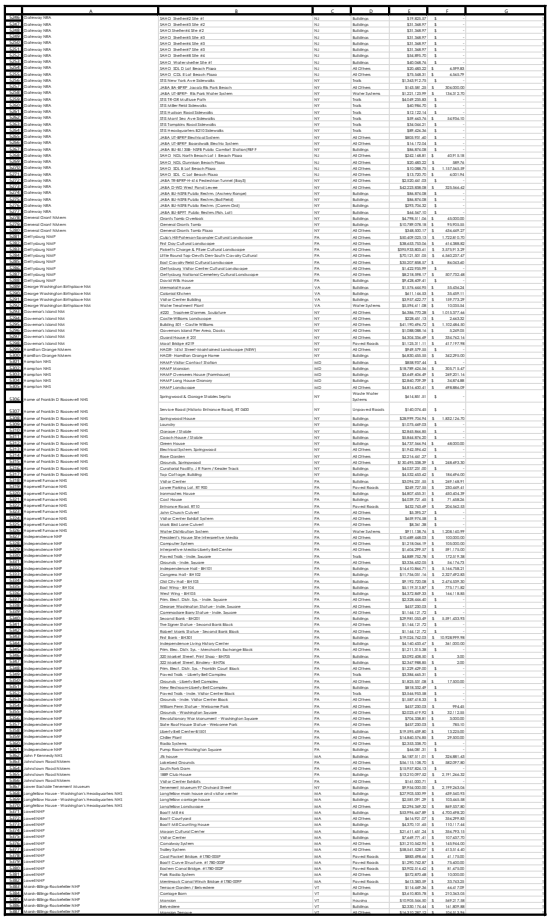

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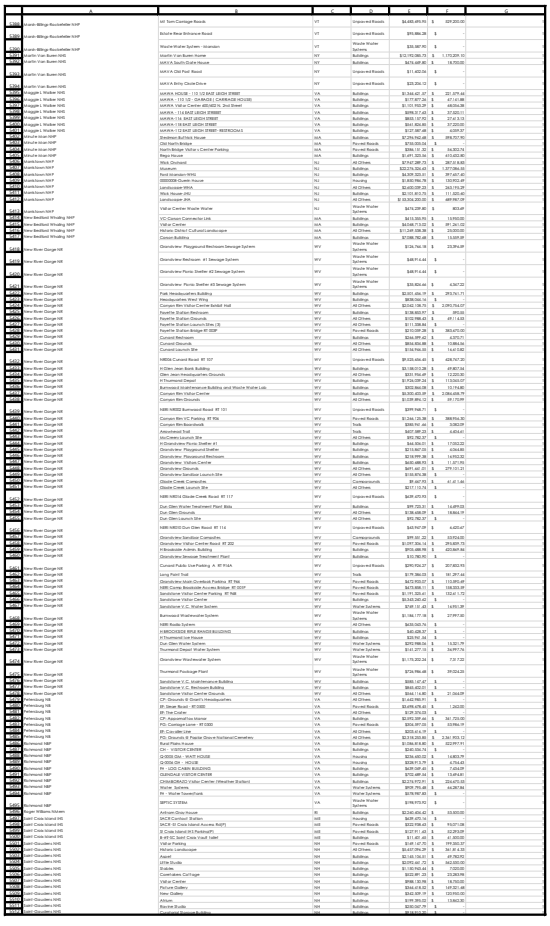

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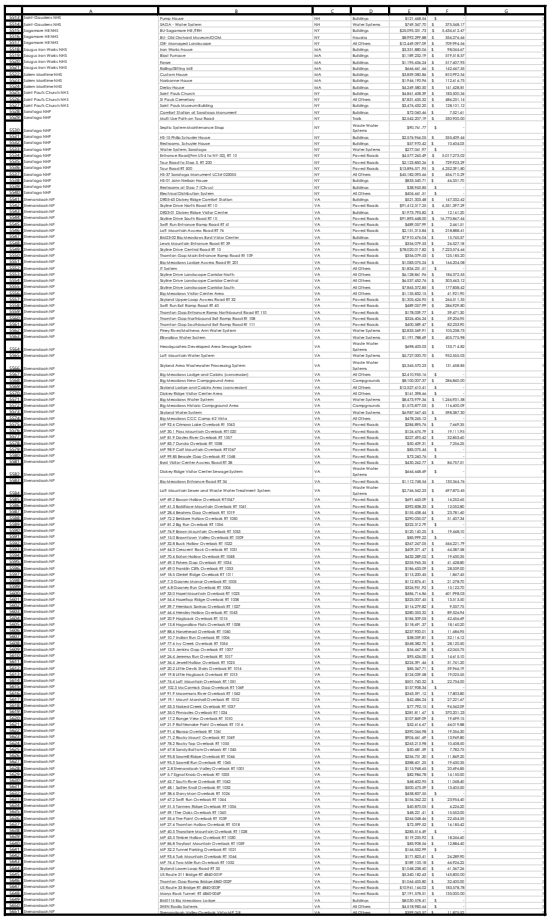

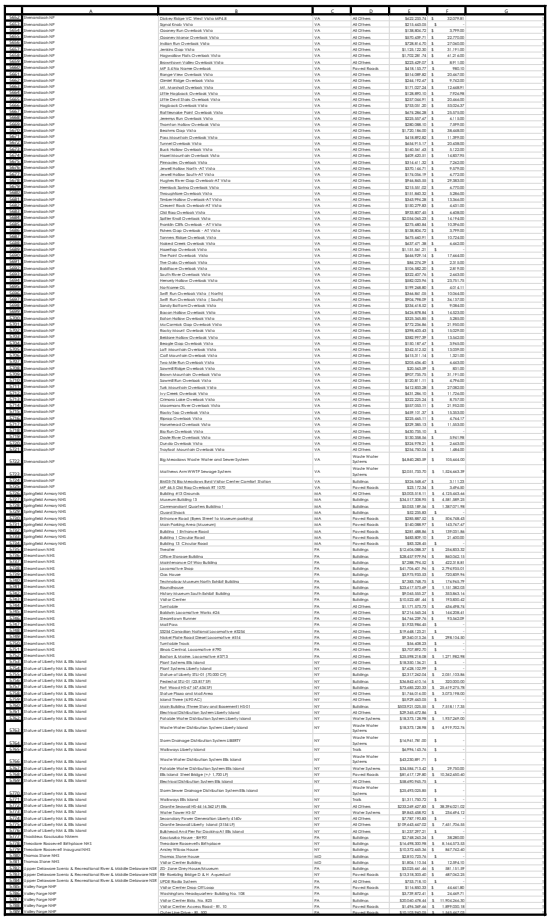

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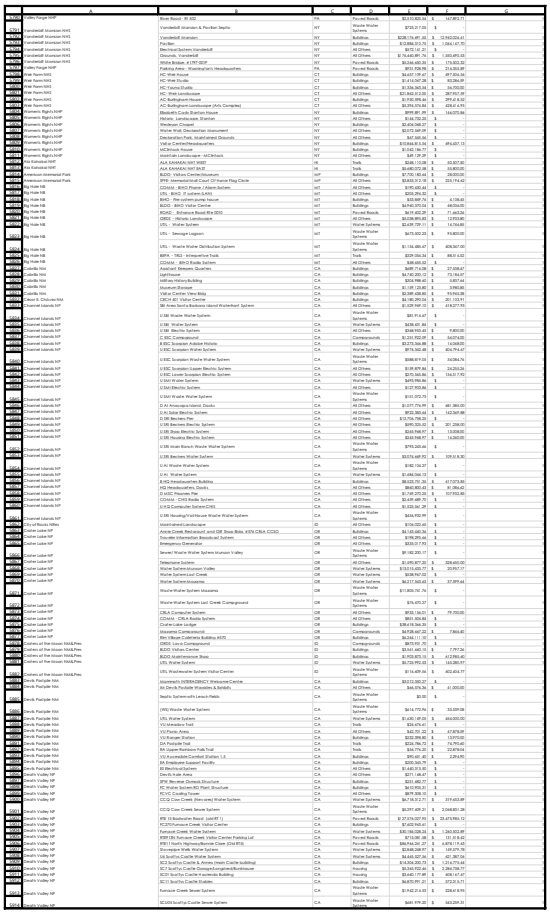

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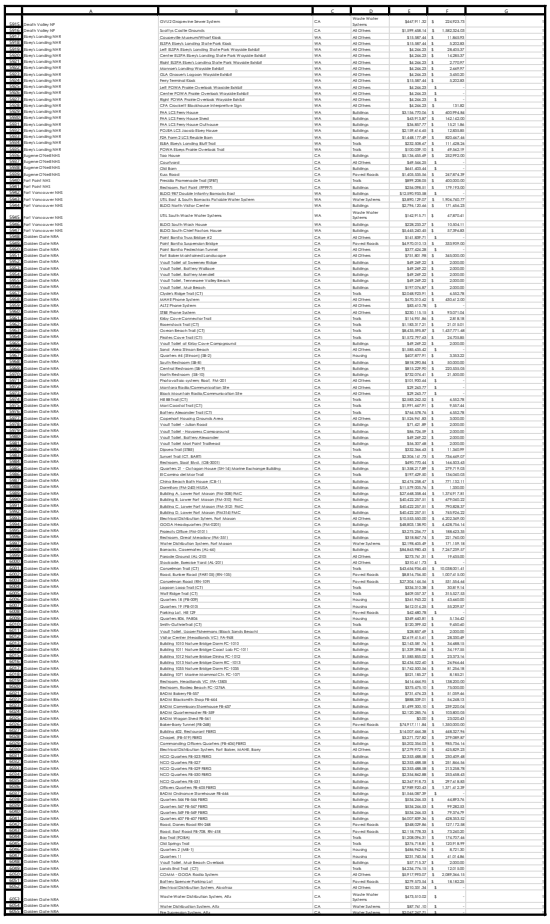

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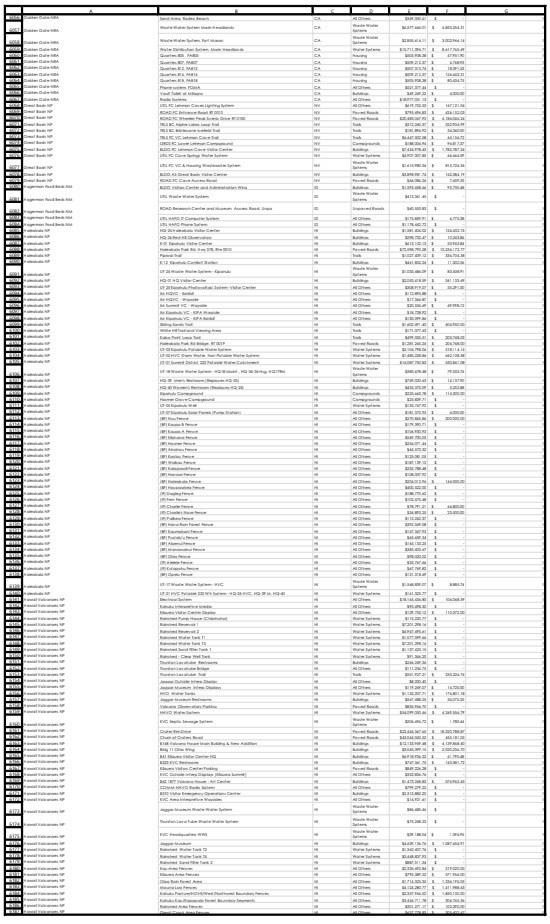

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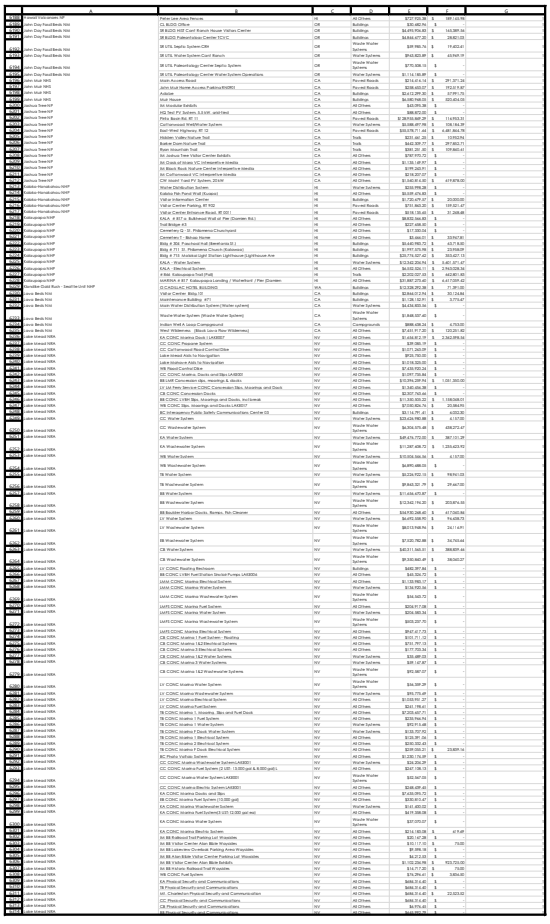

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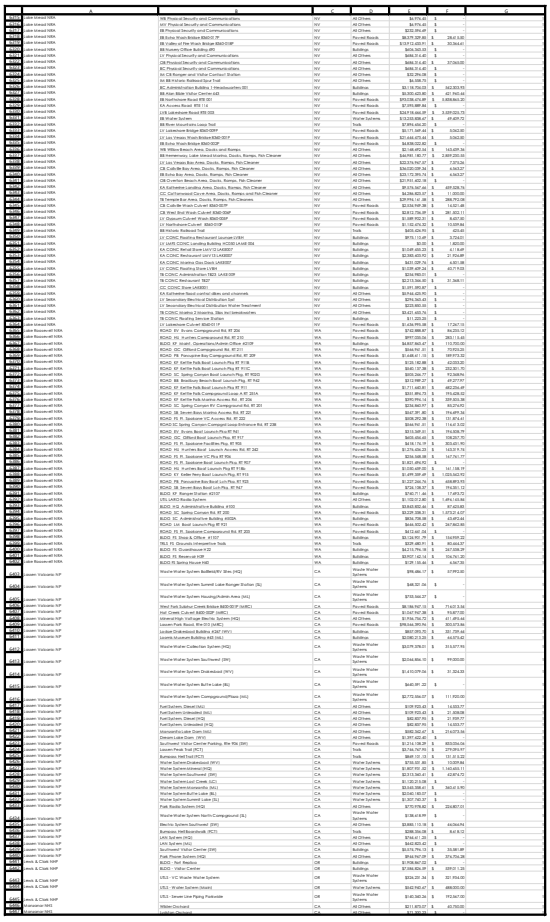

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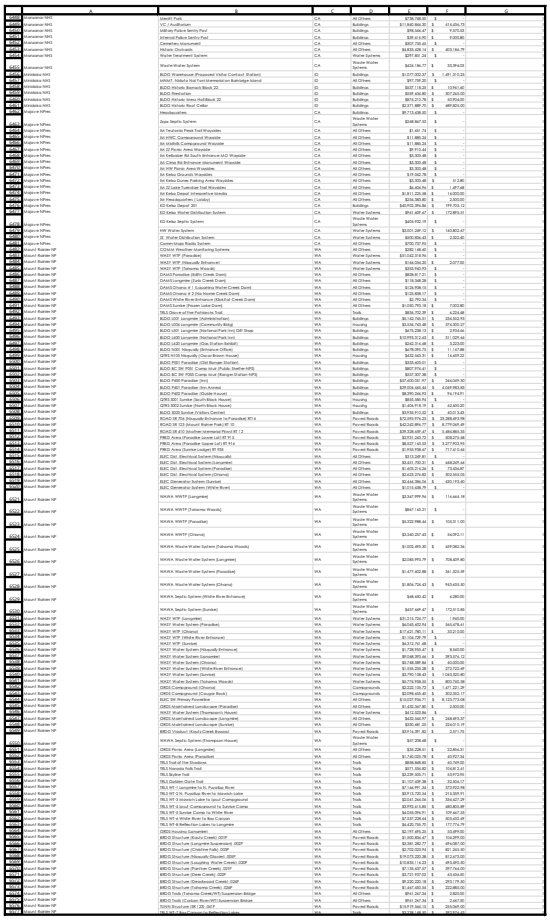

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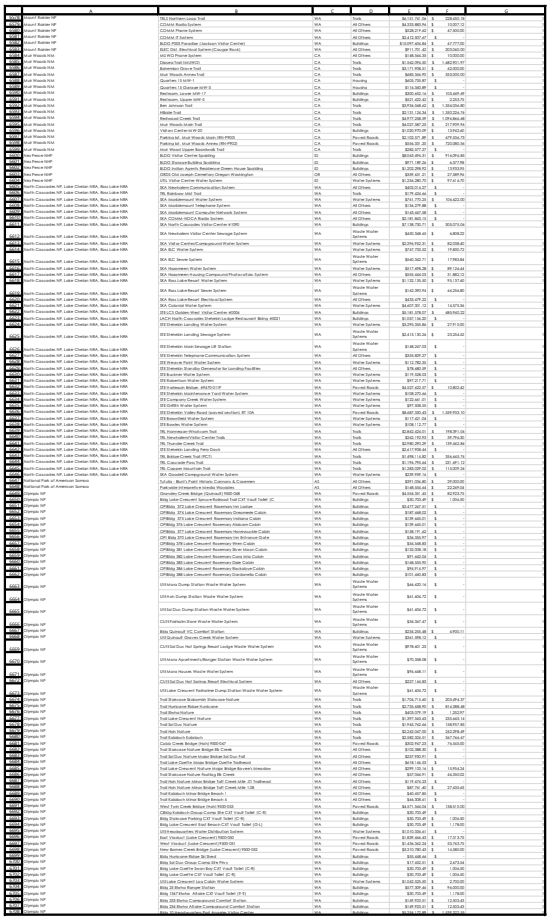

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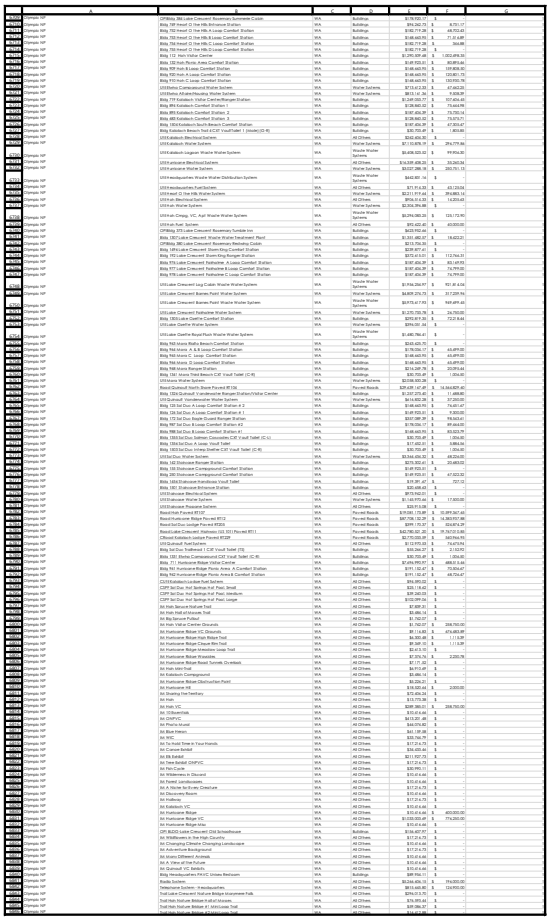

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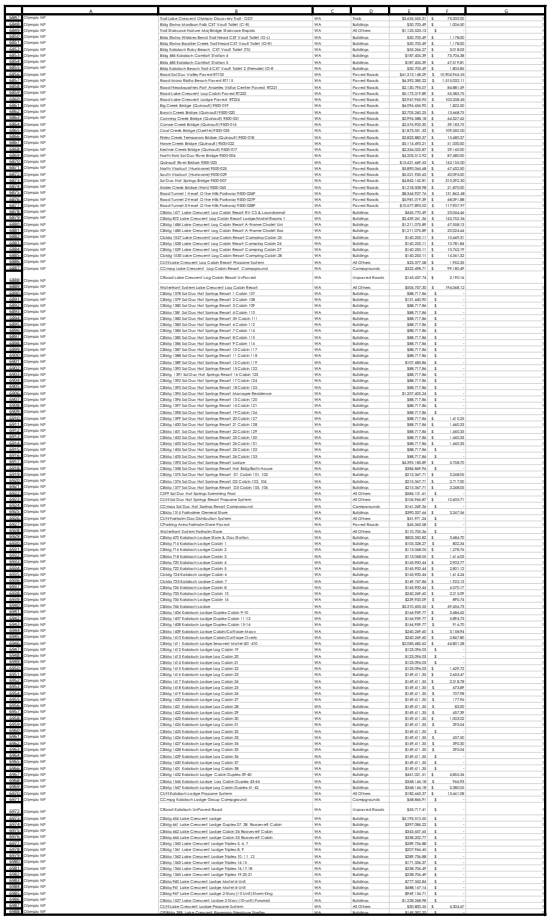

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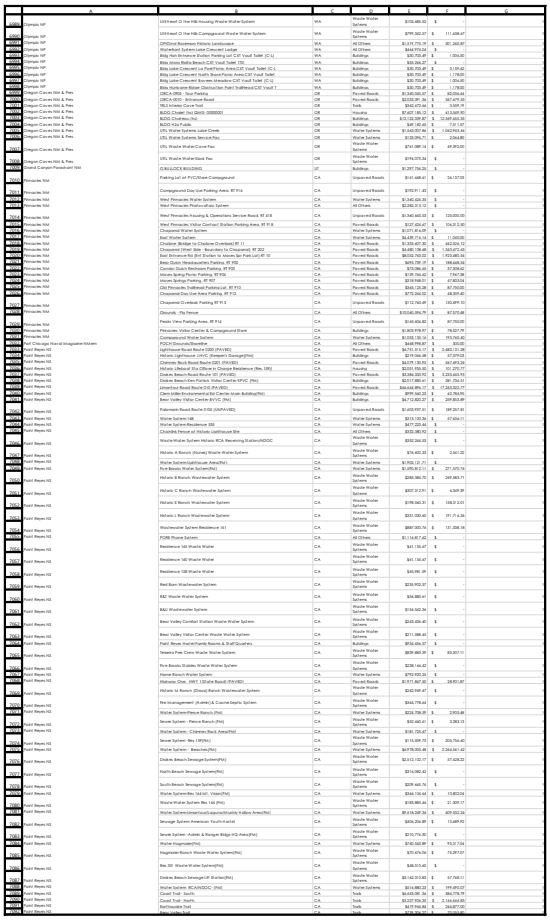

	A	B	C	D	E	F	G
45000	Olympic NP						
45001		1310 mod! O One Hills housing Waste Water System	WA	Waste Water Systems	$156,485.82	$ -	
45002	Olympic NP						
45003		1310 mod! O One Hills Campground Waste Water System	WA	Waste Water Systems	$799,342.97	$ 111,408.97	
45004	Olympic NP						
45005	Olympic NP	OPEnd Basement Historic Landscape	WA	All Others	$1,378,775.78	$ 361,340.87	
45006	Olympic NP	Waterfront System Lake Crescent Lodge	WA	All Others	$444,979.34	$ -	
45007	Olympic NP	Bldg North Entrance Station Parking Lot CXT Vault Toilet (C-1)	WA	Buildings	$30,705.87	$ 1,054.00	
45008	Olympic NP	Bldg Visitor Bldg Beach CXT Vault Toilet 150	WA	Buildings	$30,394.27	$ -	
45009	Olympic NP	Bldg Lake Crescent Lo Park/Picnic Area CXT Vault Toilet (C-1	WA	Buildings	$30,705.87	$ 3,195.42	
45010	Olympic NP	Bldg Lake Crescent Picnic Area CXT Vault Toilet (C-2	WA	Buildings	$30,705.87	$ 1,054.00	
45011	Olympic NP	Bldg Lake Crescent Beaches Area/Sol CXT Vault Toilet (C-3	WA	Buildings	$30,705.87	$ 1,054.00	
45012	Olympic NP	Bldg Hurricane Ridge Obs/Vis/Ser Relief Trailhead CXT Vault T	WA	Buildings	$30,705.87	$ 1,738.00	
45013	Oregon Caves Nat & Pres	ORCA-0800 - Tool Facility	OR	Paved Roads	$1,540,595.37	$ 62,056.40	
45014	Oregon Caves Nat & Pres	ORCA-0810 - Entrance Road	OR	Paved Roads	$2,035,391.34	$ 347,475.00	
45015	Oregon Caves Nat & Pres	TBLS Interior Curve Tool	OR	Trails	$540,472.44	$ 3,691.19	
45016	Oregon Caves Nat & Pres	BLDG Cruiser Incl QtrsID: 10000001	OR	Housing	$7,407,185.32	$ 413,645.80	
45017	Oregon Caves Nat & Pres	BLDG Cr-Ad-Vis (No)	OR	Buildings	$10,133,595.97	$ 32,849,665.39	
45018	Oregon Caves Nat & Pres	BLDG Kiln Public	OR	Buildings	$48,182.60	$ 7,01 1.07	
45019	Oregon Caves Nat & Pres	OIL Water Systems Lake Creek	OR	Water Systems	$1,193,837.86	$ 1,242,743.46	
45020	Oregon Caves Nat & Pres	OIL Water Systems Service Rec	OR	Water Systems	$1,08,956.71	$ 2,244.80	
45021	Oregon Caves Nat & Pres	OIL Waste Water Cave Rec	OR	Waste Water Systems	$741,398.14	$ 49,383.80	
45022	Oregon Caves Nat & Pres	OIL Waste Water Kiosk Rec	OR	Waste Water Systems	$784,075.34	$ -	
45023	Oregon Caves Nat & Pres	O BUILDOCE BUILDING	UT	Buildings	$1,297,756.35	$ -	
45024	Pinnacles NM	Parking Lot of PVC/Water Campground	CA	Unpaved Roads	$181,448.41	$ 24,137.03	
45025	Pinnacles NM	Campground Day Use Parking Area, RT 914	CA	Unpaved Roads	$782,971.48	$ -	
45026	Pinnacles NM	West Pinnacles Water System	CA	Water Systems	$1,345,424.35	$ -	
45027	Pinnacles NM	West Pinnacles Photovoltaic System	CA	All Others	$2,292,313.10	$ -	
45028	Pinnacles NM	West Pinnacles Housing & Operations Service Road, RT 418	CA	Unpaved Roads	$1,340,445.05	$ 139,000.00	
45029	Pinnacles NM	West Pinnacles Visitor Contact Station Parking Area, RT 91 8	CA	Paved Roads	$137,429.47	$ 514.31.00	
45030	Pinnacles NM	Chaparral Water System	CA	Water Systems	$1,071,814.09	$ -	
45031	Pinnacles NM	Bad Water System	CA	Water Systems	$4,439,714.14	$ 11,000.00	
45032	Pinnacles NM	Chaparral Campground Shadow Overlook) RT 11	CA	Paved Roads	$1,340,445.05	$ 1,000,000.00	
45033	Pinnacles NM	Chaparral (Other Side - Boundary to Chaparral) RT 202	CA	Paved Roads	$1,430,105.96	$ 853,474.00	
45034	Pinnacles NM	Bad Entrance Rd (Bnf Shelter to Moves Spr Park Lot) RT 10	CA	Paved Roads	$8,500,763.00	$ 923,480.34	
45035	Pinnacles NM	Bear Gulch Headquarters Parking, RT 900	CA	Paved Roads	$456,738.31	$ 588,648.84	
45036	Pinnacles NM	Condor Gulch Restroom Parking, RT 905	CA	Paved Roads	$79,086.60	$ 37,508.42	
45037	Pinnacles NM	Moves Spring Picnic Parking, RT 906	CA	Paved Roads	$139,764.42	$ 7,767.99	
45038	Pinnacles NM	Moves Springs Parking, RT 907	CA	Paved Roads	$319,948.51	$ 47,803.04	
45039	Pinnacles NM	Old Pinnacles Trailhead Parking Lot, RT 910	CA	Paved Roads	$648,128.28	$ 87,750.00	
45040	Pinnacles NM	Chaparral Day Use Area Parking, RT 912	CA	Paved Roads	$772,344.03	$ 48,591.40	
45041	Pinnacles NM	Chaparral Overlook Parking RT 913	CA	Unpaved Roads	$112,763.81	$ 133,691.10	
45042	Pinnacles NM	Grounds - Pay Fencee	CA	All Others	$ 10,540,994.79	$ 97,970.48	
45043	Pinnacles NM	Peaks View Parking Area, RT 914	CA	Unpaved Roads	$146,404.80	$ 87,750.00	
45044	Pinnacles NM	Pinnacles Visitor Center & Campground Store	CA	Buildings	$1,803,978.97	$ 79,627.79	
45045	Pinnacles NM	Campground Water System	CA	Water Systems	$1,058,139.34	$ 193,765.40	
45046	Park Chicago Row of Magazine Miram	FOCH Grounds/Boundary	CA	All Others	$448,958.87	$ 500.00	
45047	Point Reyes NS	Lighthouse Road Bache 0200 (PAVED)	CA	Paved Roads	$4,731,613.17	$ 2,483,151.38	
45048	Point Reyes NS	Historic Lighthouse (HVC) (Keepers Dwelgn)(Hist)	CA	Buildings	$279,584.99	$ 37,979.03	
45049	Point Reyes NS	Chimney Rock Road Bache 0220 (PAVED)	CA	Paved Roads	$4,079,139.95	$ 347,487.24	
45050	Point Reyes NS	Drakes Beach Road Bache 0230 (PAVED) (Entrance (Rec 1080	CA	Paved Roads	$2,596,333.91	$ 1,233,444.70	
45051	Point Reyes NS	Drakes Beach Road Bache 101 (PAVED)	CA	Paved Roads	$3,596,333.91	$ 6,233,444.70	
45052	Point Reyes NS	Drakes Beach Gen Parkin Visitor Center KPVC (Rec)	CA	Buildings	$213,717,880.61	$ 281,754.51	
45053	Point Reyes NS	Limantour Road Bache 010 (PAVED)	CA	Paved Roads	$44,644,876.17	$ 17,243,553.77	
45054	Point Reyes NS	Clem Miller Environmental Ed Center Main Building(Rec)	CA	Buildings	$999,340.25	$ 42,764.55	
45055	Point Reyes NS	Bear Valley Visitor Center BVVC (Rec)	CA	Buildings	$4,712,920.37	$ 297,653.89	
45056	Point Reyes NS	Pallemeln Road Bache 0100 (UNPAVED)	CA	Unpaved Roads	$1,409,957.01	$ 589,267.69	
45057	Point Reyes NS	Wylie Sailers Hill	CA	Water Systems	$515,135.34	$ 57,464.71	
45058	Point Reyes NS	Wylie System-Residence 555	CA	Water Systems	$477,220.44	$ -	
45059	Point Reyes NS	Drakehik Fence at Historic Ltd/House Site	CA	All Others	$830,380.70	$ -	
45060	Point Reyes NS	Wylie Water System Historic RCA Receiving Station(NSOC	CA	Waste Water Systems	$392,344.93	$ -	
45061	Point Reyes NS	Historic A Ranch (Nunes) Wylie Water System	CA	Waste Water Systems	$76,402.33	$ 2,561.33	
45062	Point Reyes NS	Wylie System-Lighthouse Area(Rec)	CA	Water Systems	$1,702,121.71	$ -	
45063	Point Reyes NS	Fire Breaks Water System(Rec)	CA	Water Systems	$1,970,812.11	$ 271,570.75	
45064	Point Reyes NS	Historic B Ranch Wastewater System	CA	Waste Water Systems	$266,384.76	$ 349,883.71	
45065	Point Reyes NS	Historic C Ranch Wastewater System	CA	Waste Water Systems	$307,312.91	$ 4,569.39	
45066	Point Reyes NS	Historic E Ranch Wastewater System	CA	Waste Water Systems	$199,540.31	$ 158.31 2.01	
45067	Point Reyes NS	Historic L Ranch Wastewater System	CA	Waste Water Systems	$331,035.40	$ 191,71 4.56	
45068	Point Reyes NS	Wastewater System Residence 141	CA	Waste Water Systems	$897,020.74	$ 151,358.18	
45069	Point Reyes NS	PORE Phone System	CA	All Others	$1,114,817.42	$ -	
45070	Point Reyes NS	Residence 140 Waste Water	CA	Waste Water Systems	$41,130.47	$ -	
45071	Point Reyes NS	Residence 140 Waste Water	CA	Waste Water Systems	$41,130.47	$ -	
45072	Point Reyes NS	Residence 138 Waste Water	CA	Waste Water Systems	$40,991.28	$ -	
45073	Point Reyes NS	Red Barn Wastewater System	CA	Waste Water Systems	$239,903.37	$ -	
45074	Point Reyes NS	R&C Waste Water System	CA	Waste Water Systems	$34,883.41	$ -	
45075	Point Reyes NS	B&C Wastewater System	CA	Waste Water Systems	$156,562.36	$ -	
45076	Point Reyes NS	Bear Valley Comfort Station Waste Water System	CA	Waste Water Systems	$243,434.40	$ -	
45077	Point Reyes NS	Bear Valley Visitor Center Waste Water System	CA	Waste Water Systems	$211,088.40	$ -	
45078	Point Reyes NS	Point Reyes Hostel Family Beams & Staff Quarters	CA	Buildings	$756,494.37	$ -	
45079	Point Reyes NS	Wastera Free Crane Waste Water System	CA	Waste Water Systems	$838,883.39	$ 83,307.11	
45080	Point Reyes NS	Fire Breaks Stables Waste Water System	CA	Waste Water Systems	$238,144.42	$ -	
45081	Point Reyes NS	Home Ranch Water System	CA	Water Systems	$750,720.25	$ -	
45082	Point Reyes NS	Mathews Drive - WW1 - Water Based (PAVED)	CA	Paved Roads	$1,371,867.85	$ 28,951.87	
45083	Point Reyes NS	Historic M Ranch (Glass) Ranch Wastewater System	CA	Waste Water Systems	$242,898.47	$ -	
45084	Point Reyes NS	Fire Management (Admin) & Coache Septic System	CA	Waste Water Systems	$344,778.44	$ -	
45085	Point Reyes NS	Wylie System/Fence Ranch (No)	CA	Water Systems	$339,736.09	$ 2,703.48	
45086	Point Reyes NS	Sewer System - Fence Ranch (No)	CA	Waste Water Systems	$30,340.41	$ 3,260.19	
45087	Point Reyes NS	Wylie System - Chimney Rock Area(No)	CA	Water Systems	$181,726.47	$ -	
45088	Point Reyes NS	Sewer System -Res 1 (WW1)	CA	Waste Water Systems	$115,691.70	$ 203,764.40	
45089	Point Reyes NS	Wylie System - Beaches(No)	CA	Water Systems	$479,550.48	$ 2,344,941.42	
45090	Point Reyes NS	Drakes Beach Sewage System(No)	CA	Waste Water Systems	$2,512,132.17	$ 57,438.22	
45091	Point Reyes NS	North Beach Sewage System(No)	CA	Waste Water Systems	$214,582.42	$ -	
45092	Point Reyes NS	South Beach Sewage System(No)	CA	Waste Water Systems	$209,440.74	$ -	
45093	Point Reyes NS	Wylie System/Res 140 (W1, Water)(No)	CA	Water Systems	$344,156.46	$ 13,852.04	
45094	Point Reyes NS	Wayne Water System Res 140 (No)	CA	Waste Water Systems	$165,885.84	$ 21,309.17	
45095	Point Reyes NS	Wylie System/Limantour/Lagunas/Muddy Hollow Area(No)	CA	Water Systems	$1,418,397.34	$ 409,322.34	
45096	Point Reyes NS	Sewage System Areenbrae Youth Hostel	CA	Waste Water Systems	$854,259.89	$ 13,689.62	
45097	Point Reyes NS	Sewer System -Admin & Ranger Bldgs HQ Area (No)	CA	Waste Water Systems	$210,774.30	$ -	
45098	Point Reyes NS	Water Hogmeder(No)	CA	Water Systems	$740,565.89	$ 15,31 7.04	
45099	Point Reyes NS	Hogmeder Ranch Waste Water System(No)	CA	Waste Water Systems	$70,479.09	$ 73,297.07	
45100	Point Reyes NS	Res 150 Waste Water System(Hist)	CA	Waste Water Systems	$48,517.85	$ -	
45101	Point Reyes NS	Drakes Beach Sewage Lift Station(No)	CA	Waste Water Systems	$3,142,313.85	$ 37,748.51	
45102	Point Reyes NS	Wylie System -RCA/NSOC - (No)	CA	Water Systems	$514,885.20	$ 199,850.07	
45103	Point Reyes NS	Coast Trail - South	CA	Trails	$4,435,091.39	$ 564,776.79	
45104	Point Reyes NS	Coast Trail - North	CA	Trails	$3,537,934.36	$ -2,164,464.85	
45105	Point Reyes NS	Bell House Trail	CA	Trails	$219,764.84	$ 244,877.82	
45106	Point Reyes NS	Bolinas Ridge Trail	CA	Trails	$429,234.31	$ 212,716.40	

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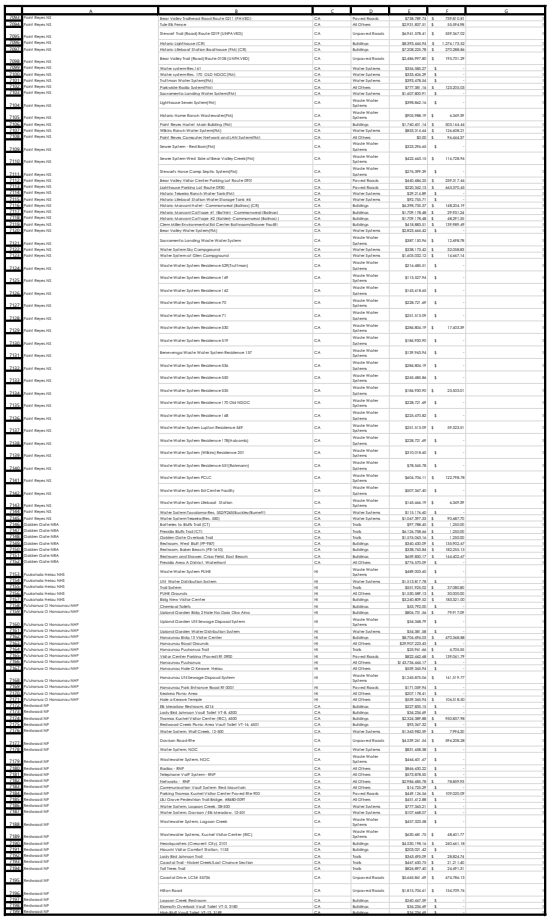

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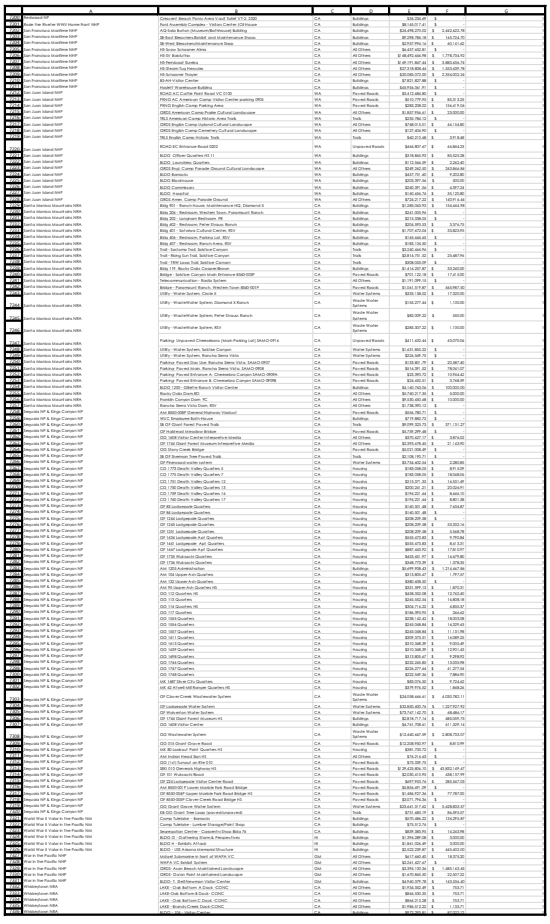

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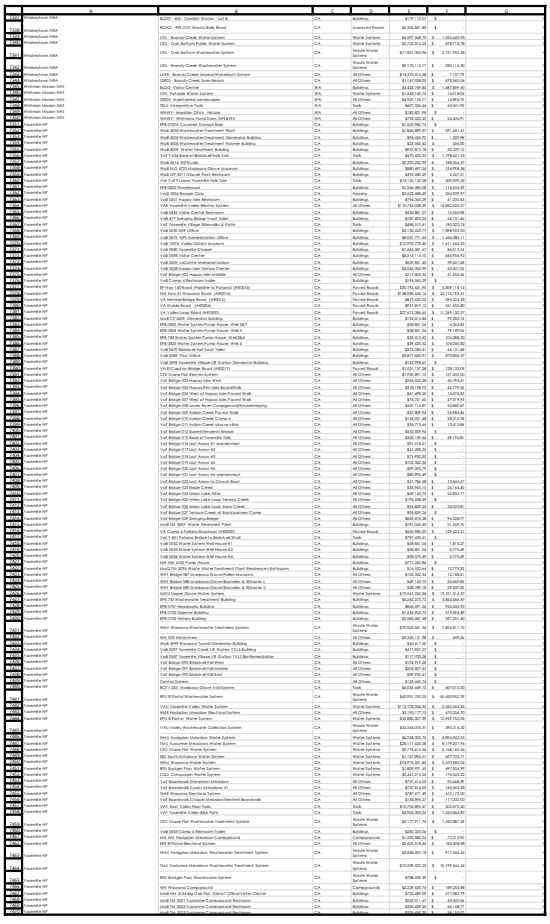

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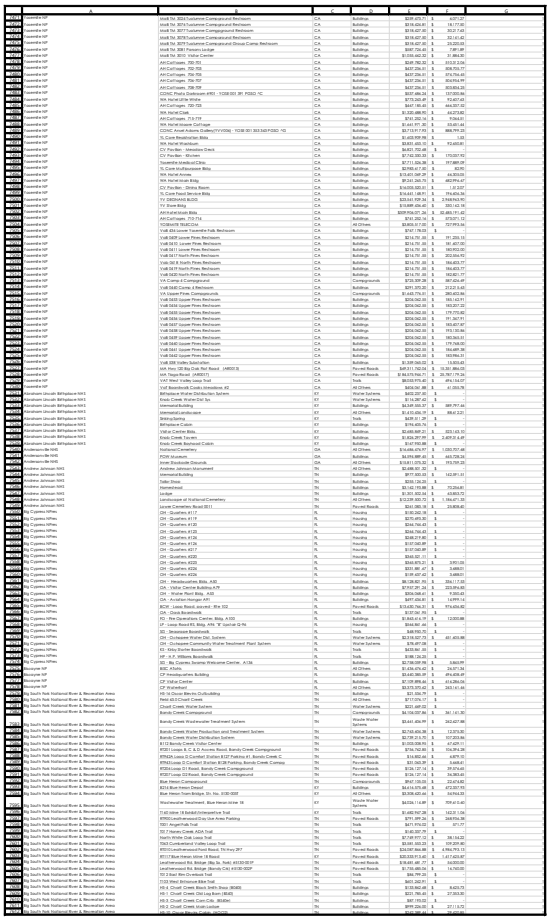

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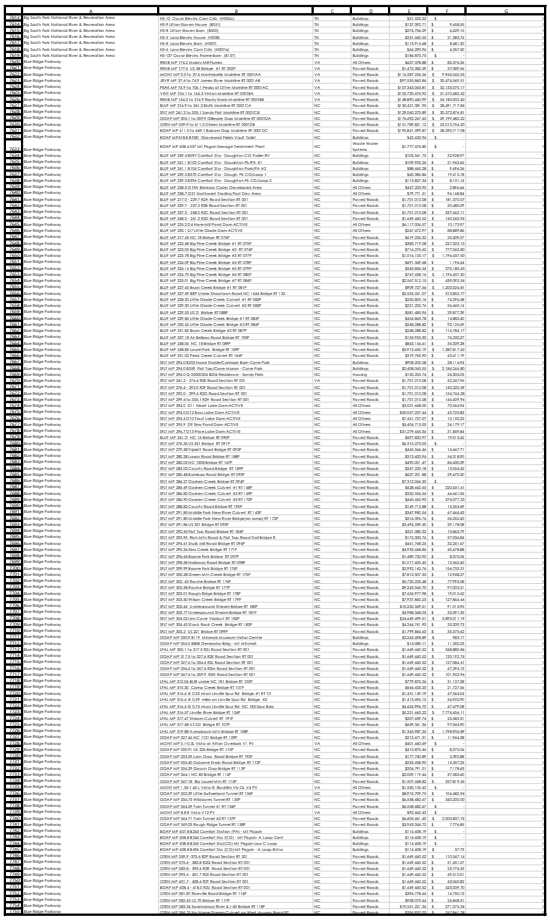

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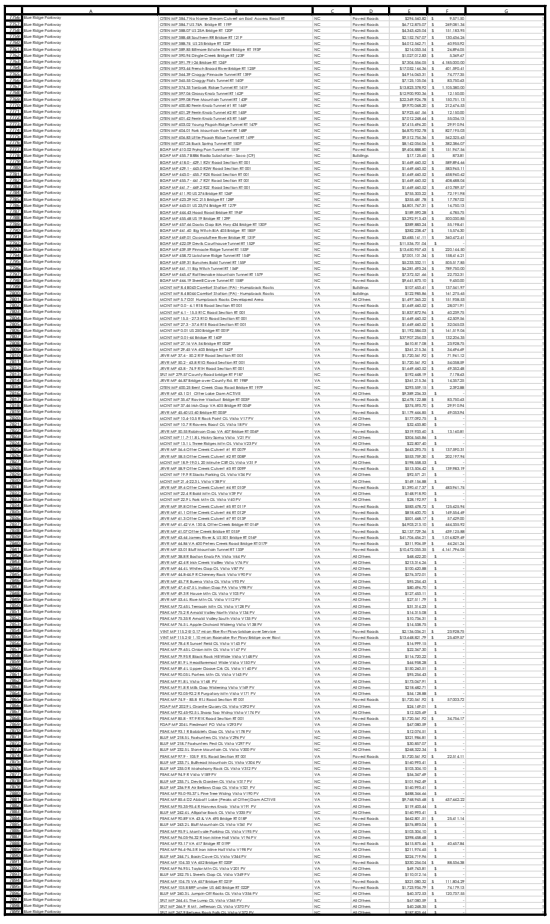

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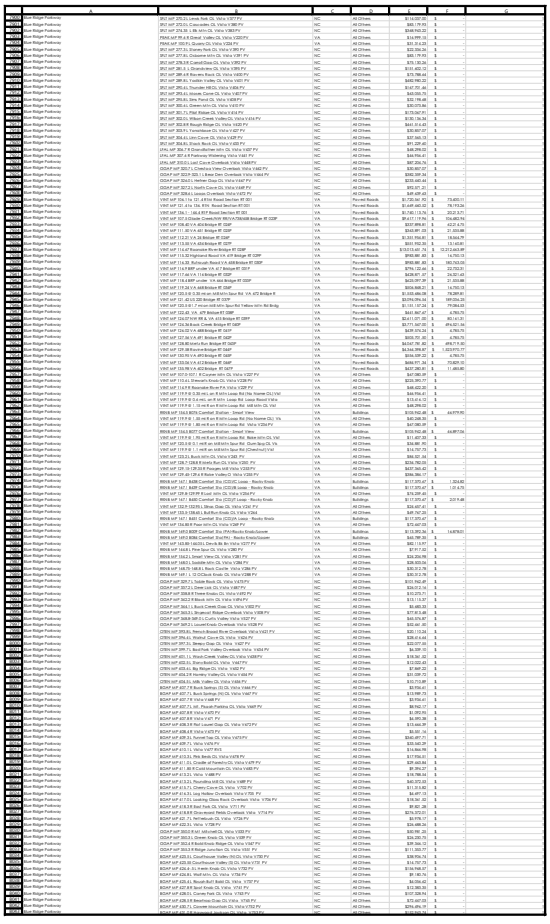

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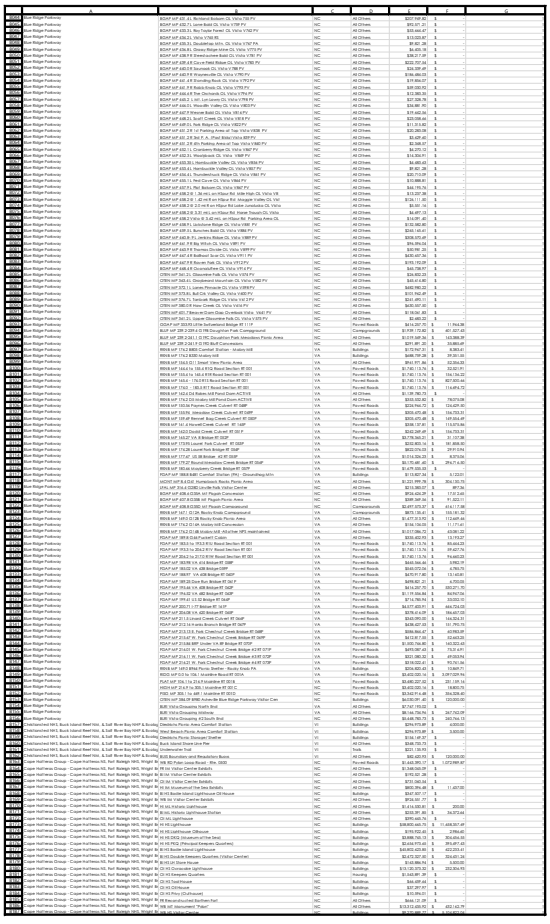

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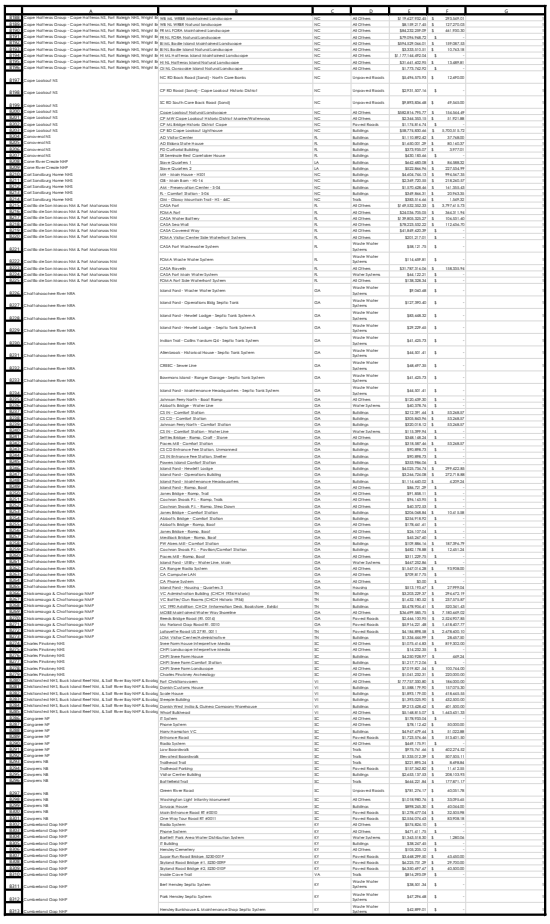

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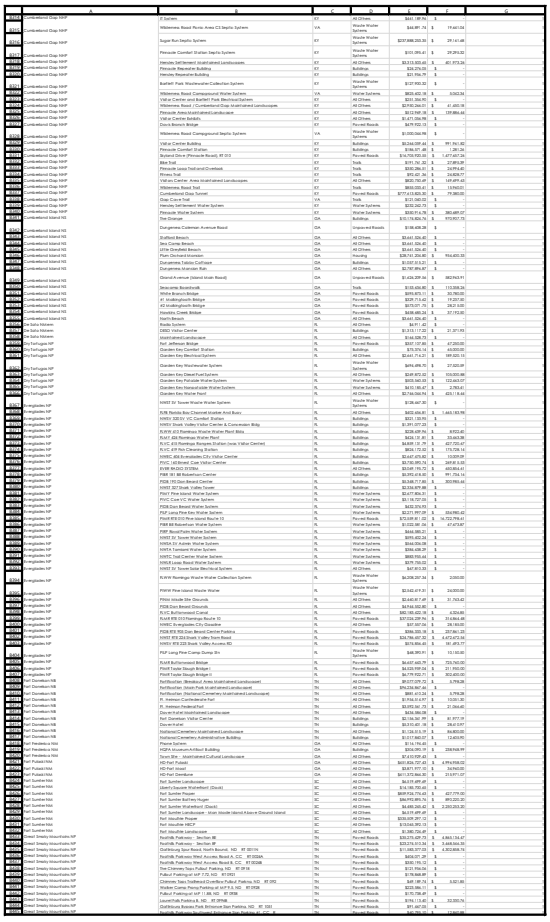

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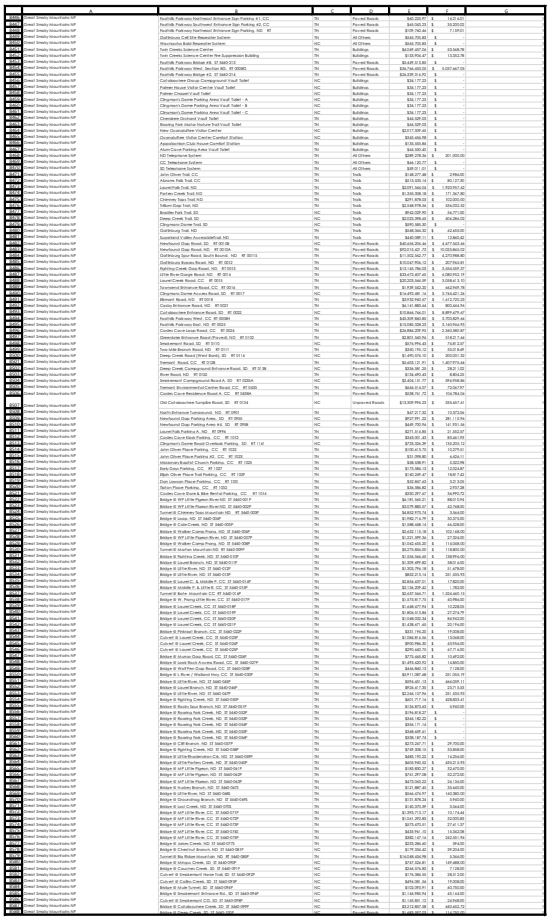

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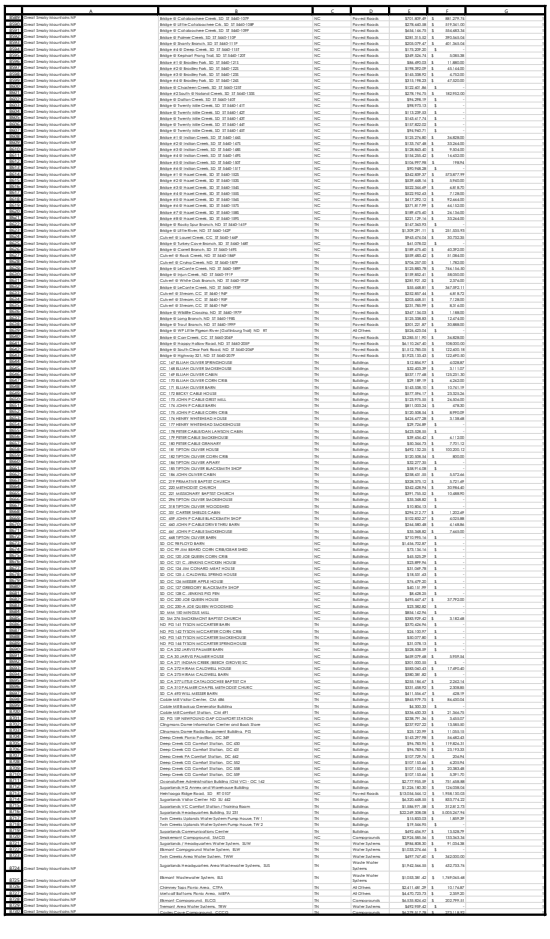

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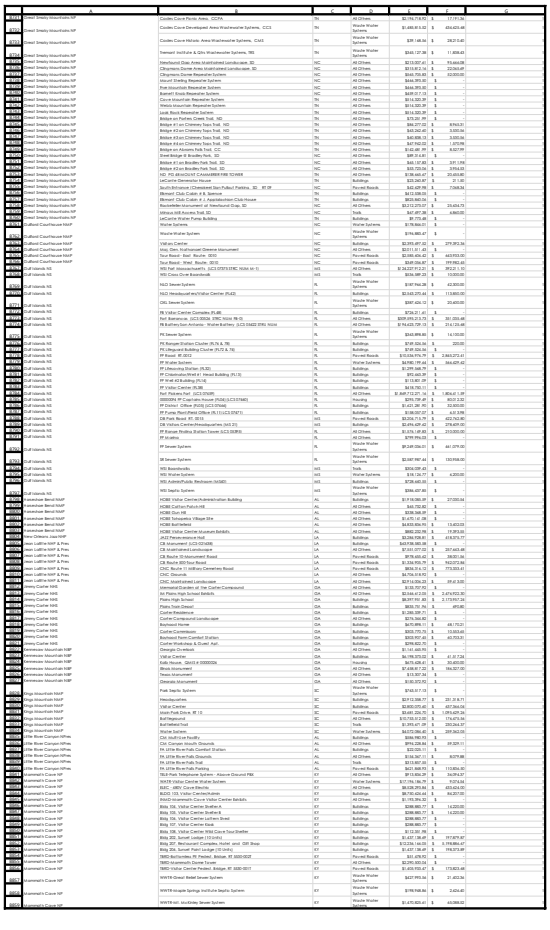

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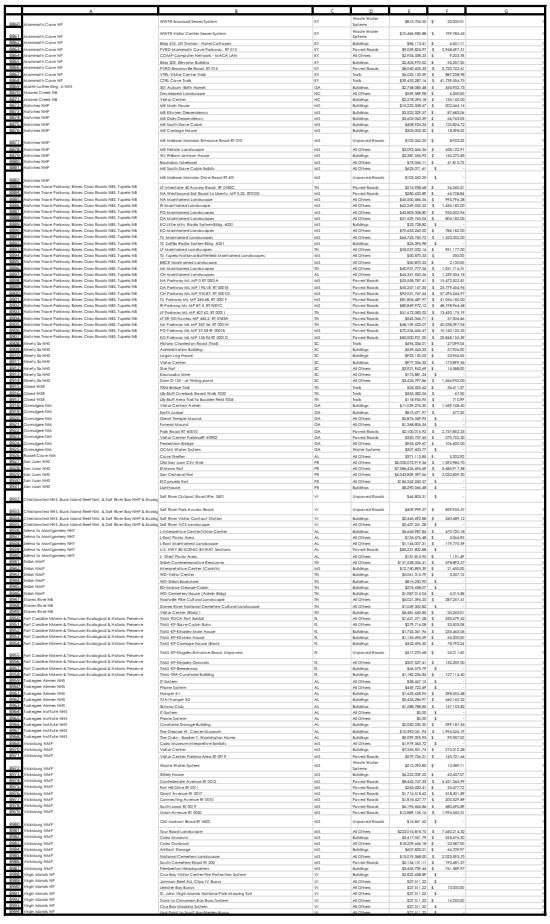

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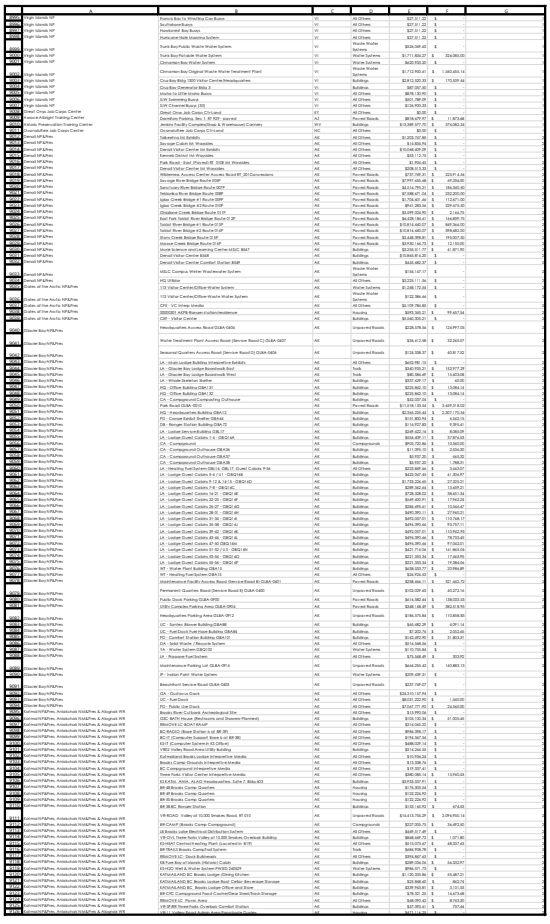

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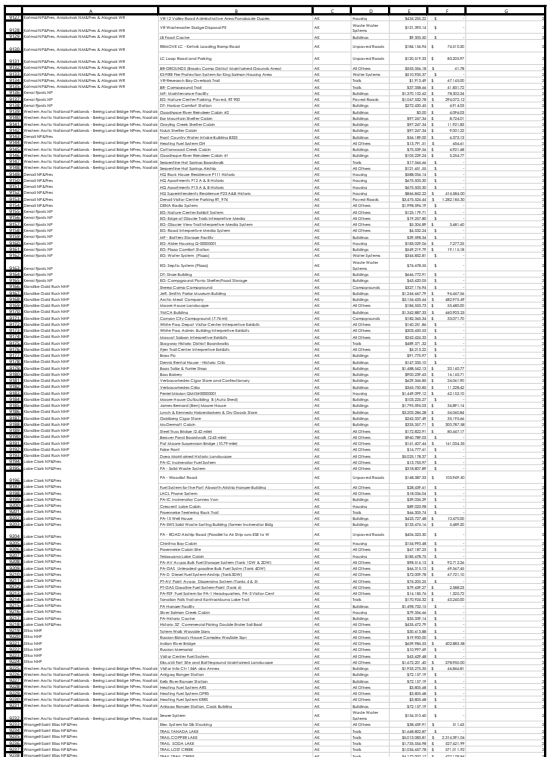

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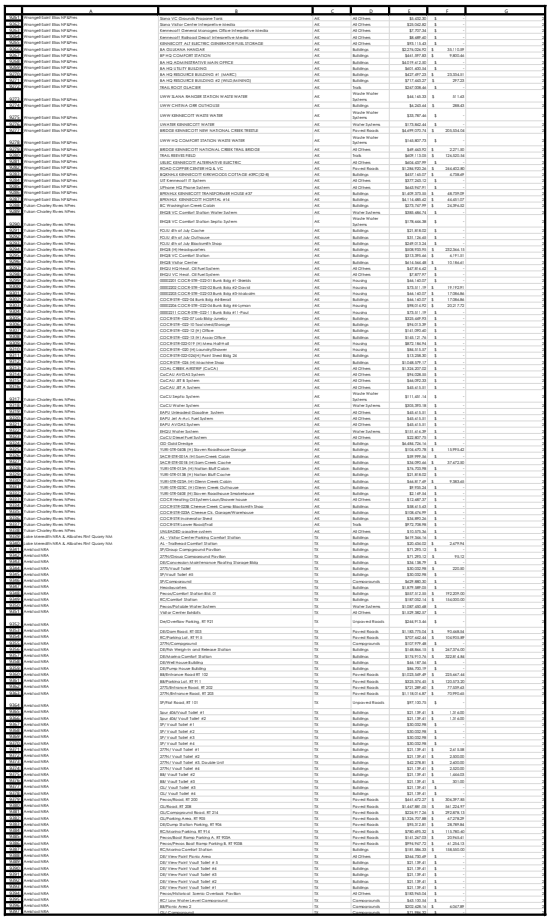

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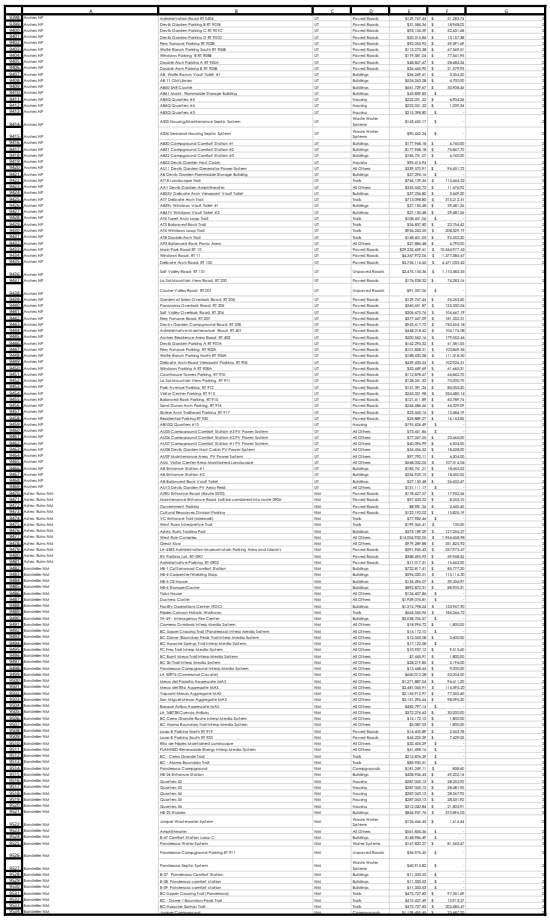

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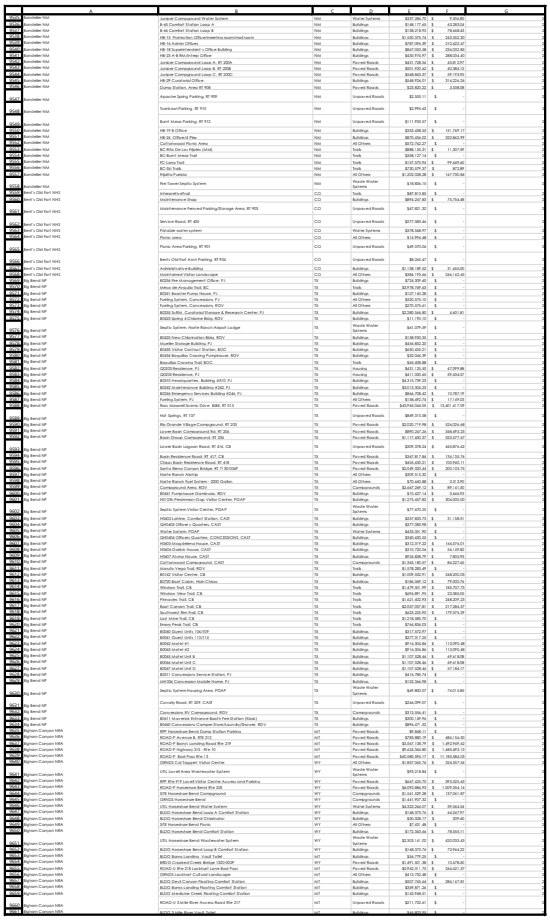

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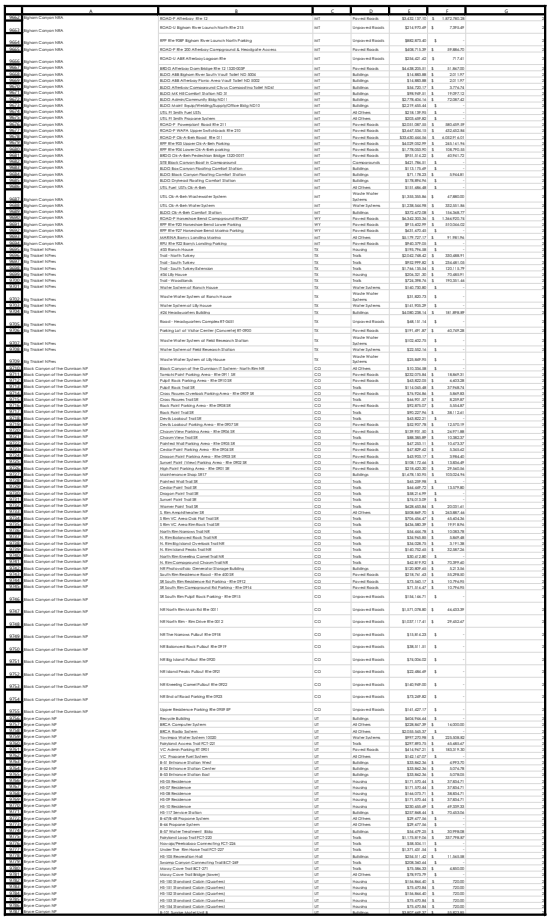

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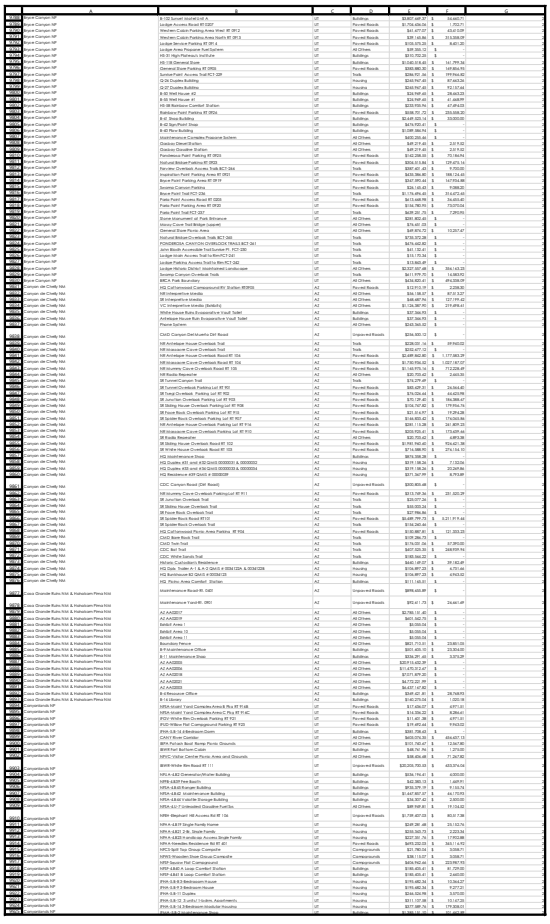

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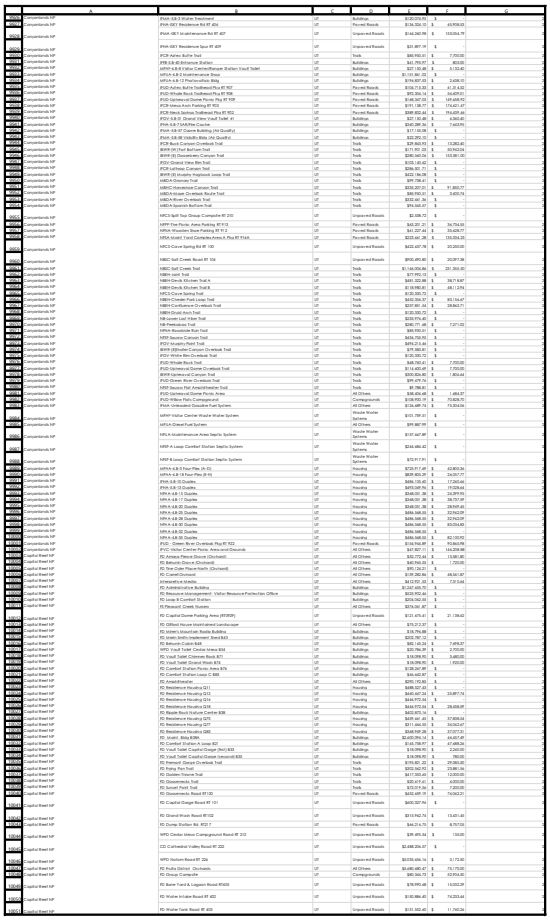

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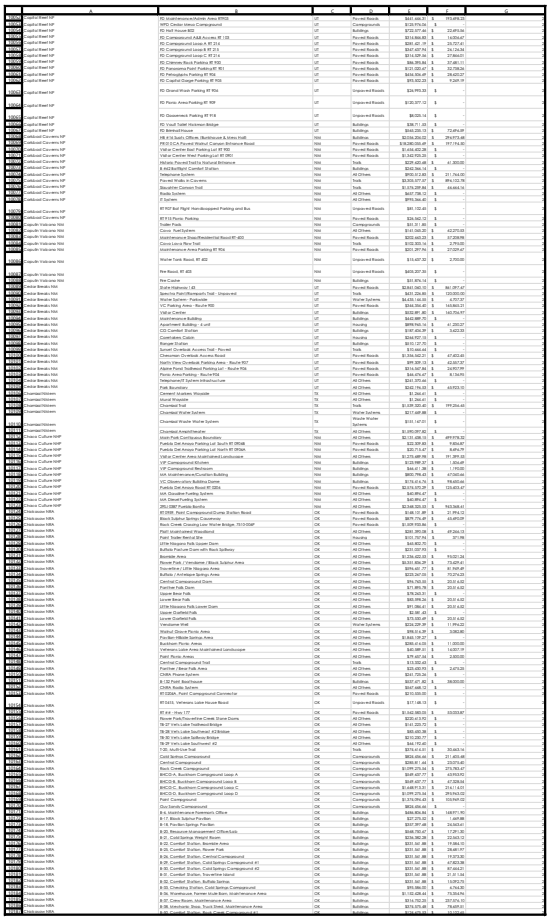

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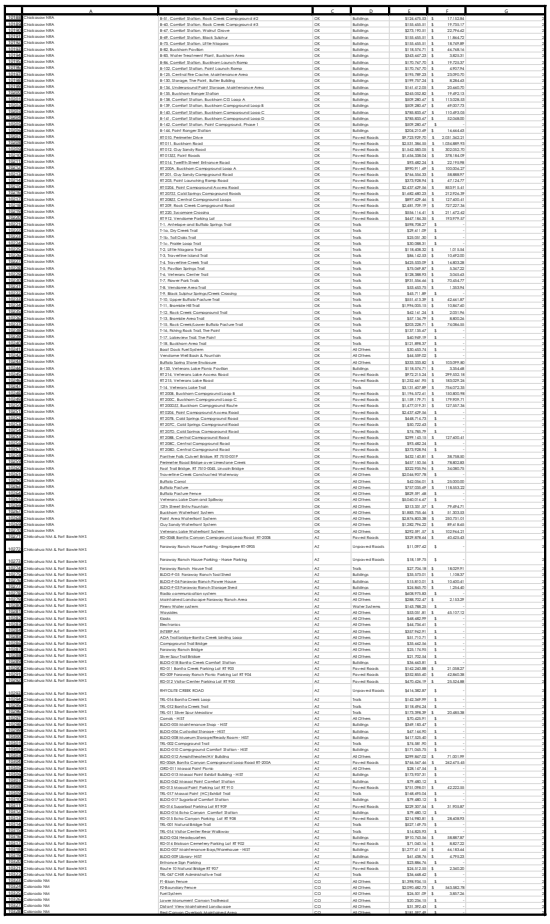

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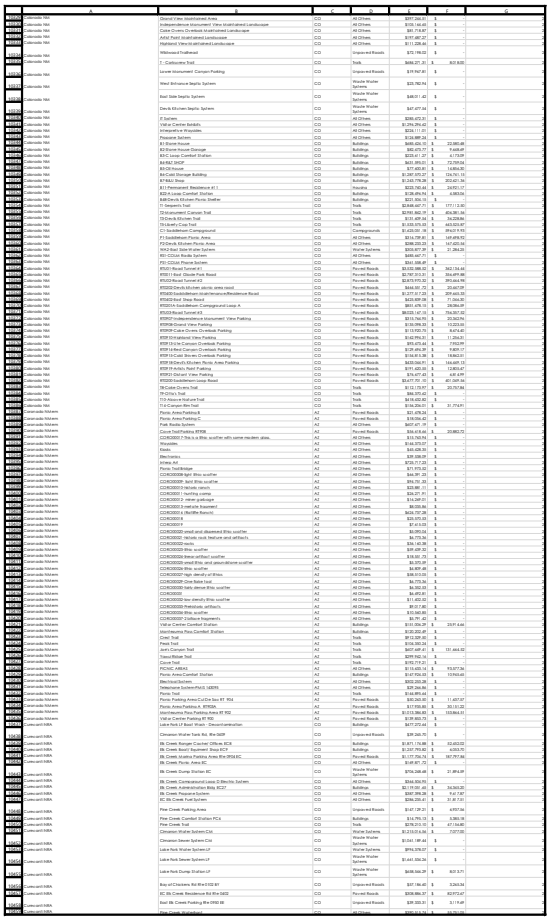

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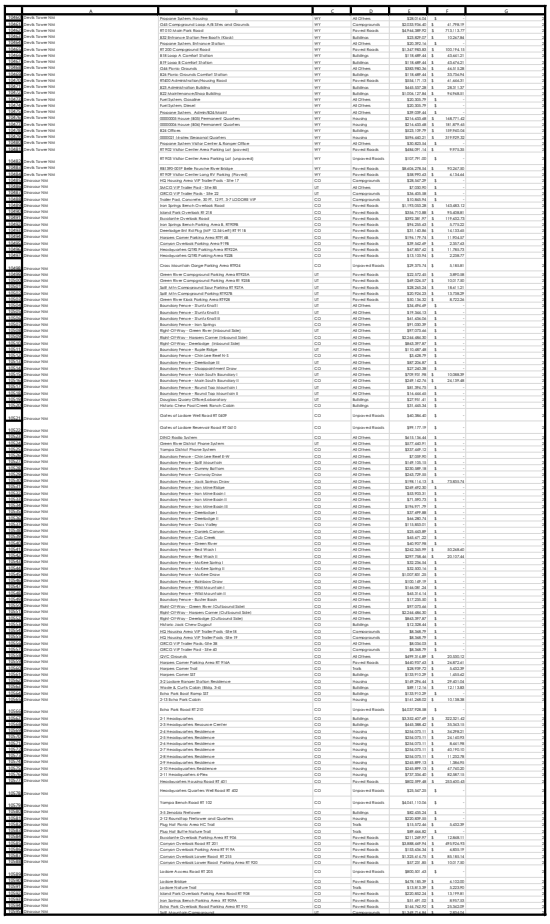

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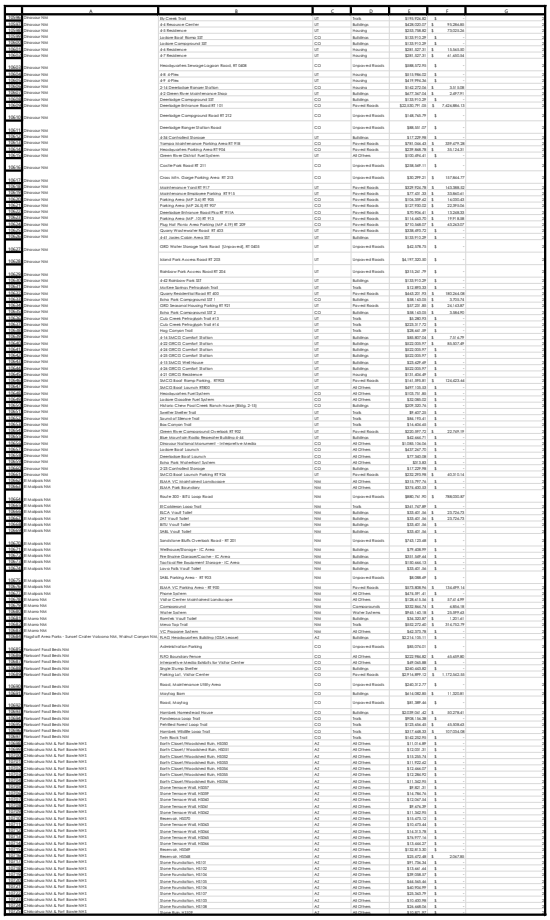

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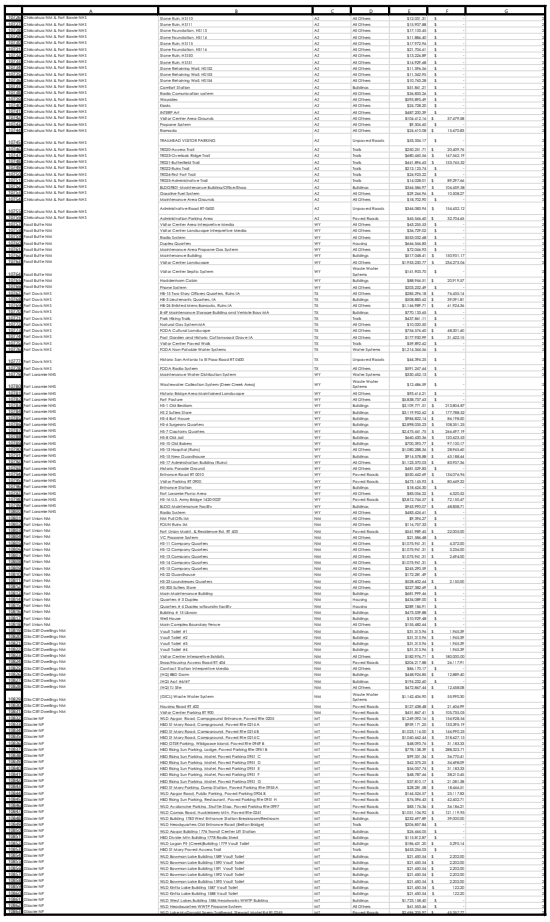

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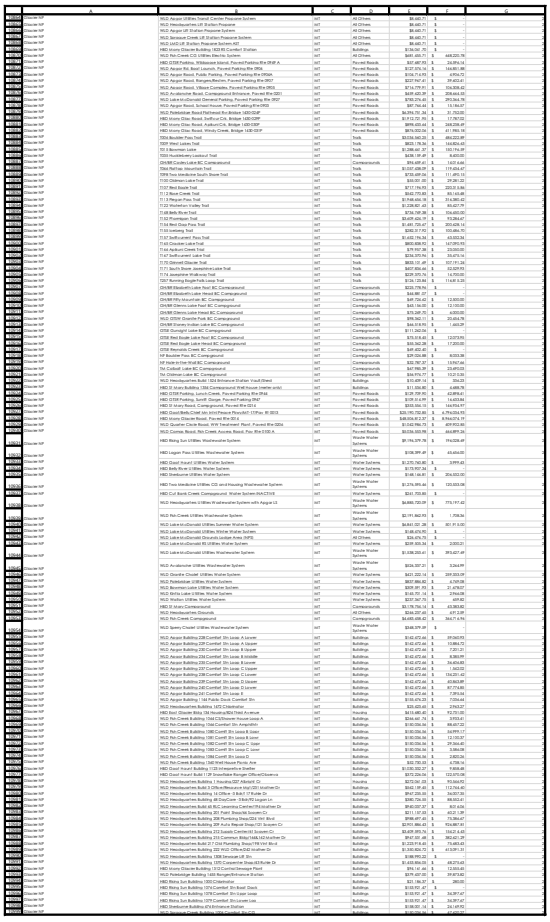

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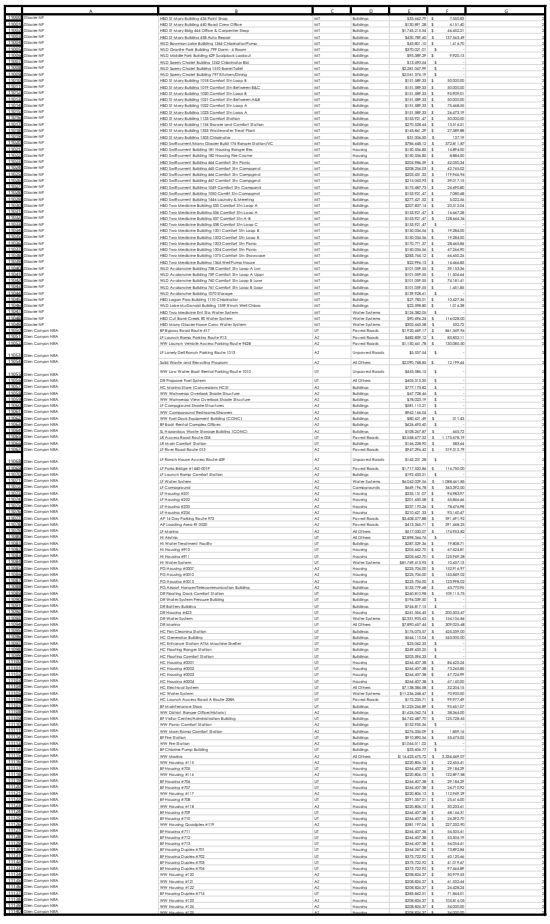

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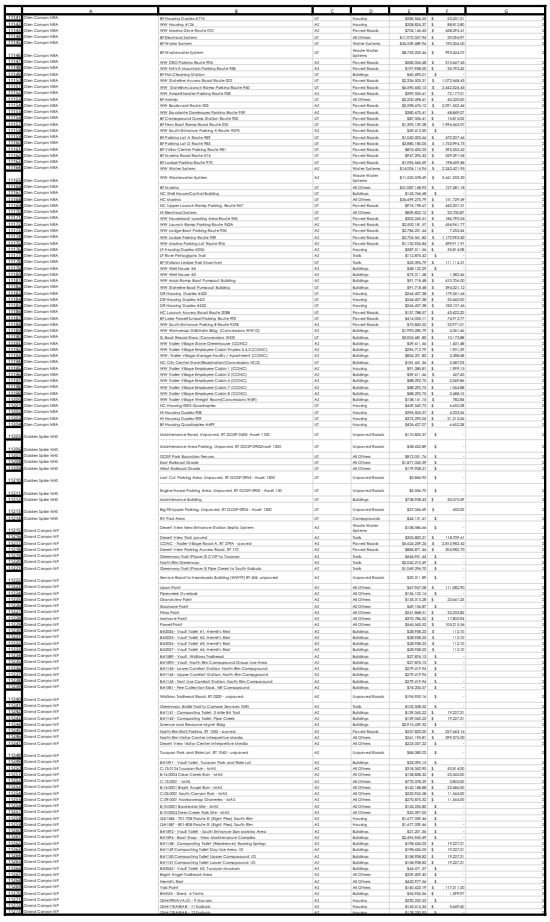

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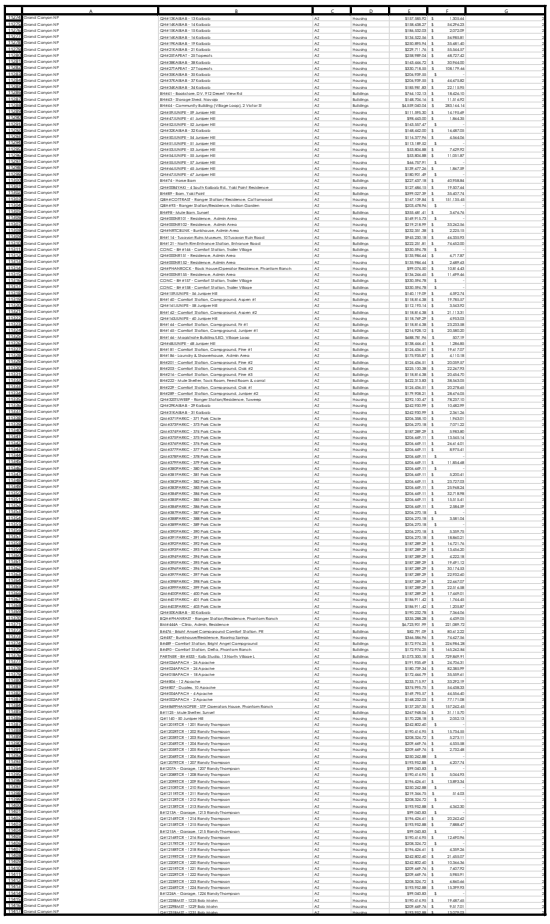

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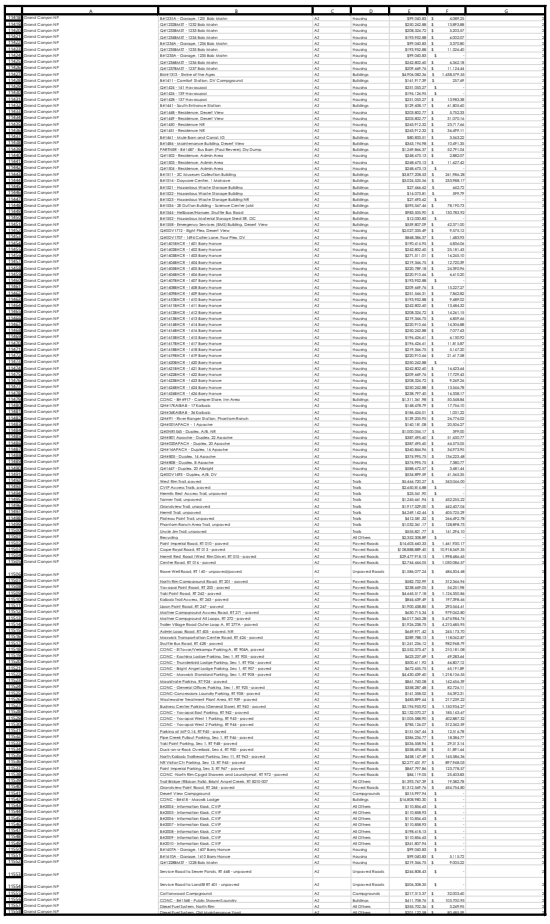

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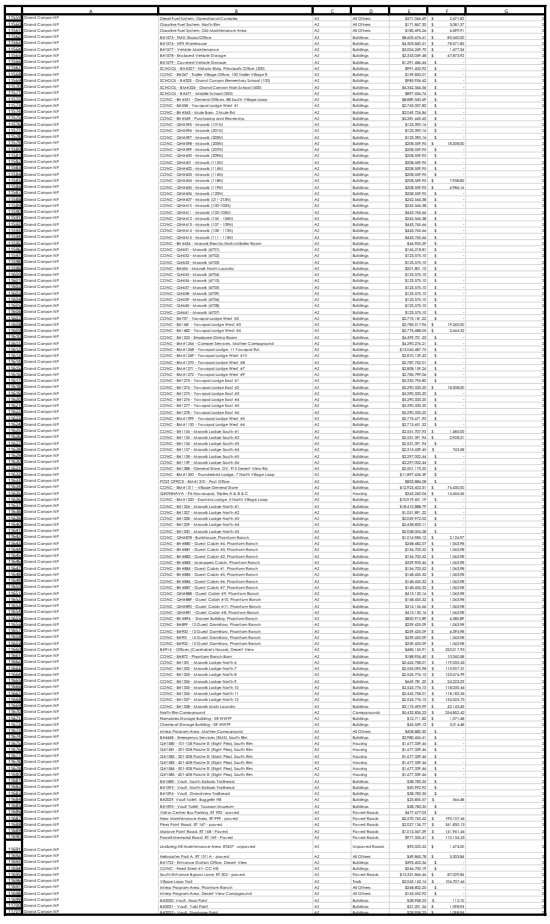

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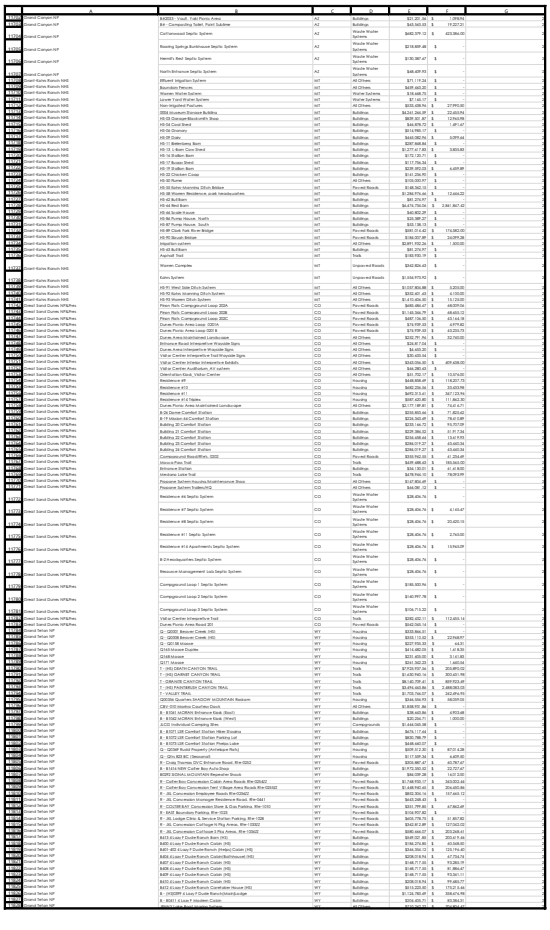

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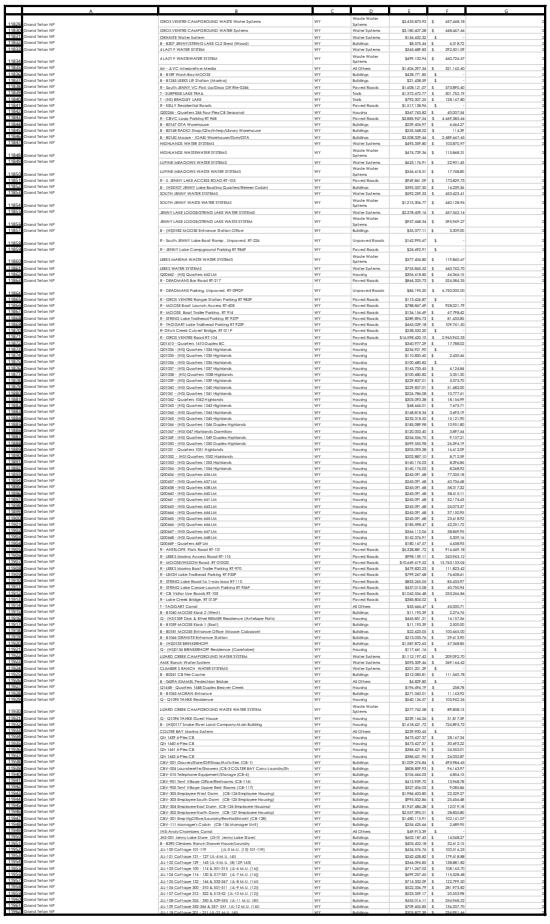

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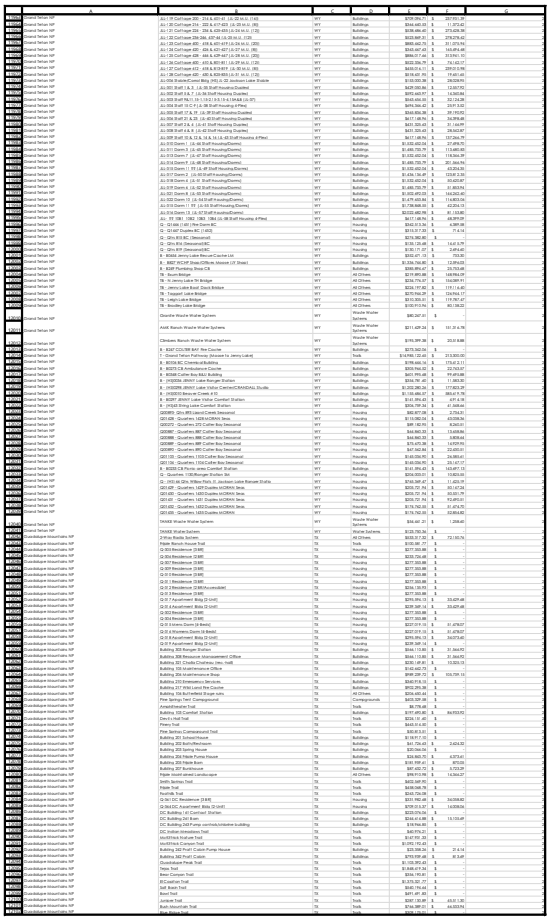

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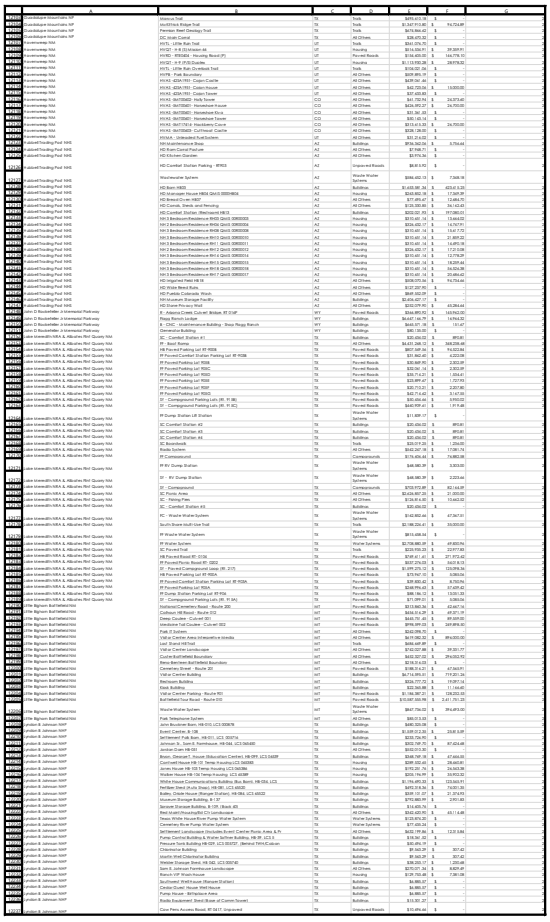

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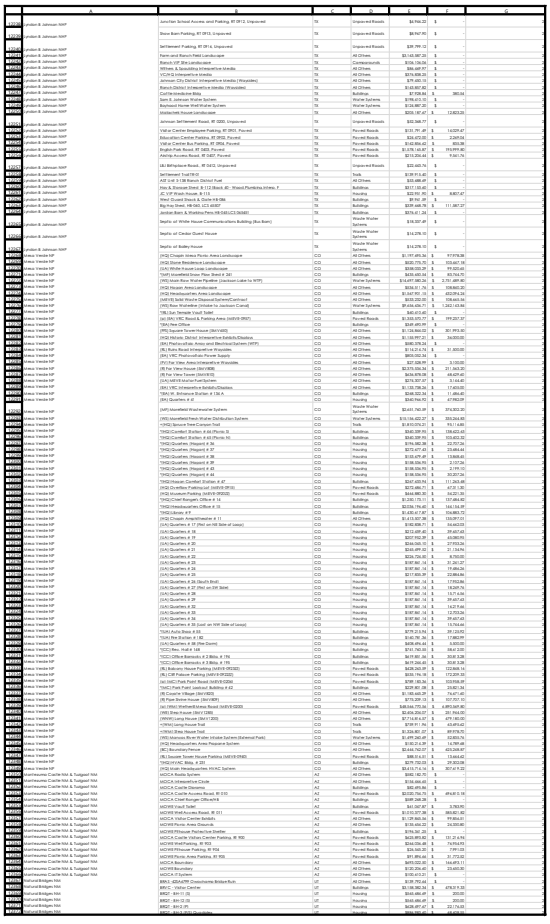

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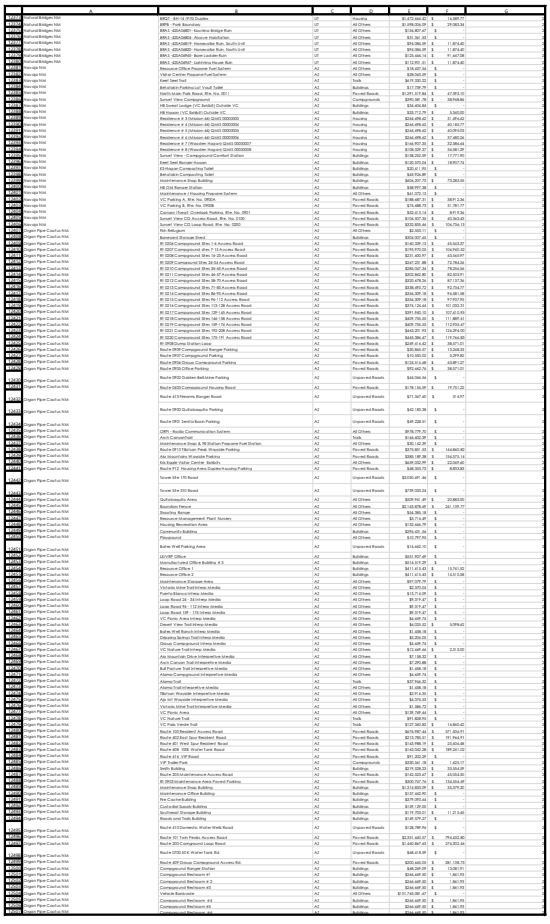

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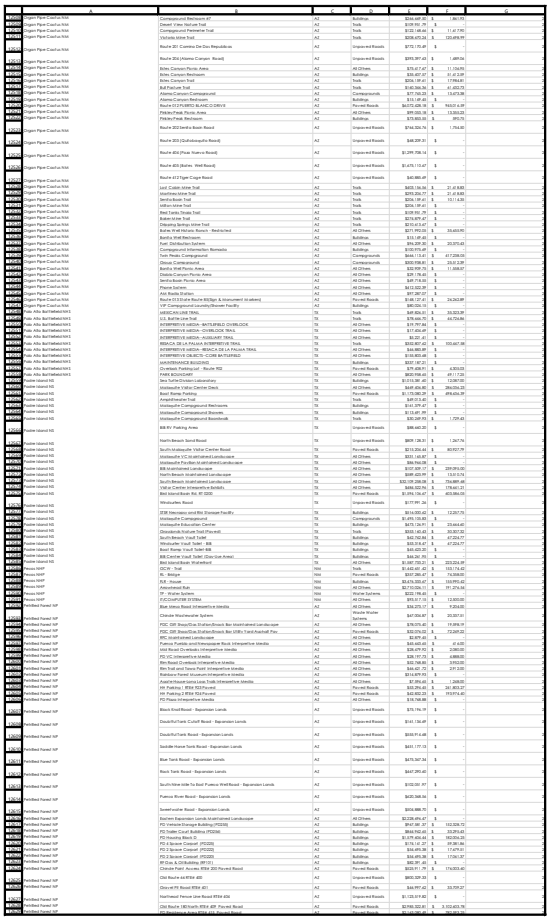

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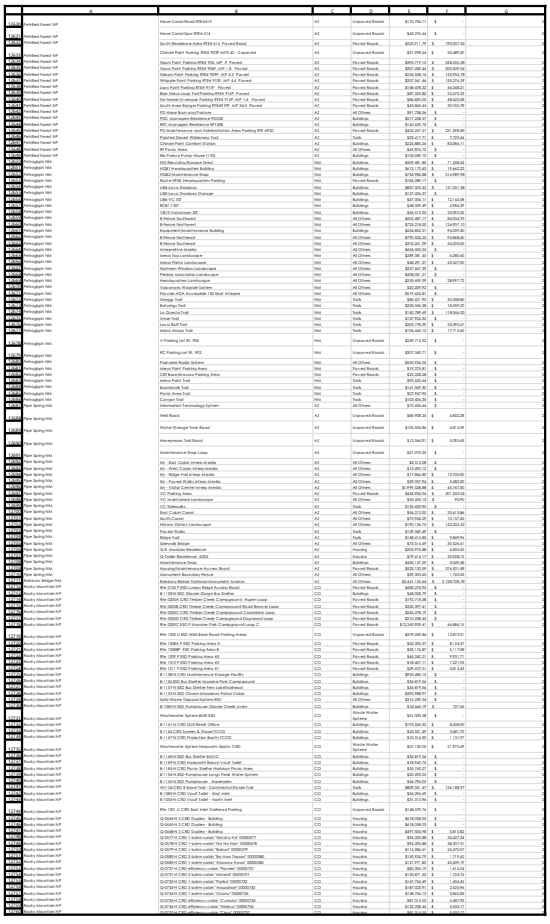

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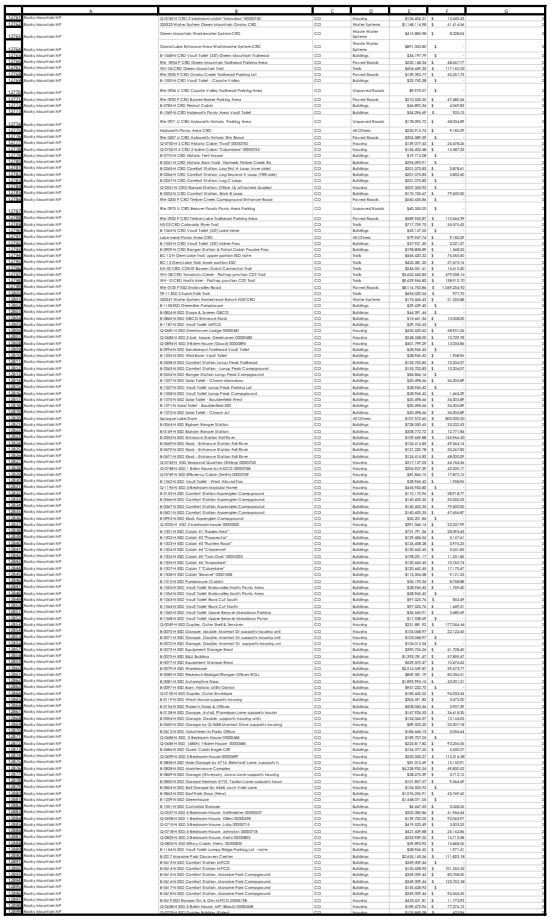

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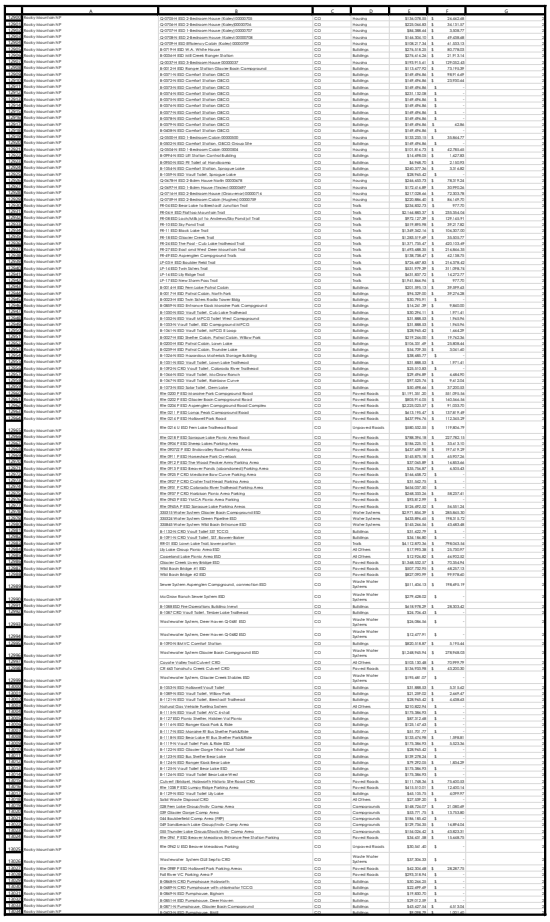

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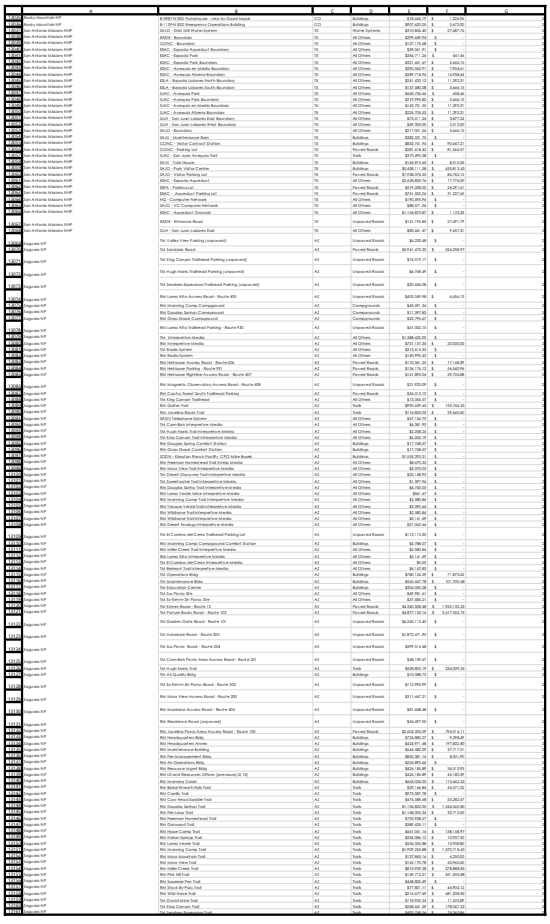

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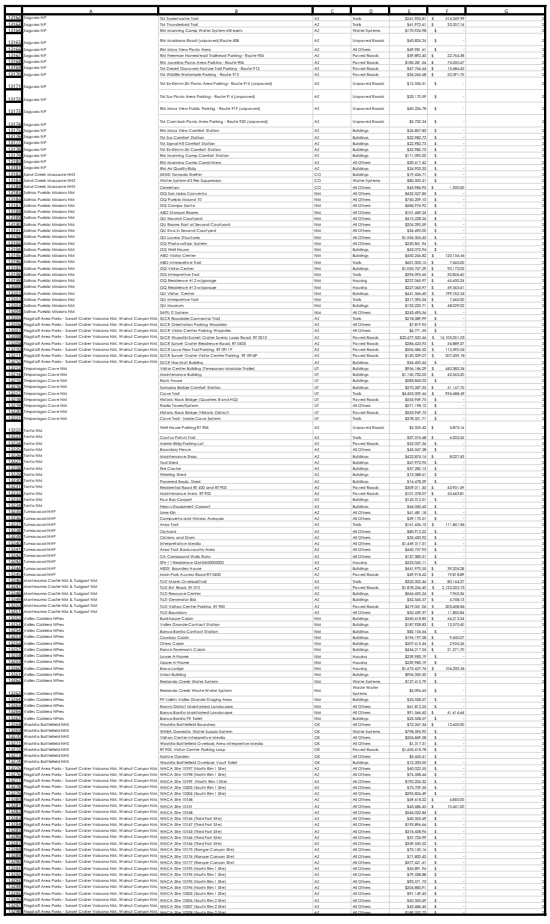

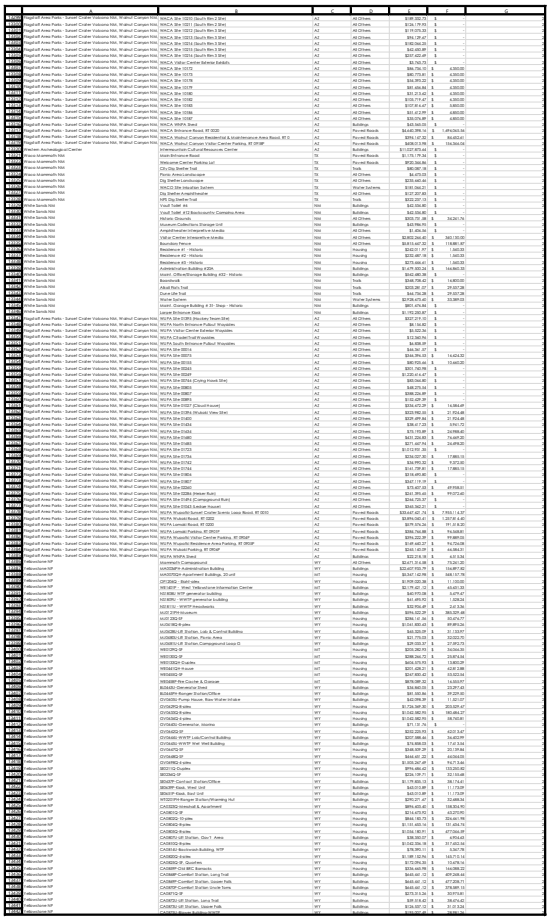

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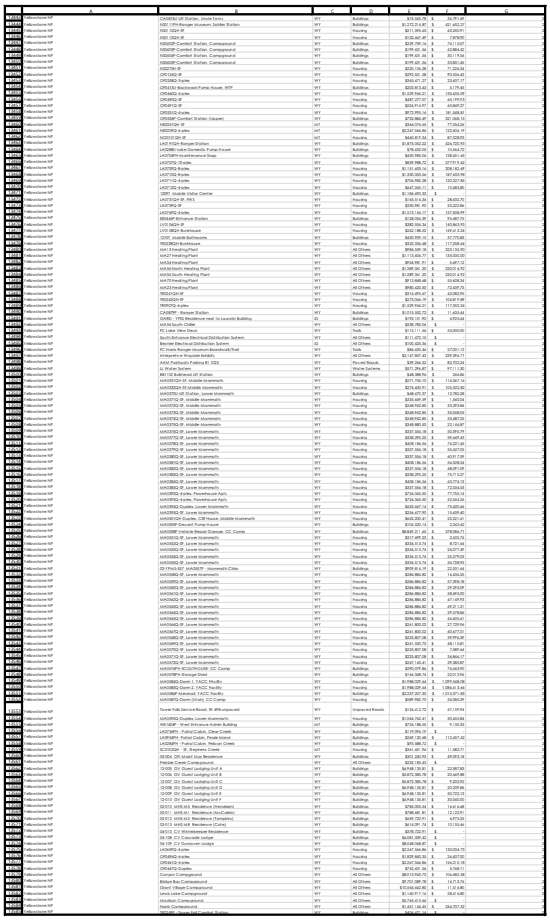

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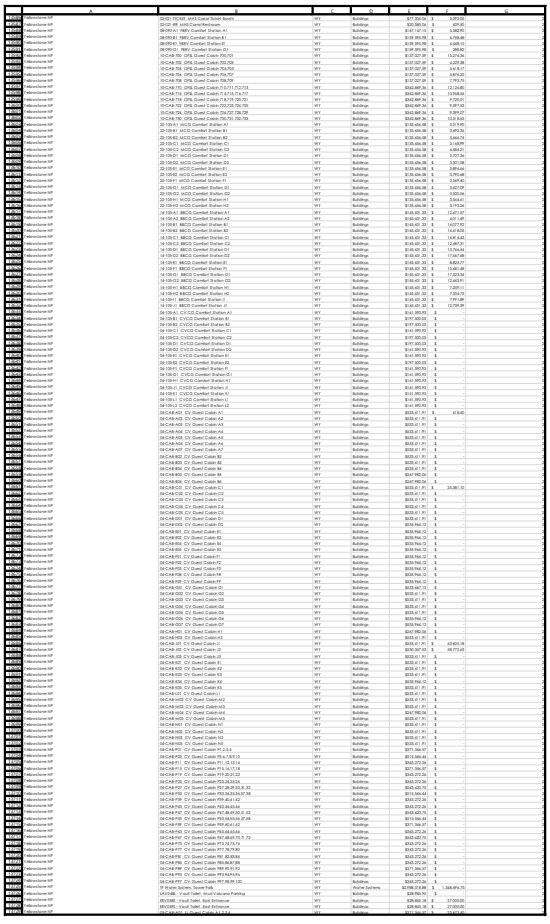

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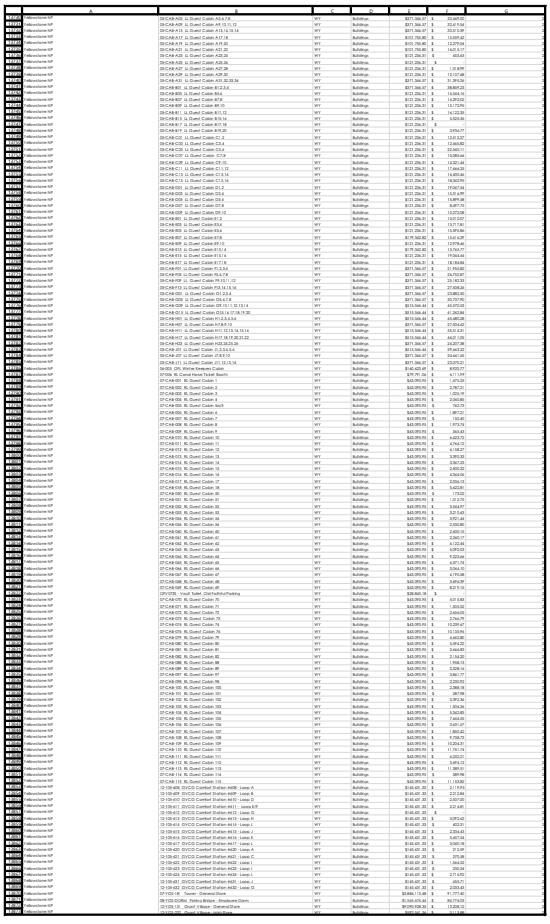

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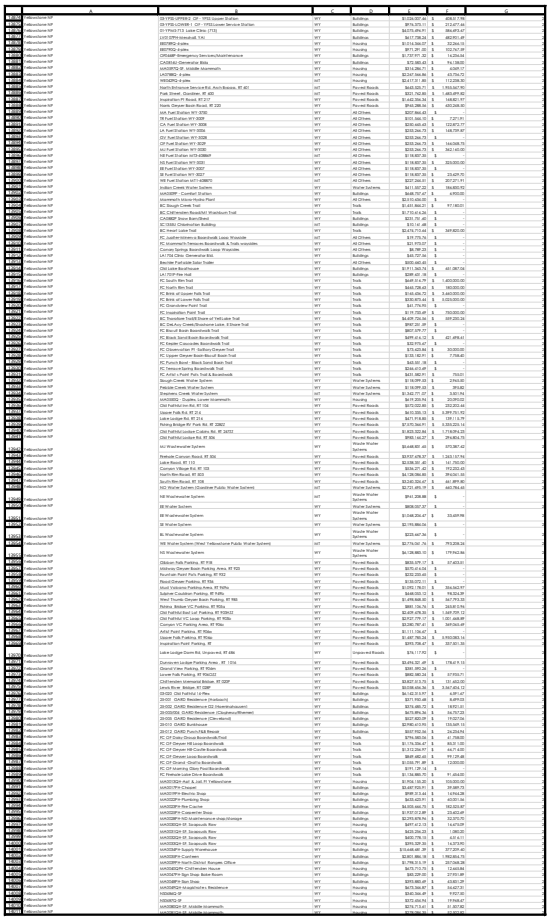

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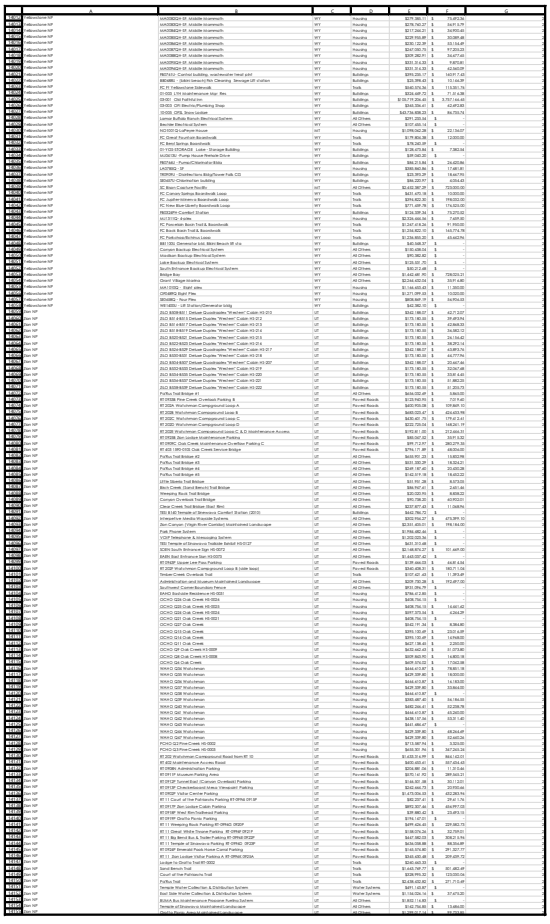

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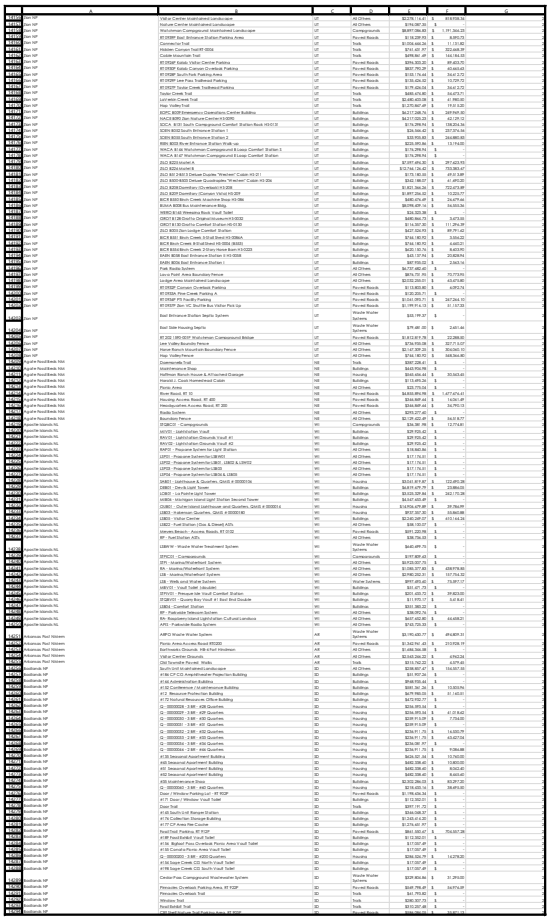

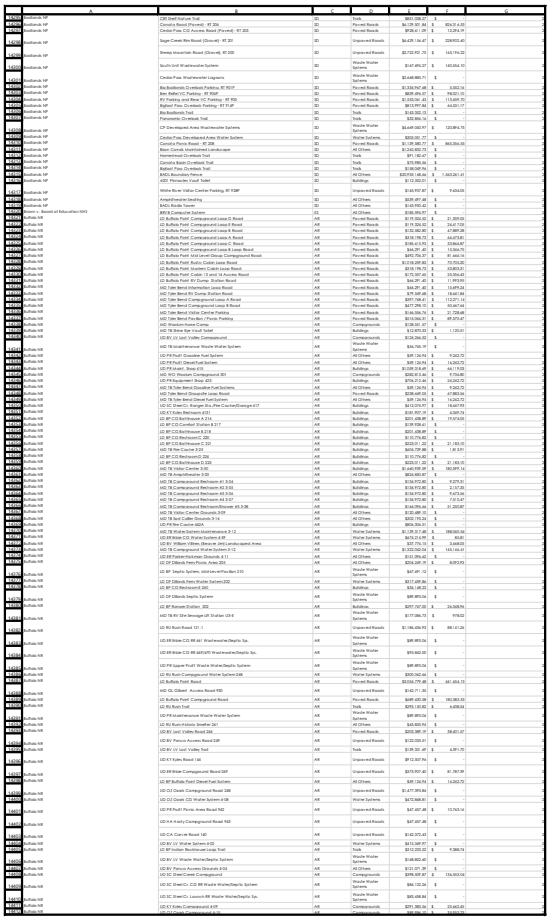

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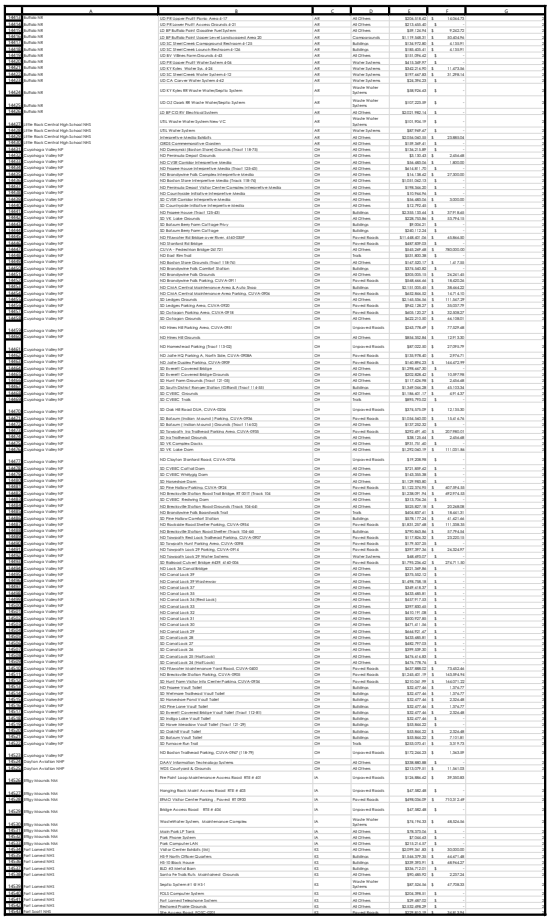

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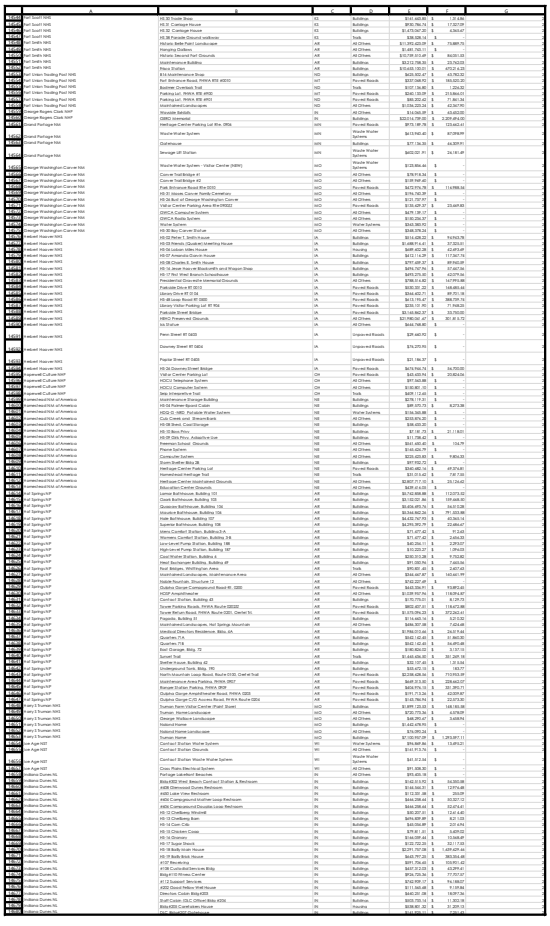

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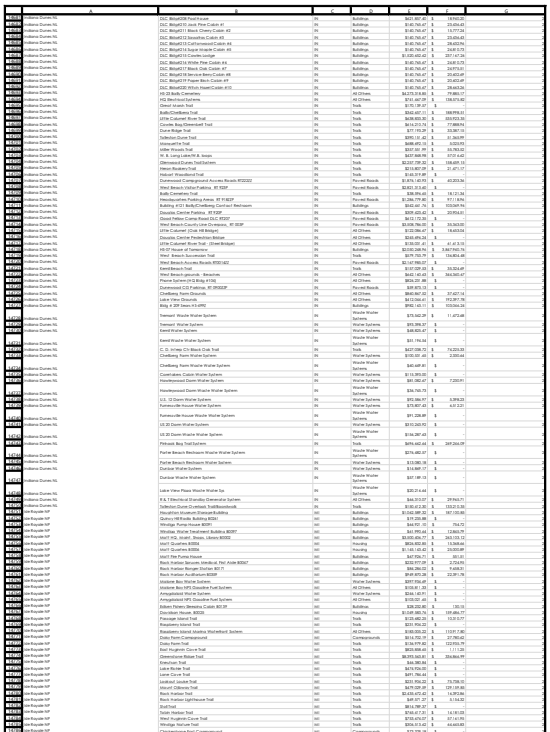

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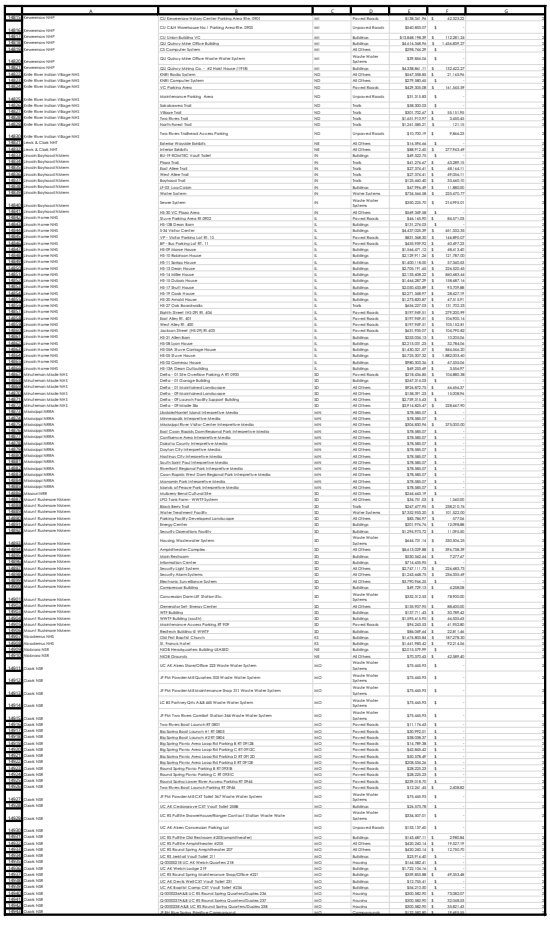

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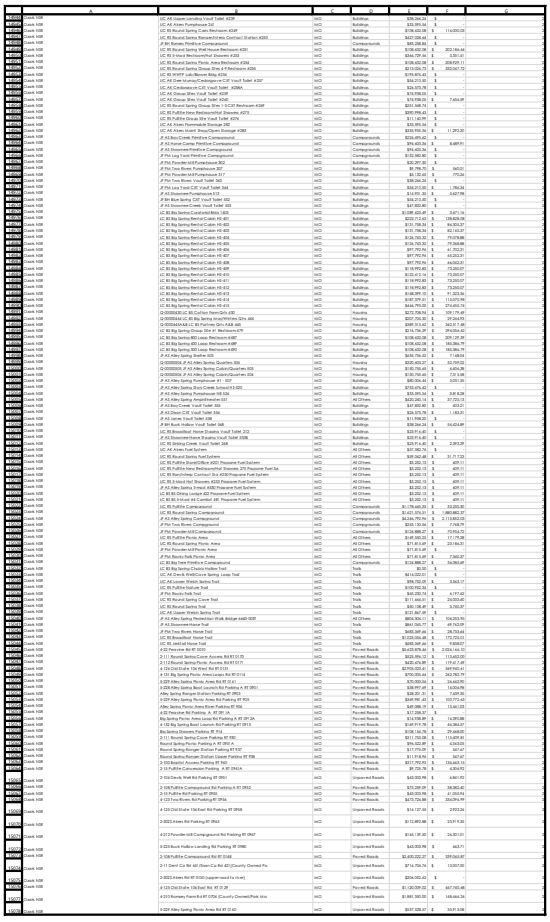

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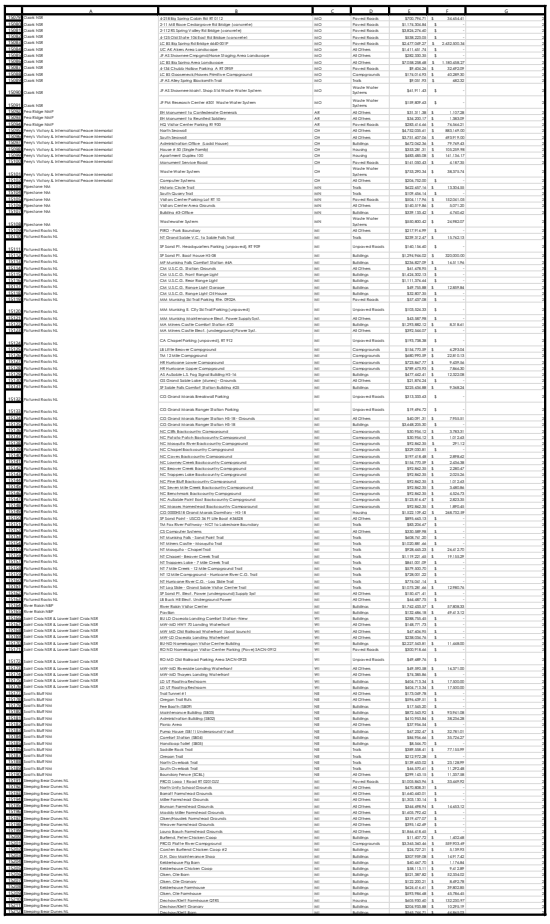

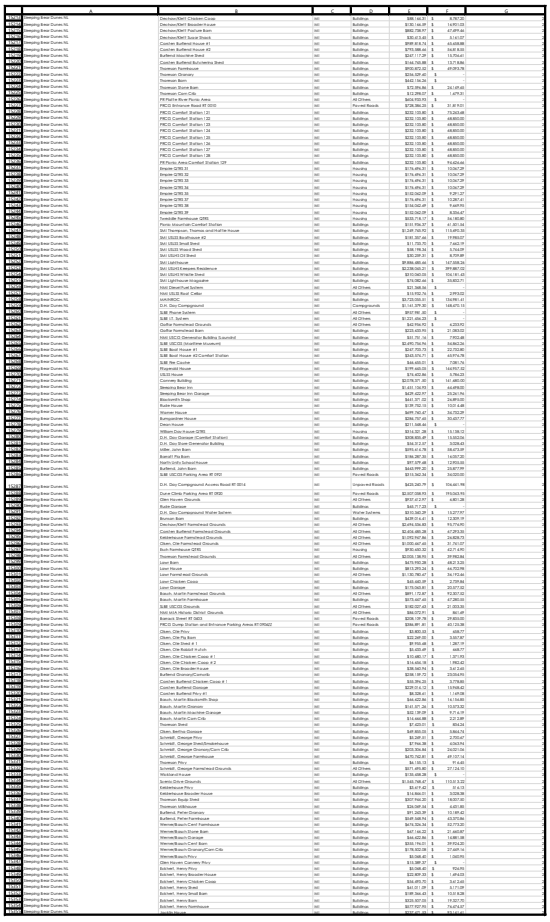

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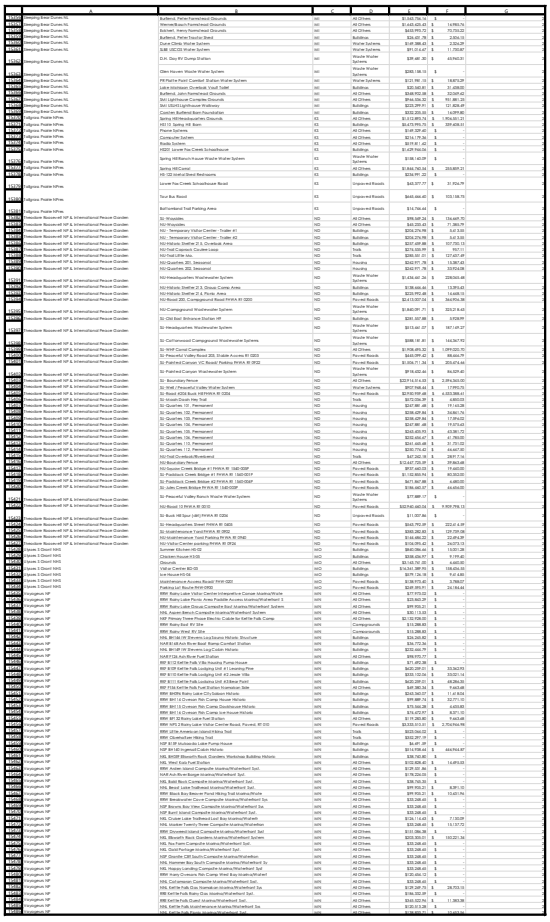

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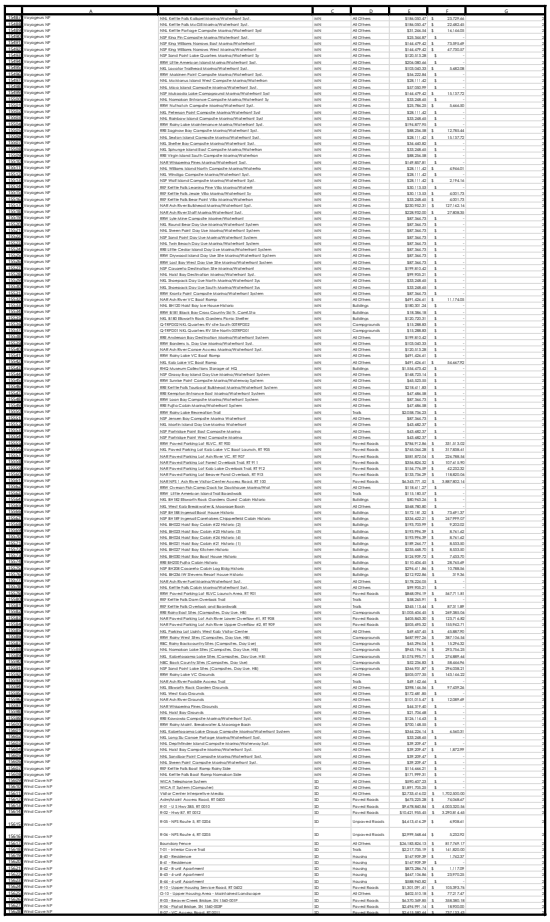

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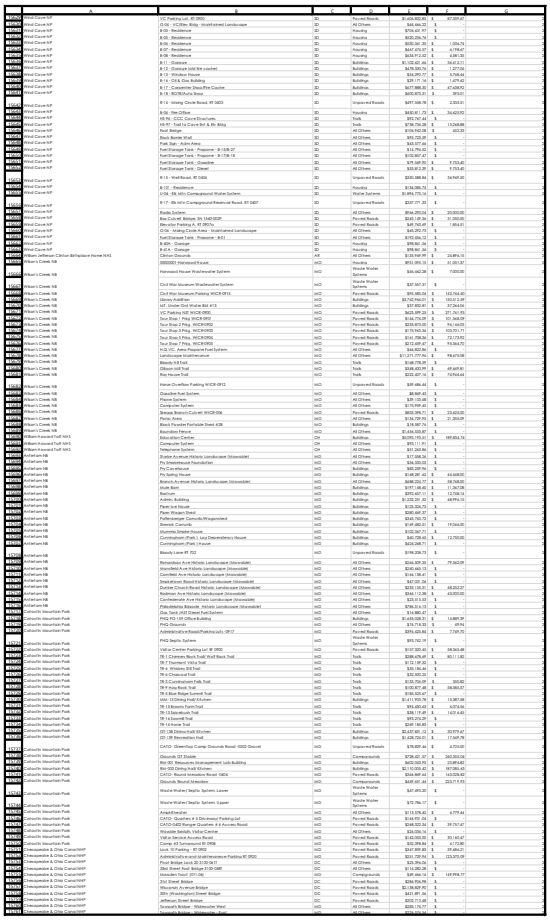

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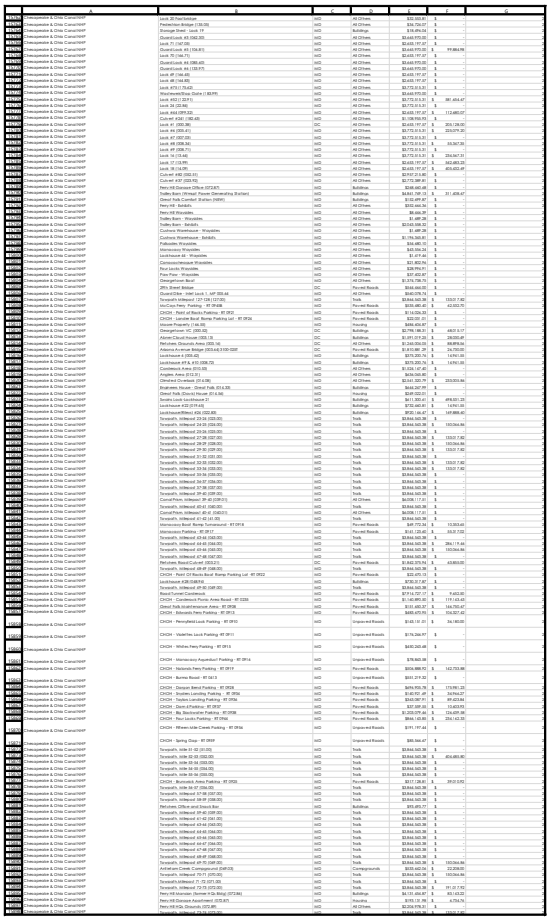

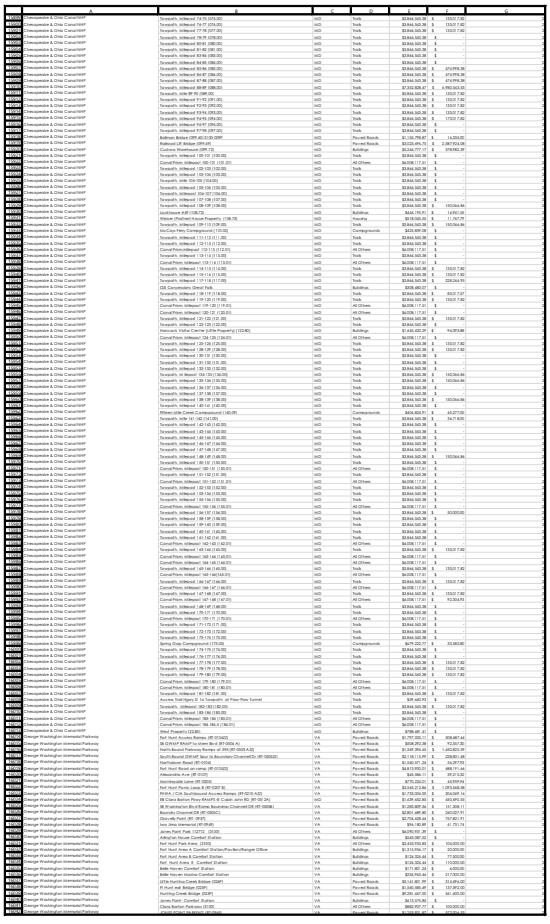

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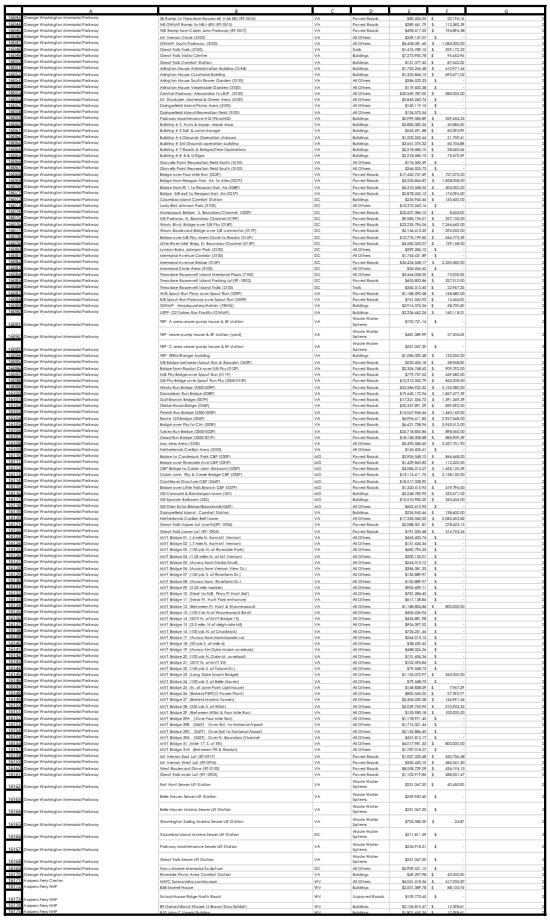

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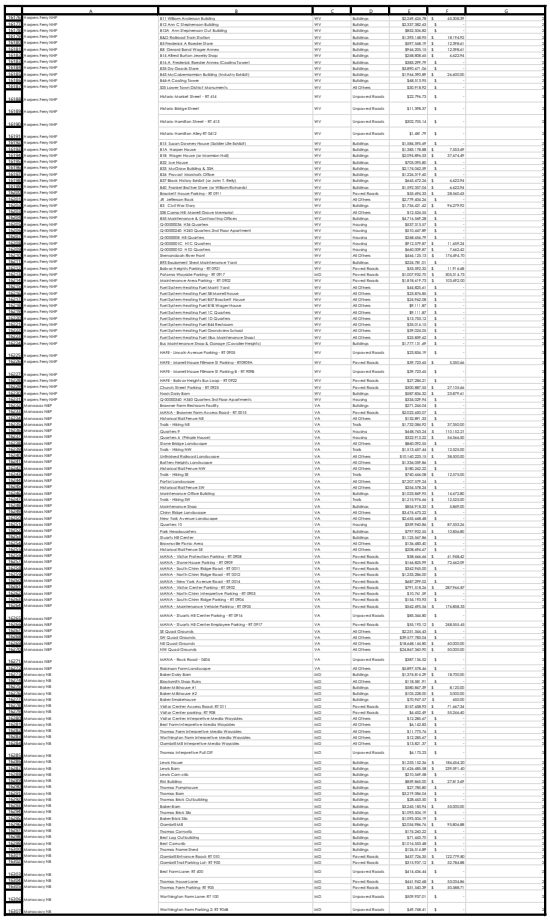

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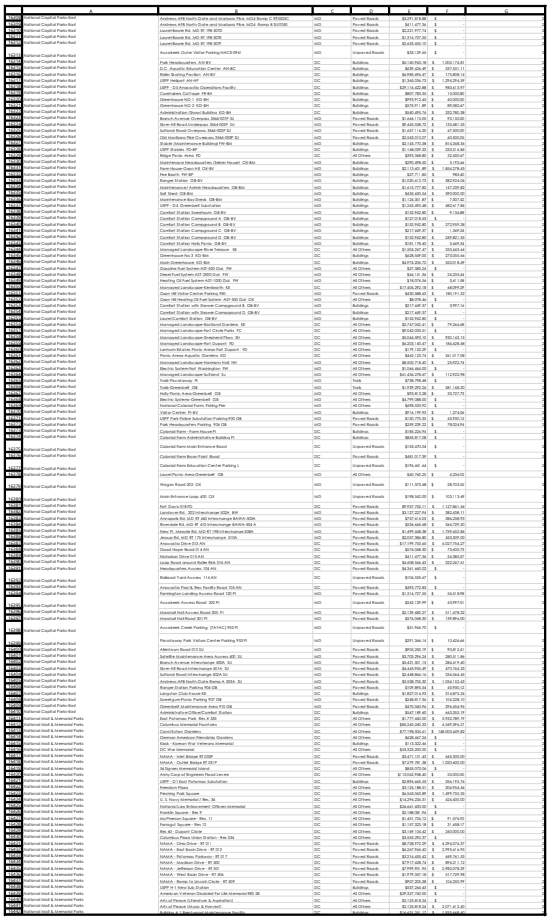

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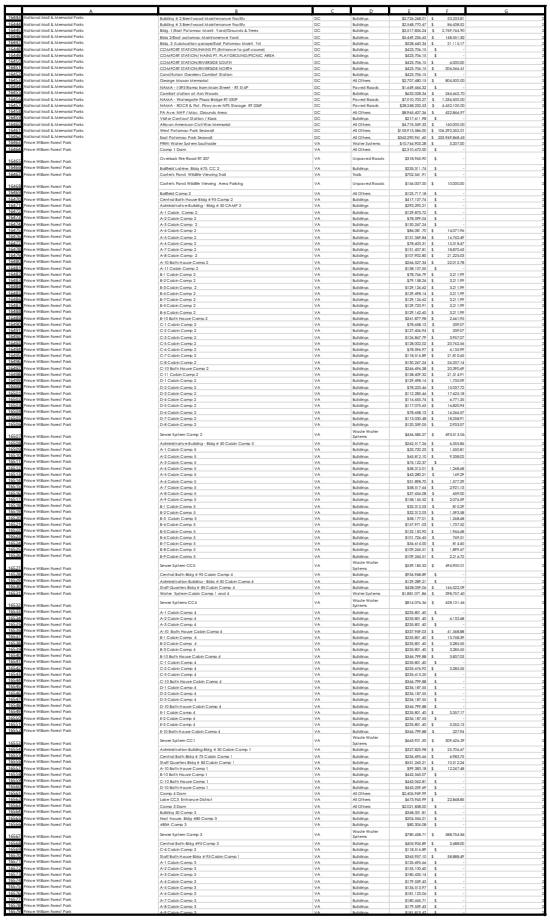

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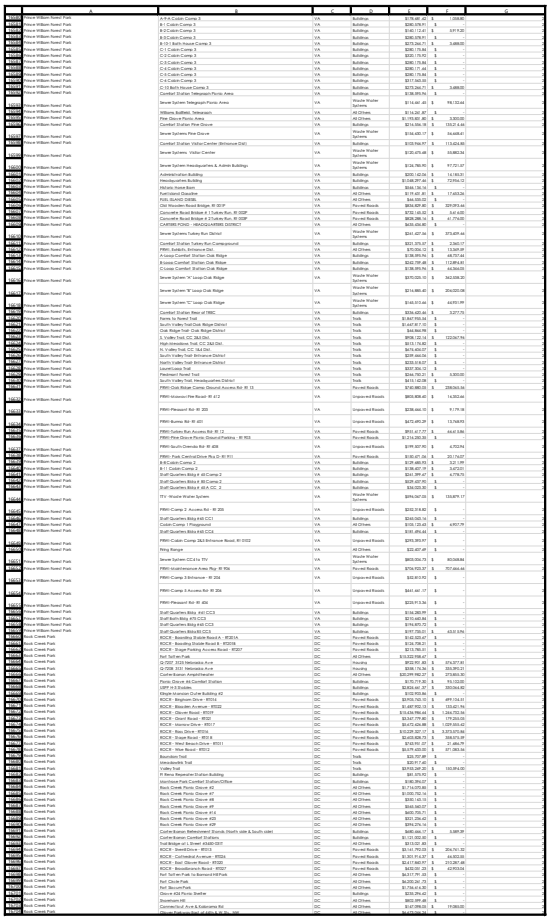

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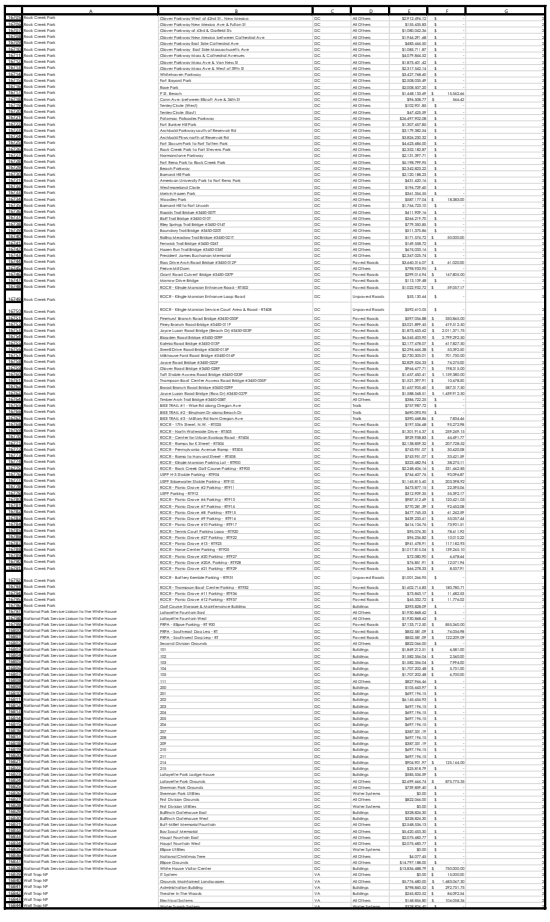

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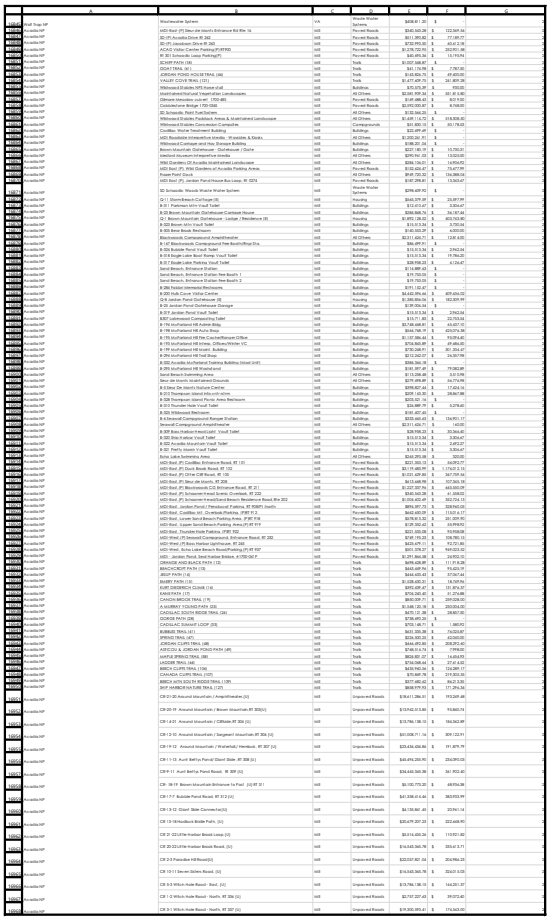

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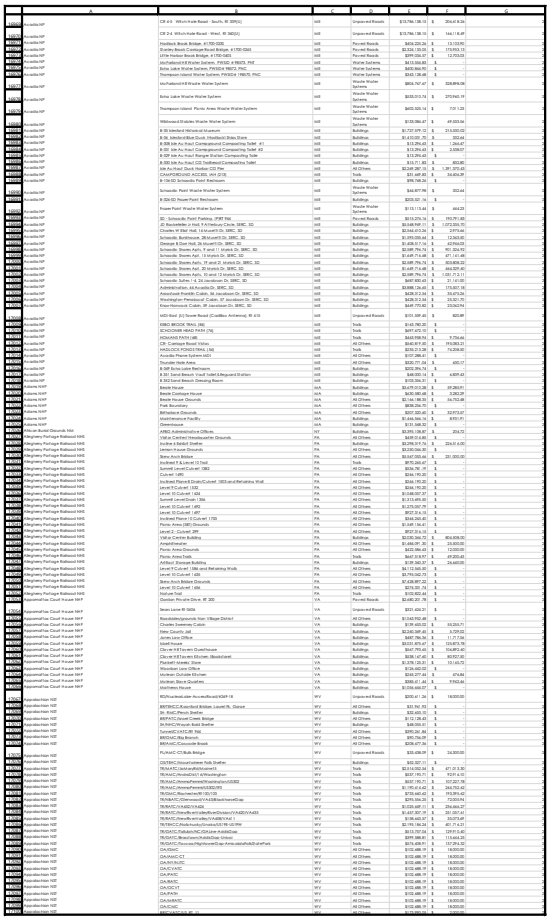

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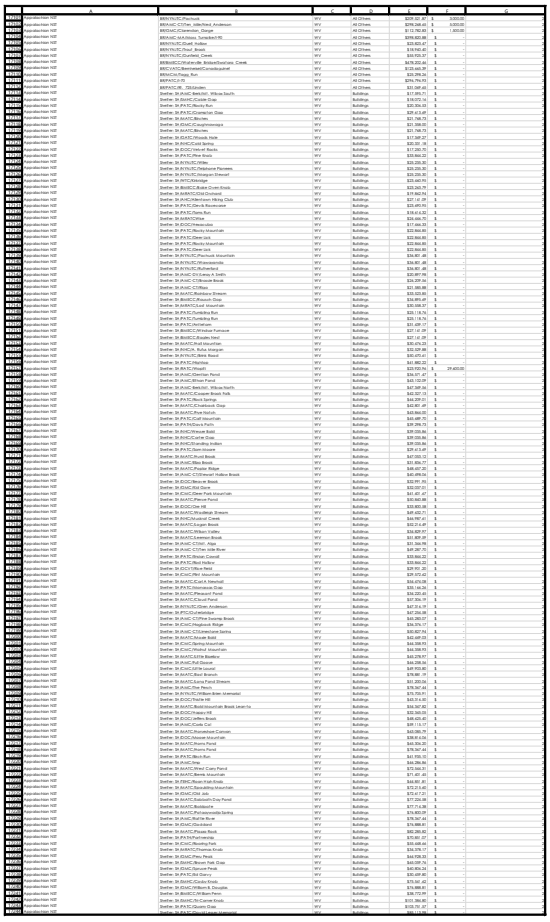

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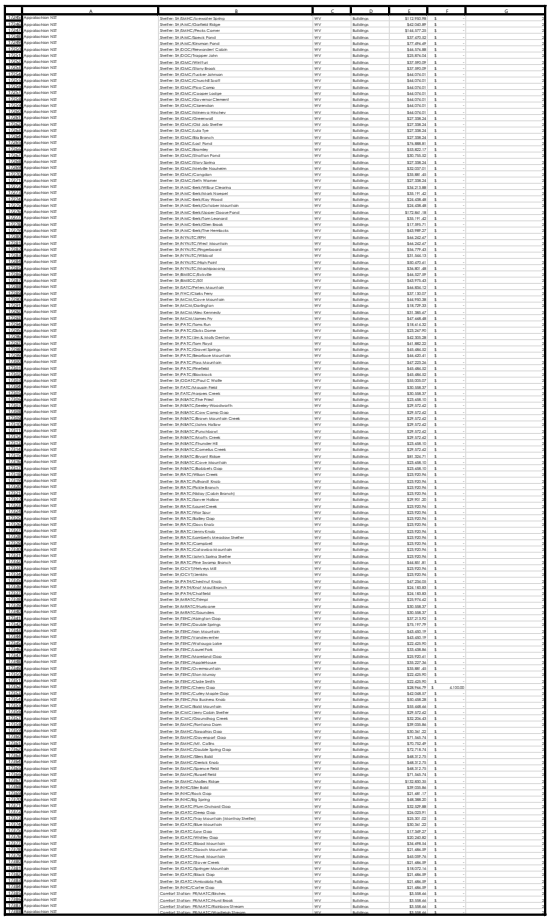

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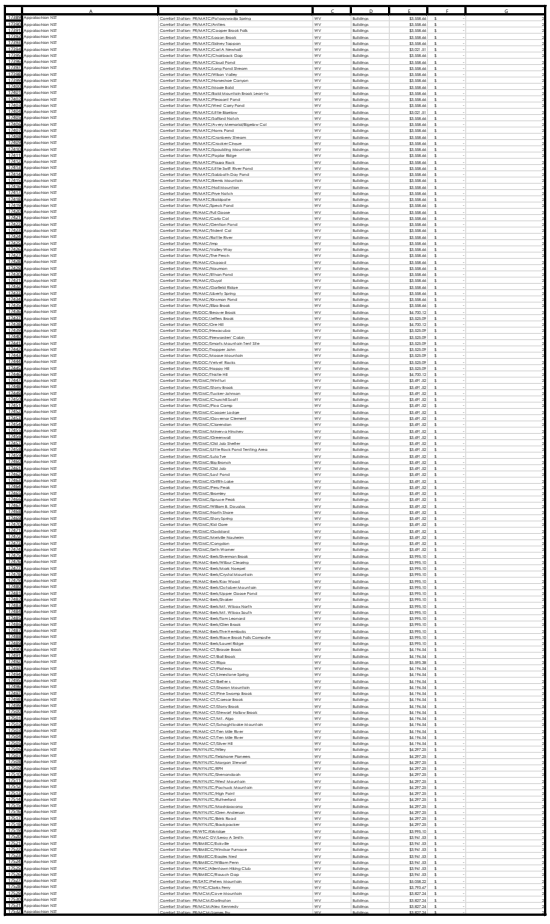

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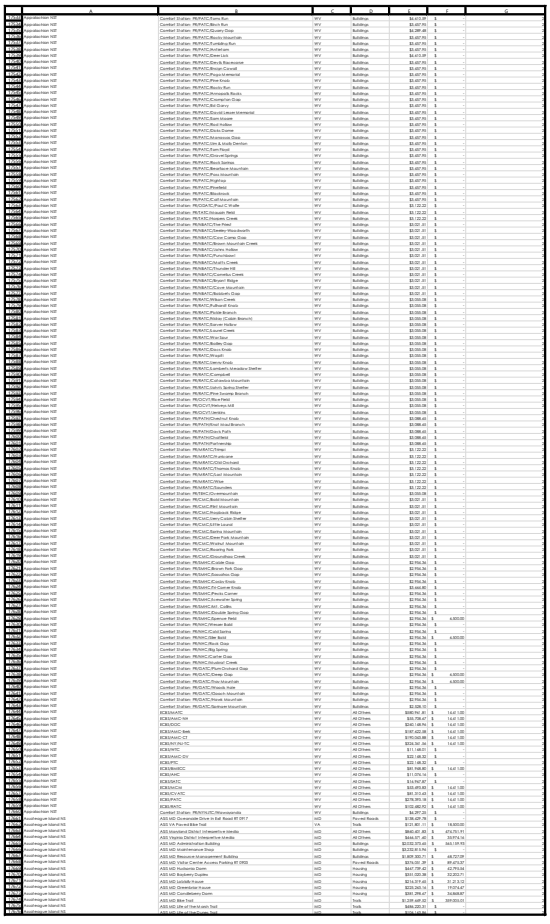

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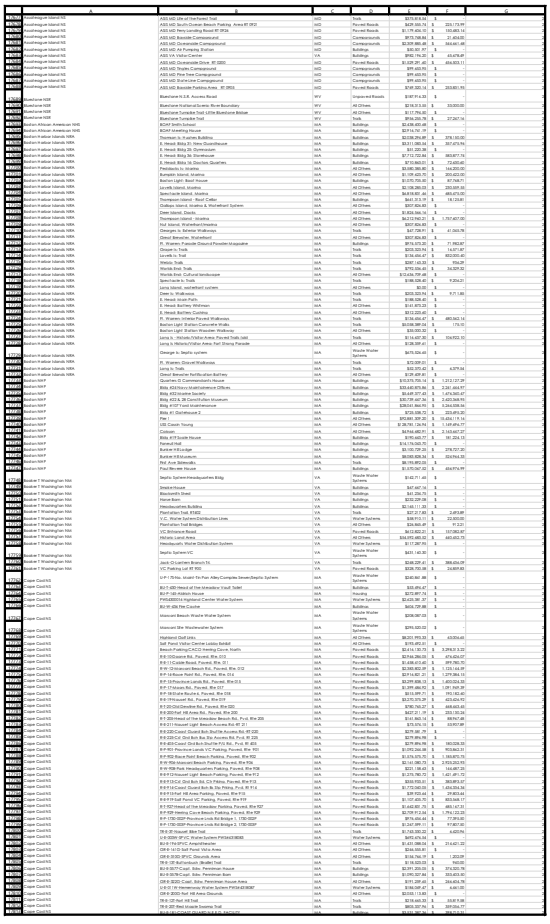

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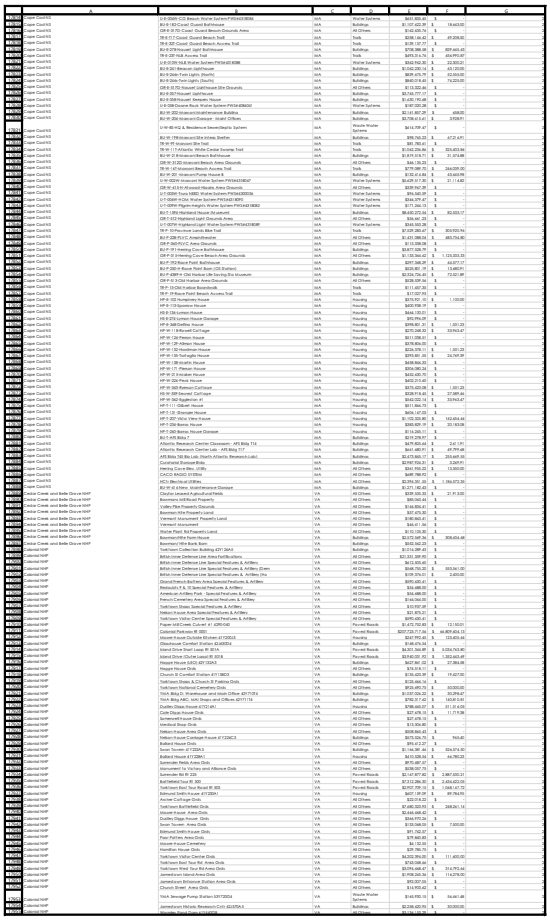

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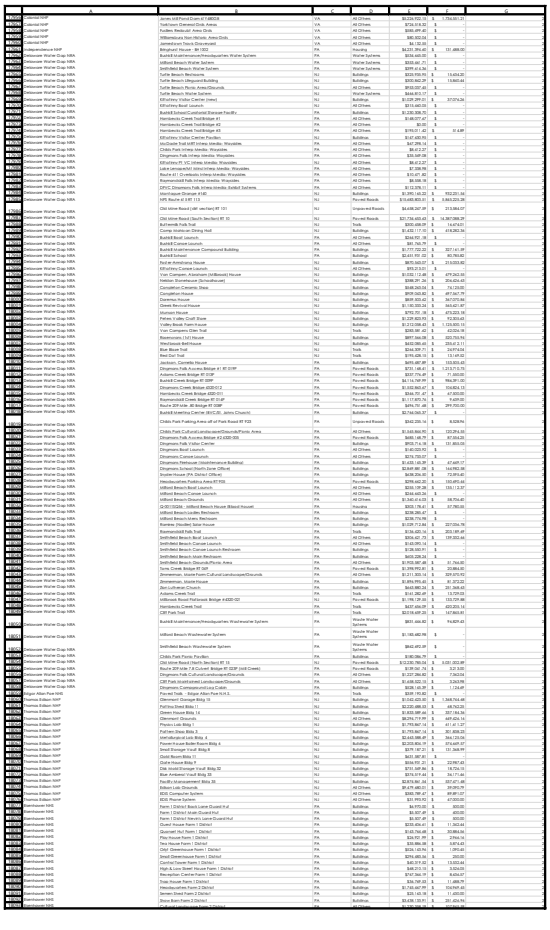

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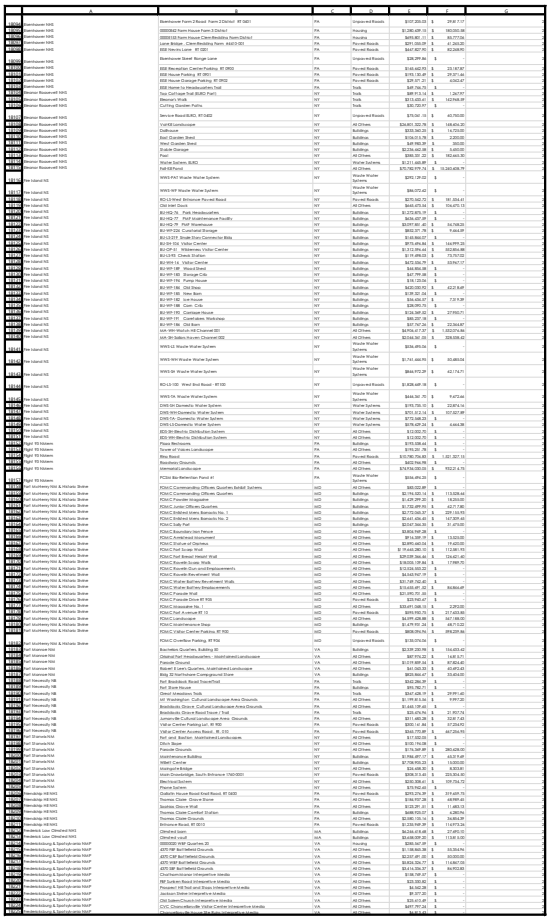

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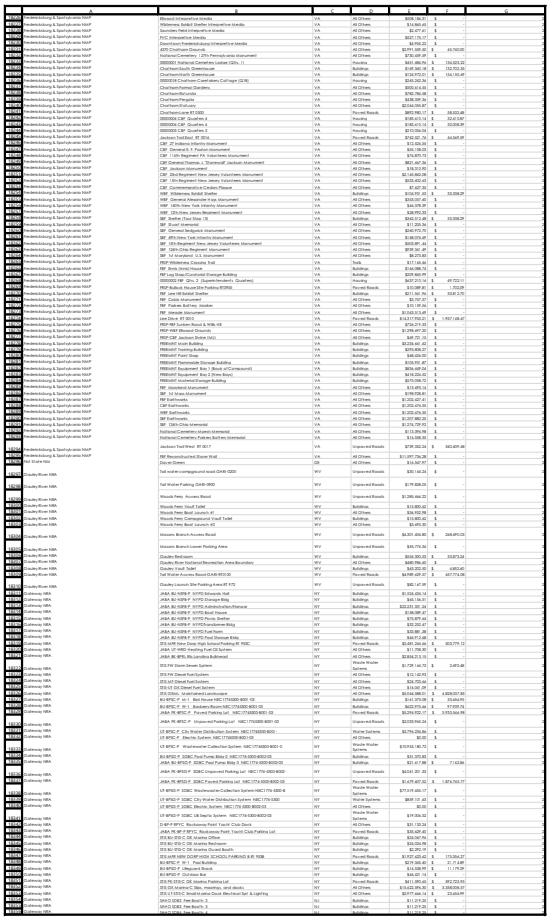

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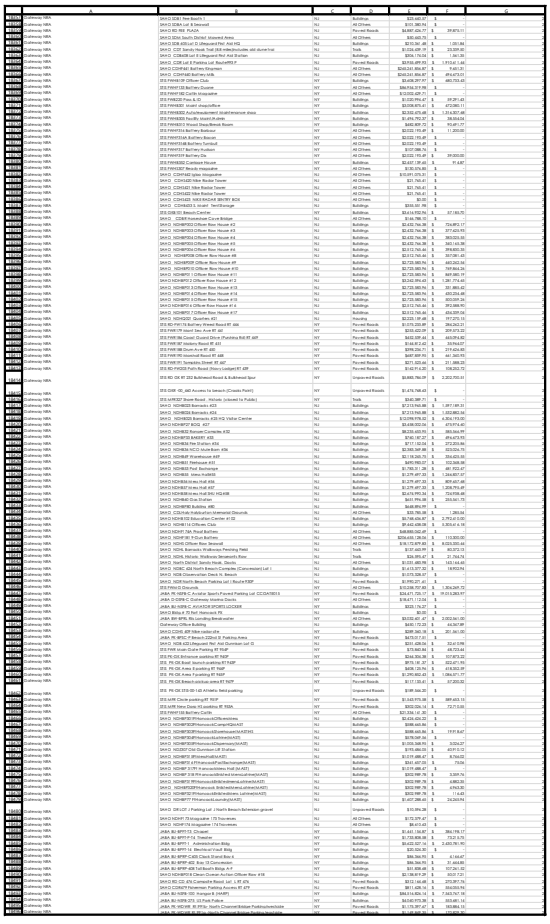

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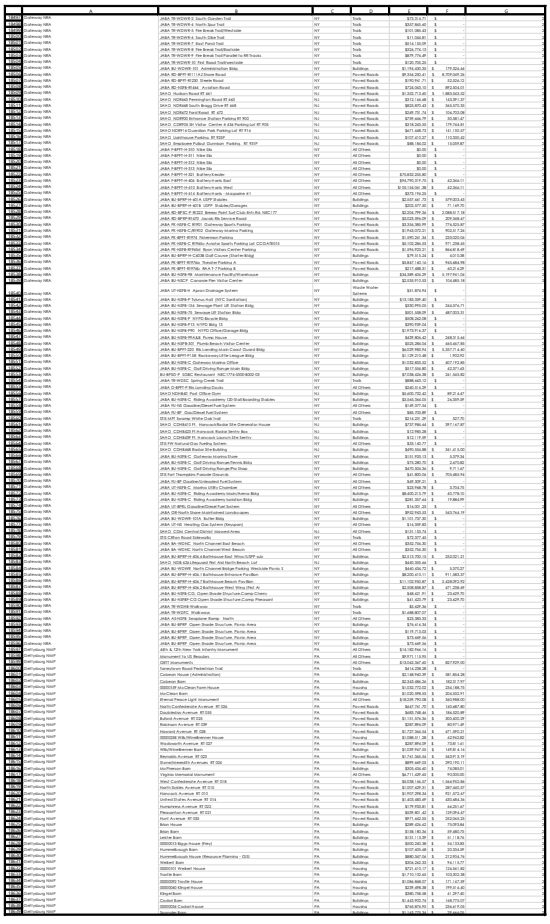

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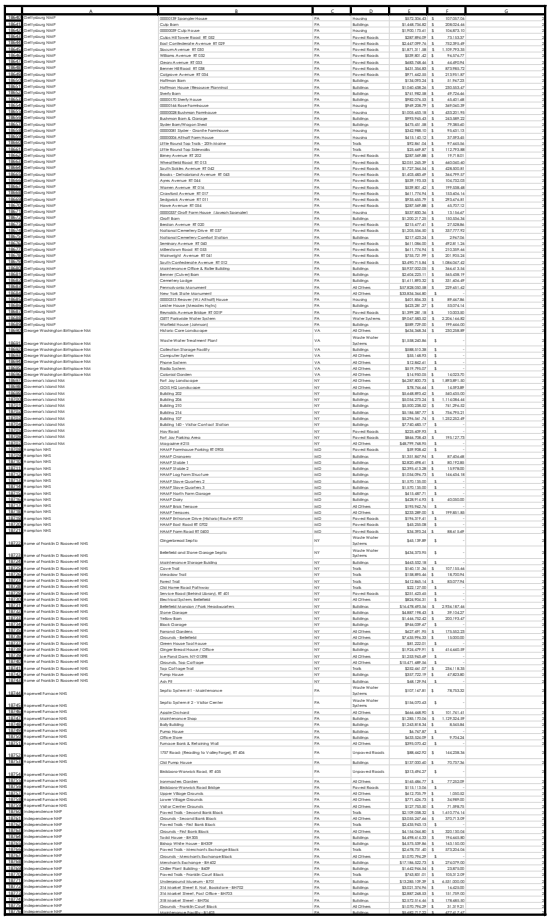

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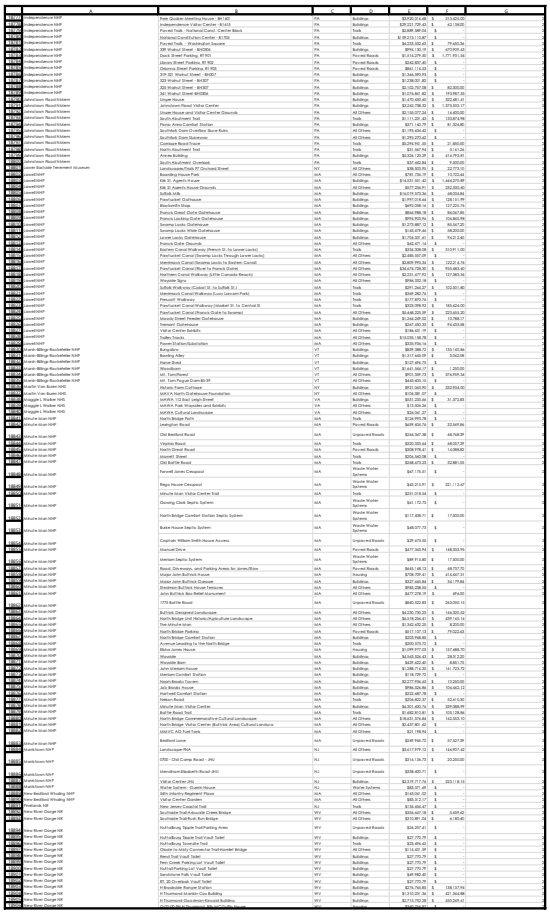

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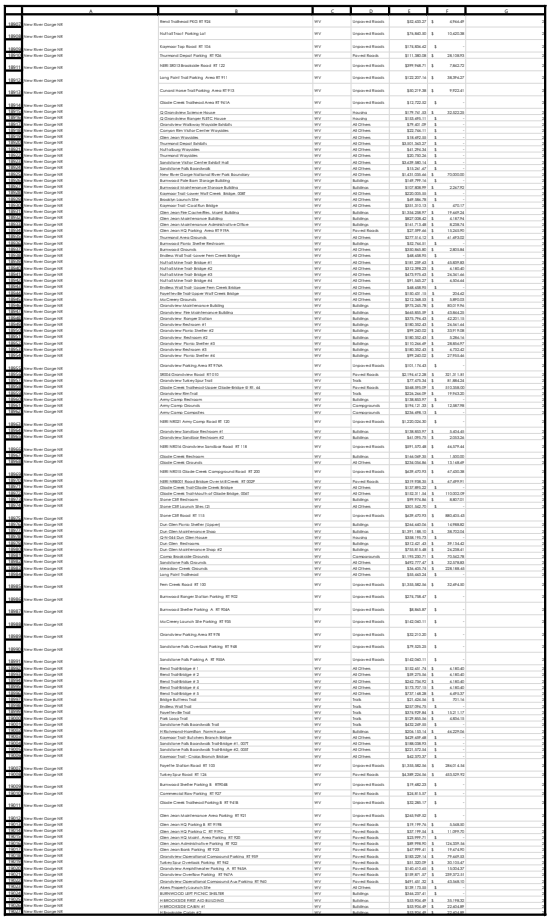

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2	16000	New River Gorge NR	Rend Trailhead PKG RT R3c	WV	Unpaved Roads	$60,420.27	$ 4764.81
3	16000	New River Gorge NR	Hull toll Tract Parking Lot	WV	Unpaved Roads	$76,840.80	$ 10,420.58
4	16000	New River Gorge NR	Keyrnean Trail Road RT 104	WV	Unpaved Roads	$178,836.42	$ -
5	16000	New River Gorge NR	Thurmond Depot Parking RT R3c	WV	Paved Roads	$111,380.08	$ 29,139.70
6	16000	New River Gorge NR	NRR 08012 Brooksville Road RT 122	WV	Unpaved Roads	$399,748.71	$ 7,843.72
7	16000	New River Gorge NR	Long Point Trail Parking Area RT R11	WV	Unpaved Roads	$122,207.14	$ 38,364.27
8	16000	New River Gorge NR	Cunard Horse Trail Parking Area RT R13	WV	Unpaved Roads	$80,217.39	$ 9,702.41
9	16000	New River Gorge NR	Glade Creek Trailhead Area RT R12A	WV	Unpaved Roads	$12,722.82	$ -
10	16000	New River Gorge NR	Q Overlook Science House	WV	Housing	$178,741.00	$ 32,622.29
11	16000	New River Gorge NR	Q Overlook Ramp Refill C House	WV	Housing	$139,485.11	$ -
12	16000	New River Gorge NR	Overlook Wayside Wayside Exhibits	WV	All Others	$76,421.29	$ -
13	16000	New River Gorge NR	Glade Creek Visitor Center Wayside	WV	All Others	$76,421.29	$ -
14	16000	New River Gorge NR	Glen Jean Wayside	WV	All Others	$58,455.93	$ -
15	16000	New River Gorge NR	Thurmond Depot Exhibits	WV	All Others	$2,603,393.27	$ -
16	16000	New River Gorge NR	Nuttallburg Waysides	WV	All Others	$41,294.54	$ -
17	16000	New River Gorge NR	Thurmond Waysides	WV	All Others	$20,792.54	$ -
18	16000	New River Gorge NR	Sandstone Visitor Center Exhibit Hall	WV	All Others	$2,428,380.14	$ -
19	16000	New River Gorge NR	Sandstone Falls Boardwalk	WV	All Others	$13,341.47	$ -
20	16000	New River Gorge NR	New Bure Gorge National River Park Boundary	WV	All Others	$1,431,359.44	$ 70,000.00
21	16000	New River Gorge NR	Burnwood Pole Barn Storage Building	WV	Buildings	$148,799.34	$ -
22	16000	New River Gorge NR	Kaymean Trail Lower Restroom Entrance Building	WV	Buildings	$107,553.35	$ 2,267.72
23	16000	New River Gorge NR	Kaymean Trail Lower Well Creek Bridge, 0268	WV	All Others	$107,553.35	$ -
24	16000	New River Gorge NR	Boulder Launch Site	WV	All Others	$48,086.76	$ -
25	16000	New River Gorge NR	Kaymean Trail- Cural Run Bridge	WV	All Others	$301,512.13	$ 470.17
26	16000	New River Gorge NR	Glen Jean Rte Cache/Bike, Island Building	WV	Buildings	$1,554,298.97	$ 19,645.24
27	16000	New River Gorge NR	Glen Jean Maintenance Building	WV	Buildings	$837,598.42	$ 6,187.76
28	16000	New River Gorge NR	Glen Jean Maintenance Administrative Office	WV	Buildings	$143,713.88	$ 8,239.74
29	16000	New River Gorge NR	Glen Jean HQ Parking Area RT R1A	WV	Paved Roads	$37,991.64	$ 13,540.95
30	16000	New River Gorge NR	Thurmond Area Grounds	WV	All Others	$277,514.33	$ 41,979.02
31	16000	New River Gorge NR	Burnwood Picnic Shelter Restroom	WV	Buildings	$160,502.45	$ -
32	16000	New River Gorge NR	Burnwood Grounds	WV	All Others	$302,540.85	$ 2,853.84
33	16000	New River Gorge NR	Brolley Wall Trail- Lower Fern Creek Bridge	WV	All Others	$48,498.76	$ -
34	16000	New River Gorge NR	Nuttallburne Trail- Bridge #1	WV	All Others	$181,295.45	$ 43,805.80
35	16000	New River Gorge NR	Nuttallburne Trail- Bridge #2	WV	All Others	$212,399.28	$ 4,180.40
36	16000	New River Gorge NR	Nuttallburne Trail- Bridge #3	WV	All Others	$479,979.43	$ 24,561.46
37	16000	New River Gorge NR	Nuttallburne Trail- Bridge #4	WV	All Others	$91,340.37	$ 4,504.44
38	16000	New River Gorge NR	Brolley Wall Trail- Lower Fern Creek Bridge	WV	All Others	$48,498.76	$ -
39	16000	New River Gorge NR	Rend Nordic Trail- Lower Well Creek Bridge	WV	All Others	$190,421.33	$ 254.42
40	16000	New River Gorge NR	Grandview Restroom	WV	All Others	$160,502.45	$ 2,853.84
41	16000	New River Gorge NR	Grandview Overlook Maintenance Building	WV	Buildings	$816,349.76	$ 8,527.93
42	16000	New River Gorge NR	Grandview Park Model Interpretive Building	WV	Buildings	$449,693.28	$ 43,864.25
43	16000	New River Gorge NR	Grandview Rail Trail Shelter	WV	Buildings	$379,794.20	$ 42,851.33
44	16000	New River Gorge NR	Grandview Restroom #1	WV	Buildings	$190,502.45	$ 24,561.46
45	16000	New River Gorge NR	Grandview Picnic Shelter #2	WV	Buildings	$99,340.53	$ 2,917.08
46	16000	New River Gorge NR	Grandview Restroom #2	WV	Buildings	$190,502.45	$ 3,284.16
47	16000	New River Gorge NR	Grandview Picnic Shelter #3	WV	Buildings	$110,394.97	$ 29,804.97
48	16000	New River Gorge NR	Grandview Restroom #3	WV	Buildings	$190,502.45	$ 6,752.42
49	16000	New River Gorge NR	Grandview Picnic Shelter #4	WV	Buildings	$99,340.53	$ 27,950.66
50	16000	New River Gorge NR	Grandview Parking Area RT R3A	WV	Unpaved Roads	$101,116.45	$ -
51	16000	New River Gorge NR	BR54 Grandview Road RT R3	WV	Paved Roads	$2,779,412.28	$ 221,31 1.81
52	16000	New River Gorge NR	Grandview Turkey Spur Trail	WV	Trails	$77,475.34	$ 61,864.24
53	16000	New River Gorge NR	Glade Creek Trailhead Upper Glade Bridge #, #, 44	WV	Paved Roads	$648,855.09	$ 633,906.00
54	16000	New River Gorge NR	Grandview Rim Trail	WV	Trails	$224,394.09	$ 19,943.20
55	16000	New River Gorge NR	Army Comp Restroom	WV	Buildings	$138,803.97	$ -
56	16000	New River Gorge NR	Army Comp Grounds	WV	Campgrounds	$764,121.20	$ 12,667.96
57	16000	New River Gorge NR	Army Comp Campsites	WV	Campgrounds	$234,499.13	$ -
58	16000	New River Gorge NR	NRR 14820 Army Comp Road RT 120	WV	Unpaved Roads	$1,230,534.36	$ -
59	16000	New River Gorge NR	Grandview Sandbar Restroom #1	WV	Buildings	$138,803.97	$ 5,453.45
60	16000	New River Gorge NR	Grandview Sandbar Restroom #2	WV	Buildings	$41,989.74	$ 2,053.24
61	16000	New River Gorge NR	NRR 14820 Grandview Sandbar Road RT 118	WV	Unpaved Roads	$991,570.48	$ 44,979.46
62	16000	New River Gorge NR	Glade Creek Restroom	WV	Buildings	$144,597.35	$ 1,933.80
63	16000	New River Gorge NR	Glade Creek Grounds	WV	All Others	$256,764.84	$ 13,149.87
64	16000	New River Gorge NR	NRR 14820 Glade Creek Campground Road RT 200	WV	Unpaved Roads	$439,473.93	$ 47,420.38
65	16000	New River Gorge NR	NRR 14820D Rend Bridge Over Mill Creek, RT 200F	WV	Paved Roads	$519,708.30	$ 47,499.91
66	16000	New River Gorge NR	Glade Creek Trail Glade Creek Bridge	WV	All Others	$137,955.20	$ -
67	16000	New River Gorge NR	Glade Creek Trail Mouth of Glade Bridge, 0547	WV	All Others	$150,511.84	$ 113,502.09
68	16000	New River Gorge NR	Dunne Cliff Restrooms	WV	Buildings	$99,719.84	$ 8,807.51
69	16000	New River Gorge NR	Dunne Cliff Launch Site, C3	WV	All Others	$301,540.75	$ -
70	16000	New River Gorge NR	Dunne Cliff Road RT 113	WV	Unpaved Roads	$439,473.93	$ 985,424.45
71	16000	New River Gorge NR	Dun Glen Picnic Shelter (Upper)	WV	Buildings	$244,445.04	$ 14,769.82
72	16000	New River Gorge NR	Dun Glen Maintenance Shed	WV	Buildings	$1,391,188.15	$ 39,753.04
73	16000	New River Gorge NR	Dun Glen Tram Office House	WV	Housing	$208,127.25	$ -
74	16000	New River Gorge NR	Dun Glen Restroom	WV	Buildings	$144,477.35	$ 39,134.83
75	16000	New River Gorge NR	Dun Glen Maintenance Shop #2	WV	Buildings	$710,611.86	$ 24,208.41
76	16000	New River Gorge NR	Dunne Beach/Info Grounds	WV	Campgrounds	$1,139,226.71	$ 73,842.76
77	16000	New River Gorge NR	Sandstone Falls Grounds	WV	All Others	$450,777.47	$ 32,978.83
78	16000	New River Gorge NR	Meadow Creek Grounds	WV	All Others	$34,420.74	$ 209,186.40
79	16000	New River Gorge NR	Long Point Trailhead	WV	All Others	$35,445.34	$ 1,821.50
80	16000	New River Gorge NR	New Creek Road RT 122	WV	Unpaved Roads	$2,330,982.84	$ 22,414.40
81	16000	New River Gorge NR	Burnwood Ranger Station Parking RT R12	WV	Unpaved Roads	$274,798.47	$ -
82	16000	New River Gorge NR	Burnwood Shelter Parking A RT R3A	WV	Unpaved Roads	$6,840.87	$ -
83	16000	New River Gorge NR	McCreery Launch Site Parking RT R3E	WV	Unpaved Roads	$142,040.11	$ -
84	16000	New River Gorge NR	Grandview Parking Area RT R7B	WV	Unpaved Roads	$32,213.20	$ -
85	16000	New River Gorge NR	Sandstone Falls Overlook Parking RT R4B	WV	Unpaved Roads	$79,425.26	$ -
86	16000	New River Gorge NR	Sandstone Falls Parking A RT R3BA	WV	Unpaved Roads	$142,040.11	$ -
87	16000	New River Gorge NR	Rend Trail Bridge # 1	WV	All Others	$132,441.74	$ 4,180.40
88	16000	New River Gorge NR	Rend Trail Bridge # 2	WV	All Others	$91,215.34	$ 4,180.40
89	16000	New River Gorge NR	Rend Trail Bridge # 3	WV	All Others	$242,756.55	$ 4,180.40
90	16000	New River Gorge NR	Rend Trail Bridge # 4	WV	All Others	$175,707.13	$ 4,180.40
91	16000	New River Gorge NR	Rend Trail Bridge # 5	WV	All Others	$737,148.28	$ 6,870.57
92	16000	New River Gorge NR	Bridge Buttress Trail	WV	Trails	$21,429.94	$ 701.14
93	16000	New River Gorge NR	Brolley Wall Trail	WV	Trails	$222,956.75	$ -
94	16000	New River Gorge NR	Rend Nordic Trail	WV	Trails	$219,437.84	$ 13,21 1.17
95	16000	New River Gorge NR	Rend Trail	WV	Trails	$1,000,000.00	$ 4,864.15
96	16000	New River Gorge NR	Sandstone Falls Boardwalk Trail	WV	Trails	$432,248.30	$ -
97	16000	New River Gorge NR	H Richmond Hamilton Remi House	WV	Buildings	$209,130.16	$ 44,229.04
98	16000	New River Gorge NR	Kaymean Trail- Kuykens Branch Bridge	WV	All Others	$229,497.48	$ -
99	16000	New River Gorge NR	Sandstone Falls Boardwalk Trail Bridge #1, 0577	WV	All Others	$198,039.70	$ -
100	16000	New River Gorge NR	Sandstone Falls Boardwalk Trail Bridge #2, 0597	WV	All Others	$311,972.34	$ -
101	16000	New River Gorge NR	Kaymean Trail - Cedar Branch Bridge	WV	All Others	$42,577.37	$ -
102	16000	New River Gorge NR	Rapelle Station Road RT 109	WV	Unpaved Roads	$1,330,982.84	$ 28437.4.34
103	16000	New River Gorge NR	Turkey Spur Road RT 126	WV	Paved Roads	$4,589,224.84	$ 433,529.40
104	16000	New River Gorge NR	Burnwood Shelter Parking B RTR4B	WV	Unpaved Roads	$19,482.28	$ -
105	16000	New River Gorge NR	Cunningwood Rest Parking RT R21	WV	Paved Roads	$34,815.97	$ -
106	16000	New River Gorge NR	Glade Creek Trailhead Parking A RT R41B	WV	Unpaved Roads	$32,285.17	$ -
107	16000	New River Gorge NR	Glen Jean Maintenance Area Parking RT R3	WV	Unpaved Roads	$240,948.62	$ -
108	16000	New River Gorge NR	Glen Jean HQ Parking B, RT R1BL	WV	Paved Roads	$19,139.74	$ 5,548.80
109	16000	New River Gorge NR	Glen Jean HQ Parking A RT R1A	WV	Paved Roads	$37,991.64	$ 11,995.70
110	16000	New River Gorge NR	Glen Jean HQ Addtl. Area Parking, RT R2E	WV	Paved Roads	$32,999.21	$ -
111	16000	New River Gorge NR	Glen Jean Administrative Parking, RT R2D	WV	Paved Roads	$89,998.80	$ 134,009.34
112	16000	New River Gorge NR	Glen Jean Bank Parking RT R2C	WV	Paved Roads	$47,999.40	$ 19,419.80
113	16000	New River Gorge NR	Grandview Diametrional Compound Parking RT R5R	WV	Paved Roads	$190,226.14	$ 79,445.93
114	16000	New River Gorge NR	Turkey Spur Overlook Parking RT R2E	WV	Paved Roads	$41,320.09	$ 33,135.47
115	16000	New River Gorge NR	Grandview Area/Retreat Parking A RT R43A	WV	Paved Roads	$140,413.40	$ 13,834.97
116	16000	New River Gorge NR	Grandview Overflow Parking RT R47A	WV	Paved Roads	$139,971.37	$ 209,372.51
117	16000	New River Gorge NR	Grandview Diametrional Compound A-xx Parking, RT R4C	WV	Paved Roads	$471,431.33	$ 43,568.72
118	16000	New River Gorge NR	Grandview Rim Trail Spur	WV	All Others	$139,737.01	$ -
119	16000	New River Gorge NR	MURPHYCOE LIFT PICNIC SHELTER	WV	Buildings	$139,737.01	$ -
120	16000	New River Gorge NR	KABOOSE/DESK FIRST AID ROOM/WC	WV	Buildings	$103,456.46	$ 39,178.50
121	16000	New River Gorge NR	KABOOSE/DESK CHURCH	WV	Buildings	$33,703.47	$ 22,414.89
122	16000	New River Gorge NR	Kaymean Trail- Cedar Run	WV	Buildings	$33,703.47	$ 22,414.89

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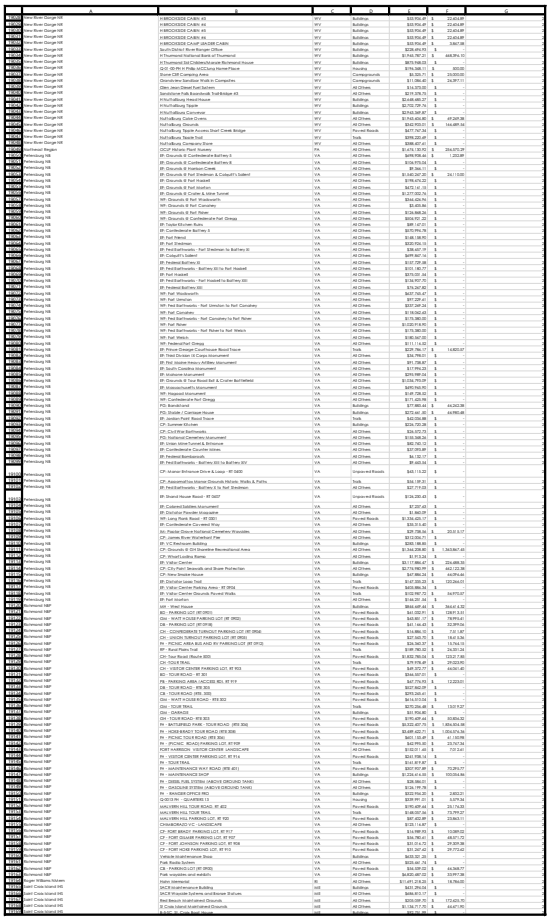

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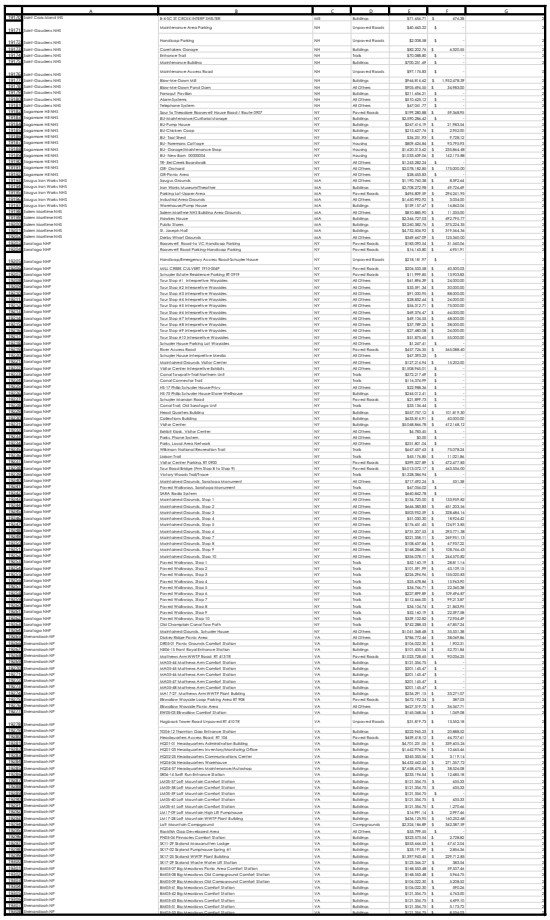

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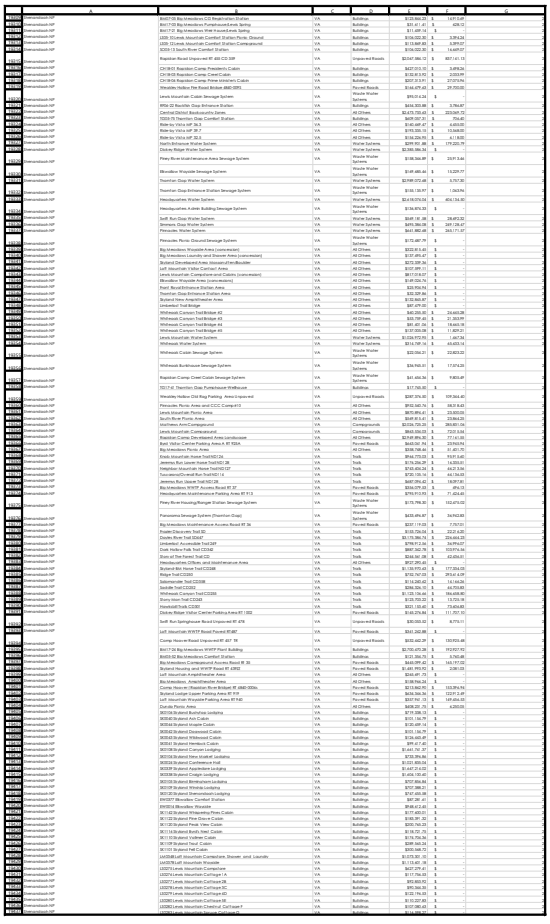

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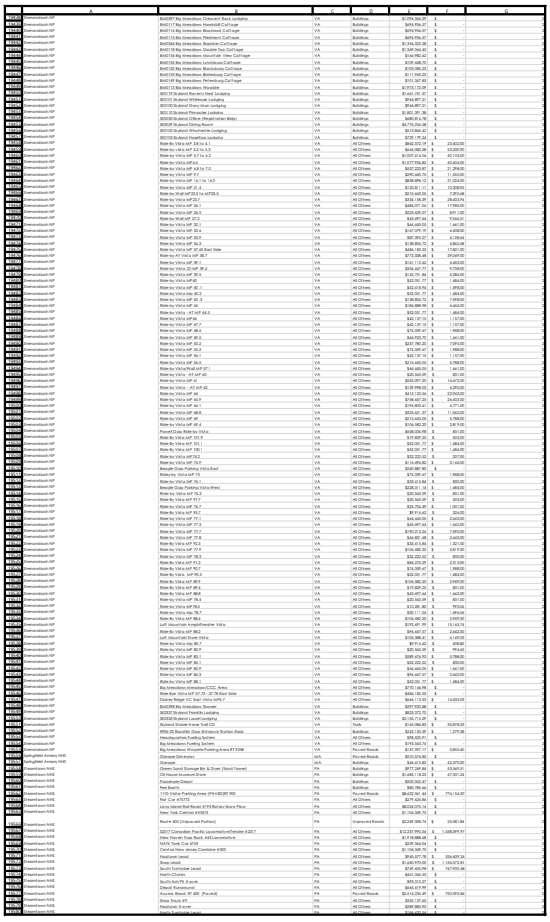

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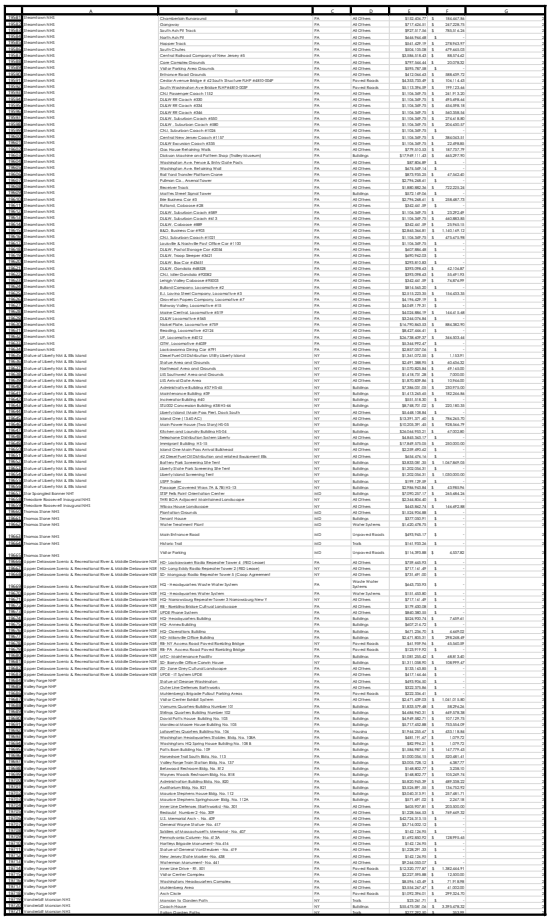

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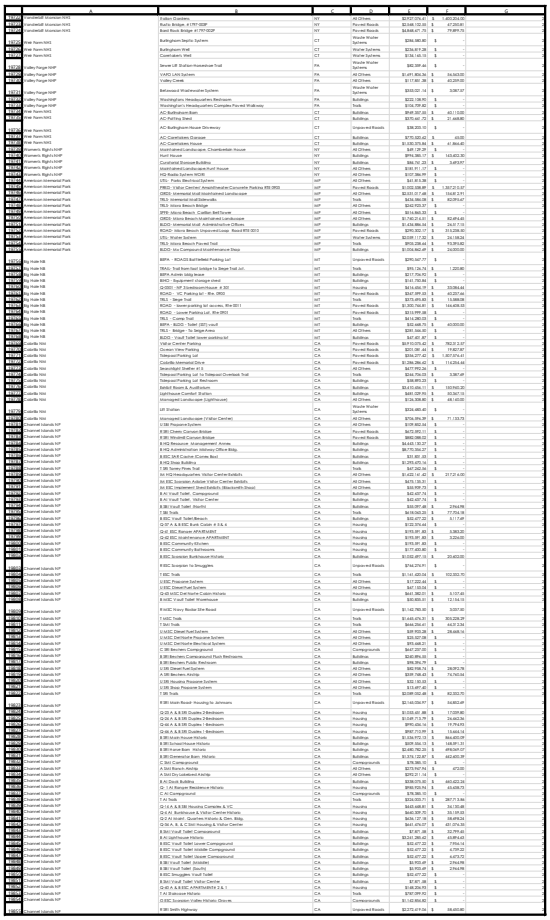

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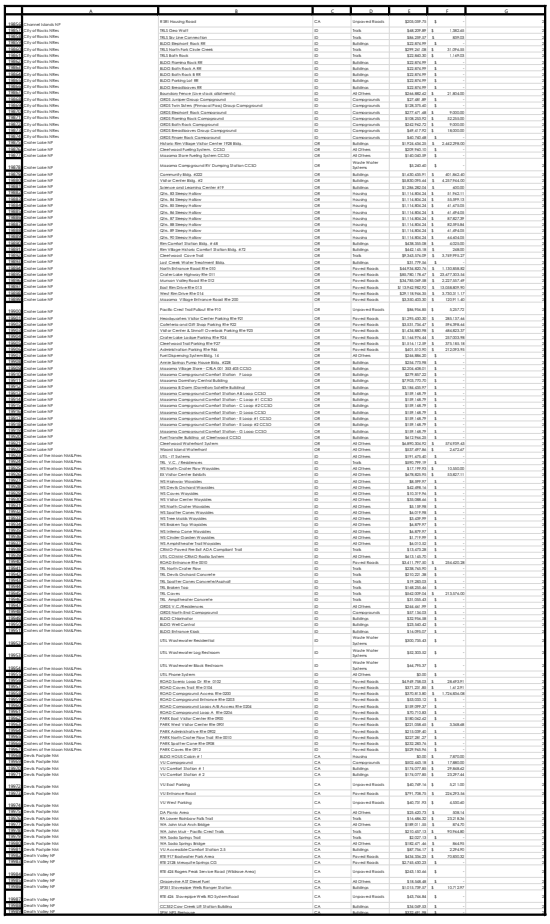

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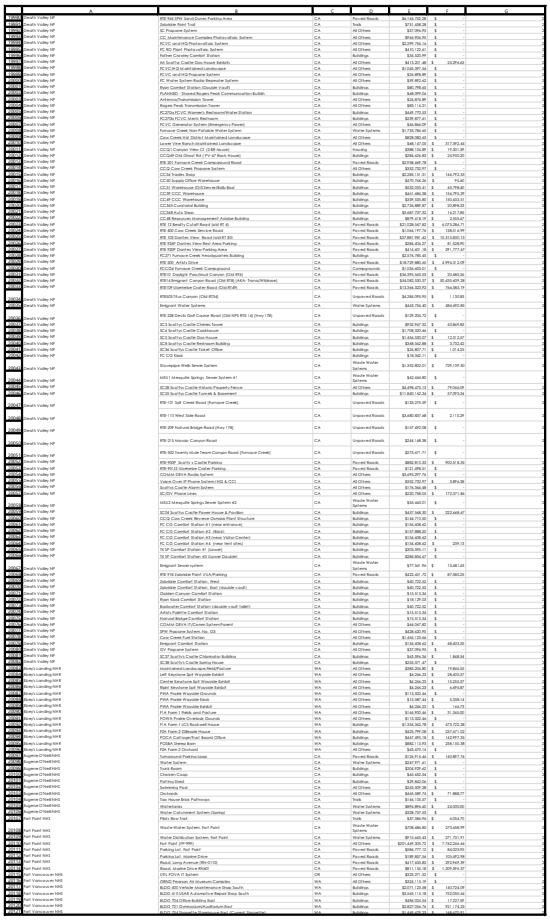

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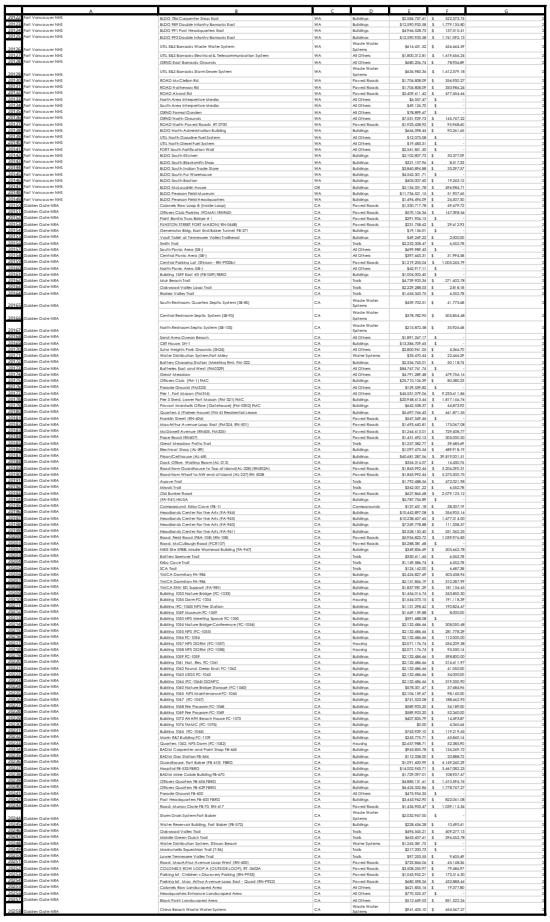

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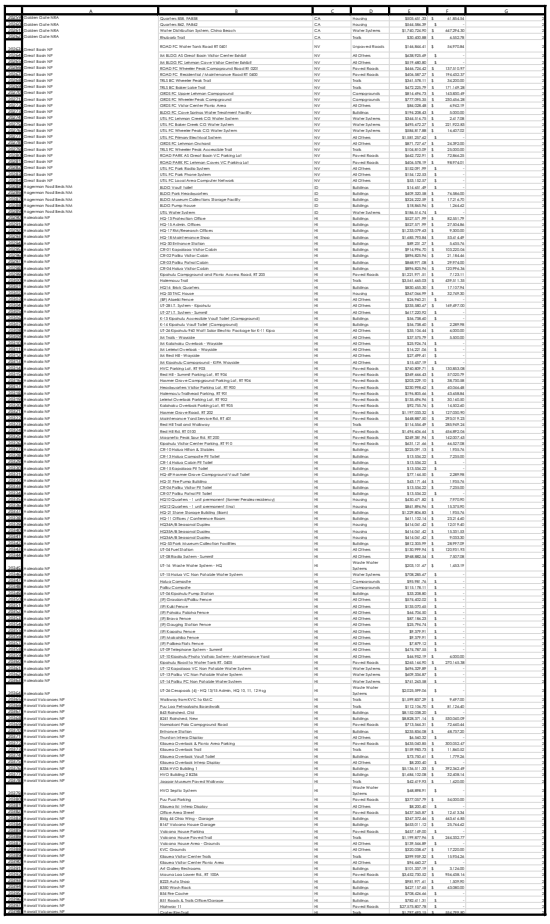

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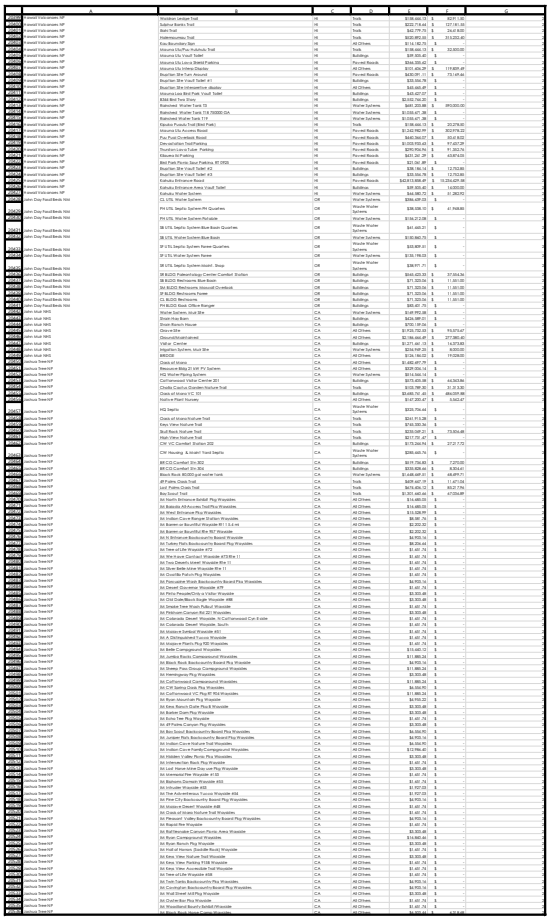

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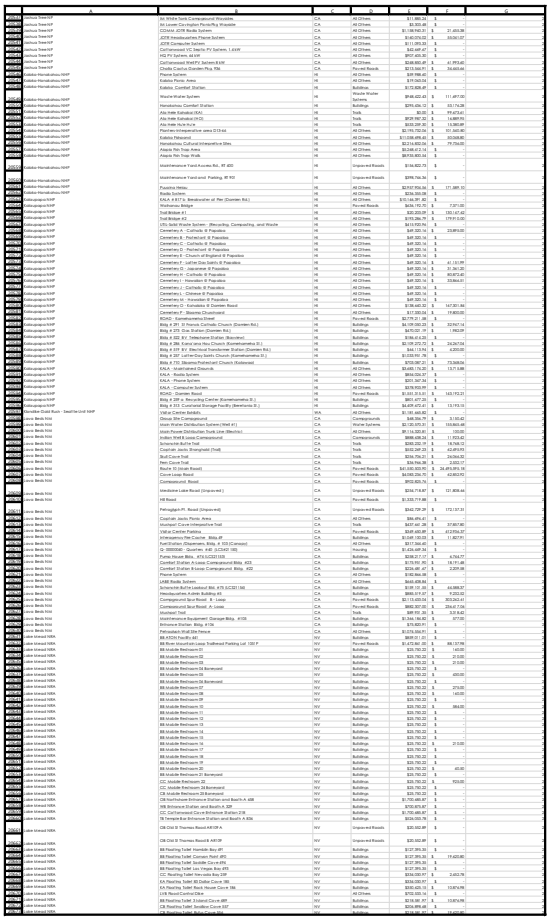

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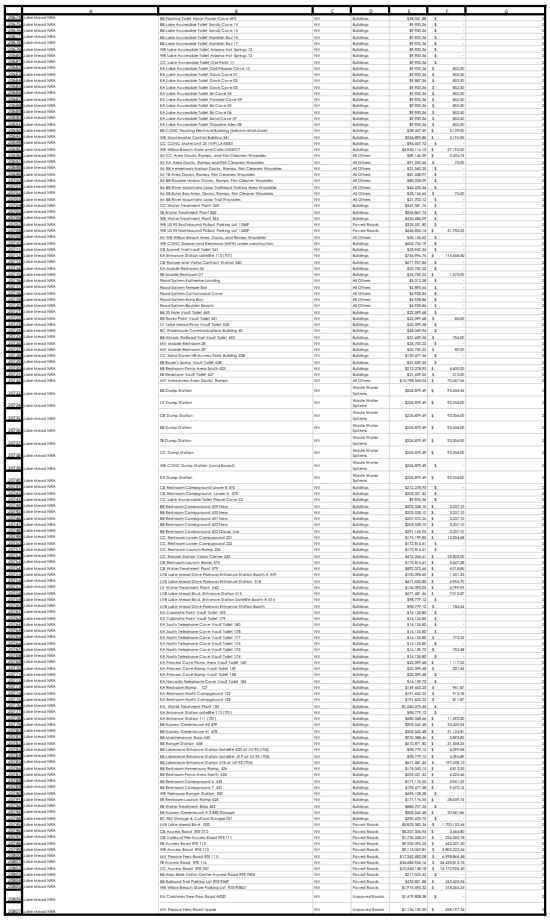

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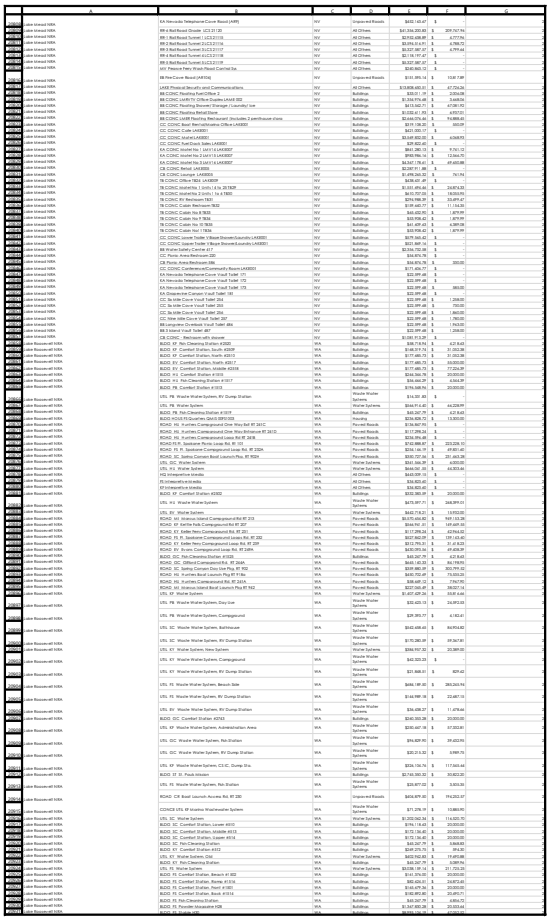

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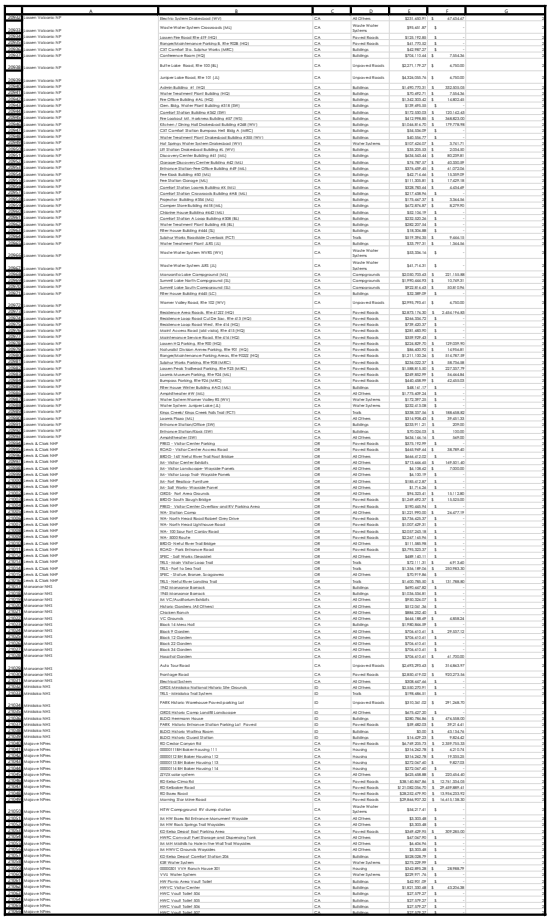

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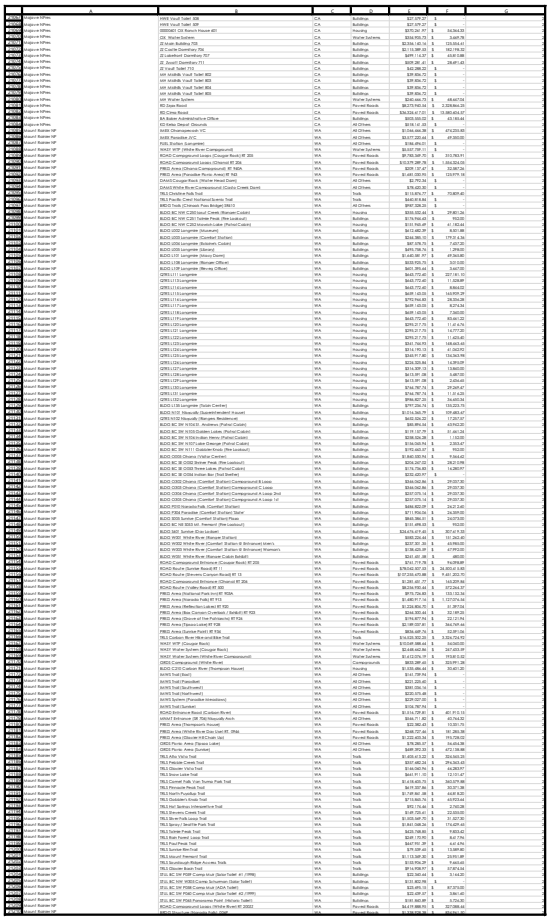

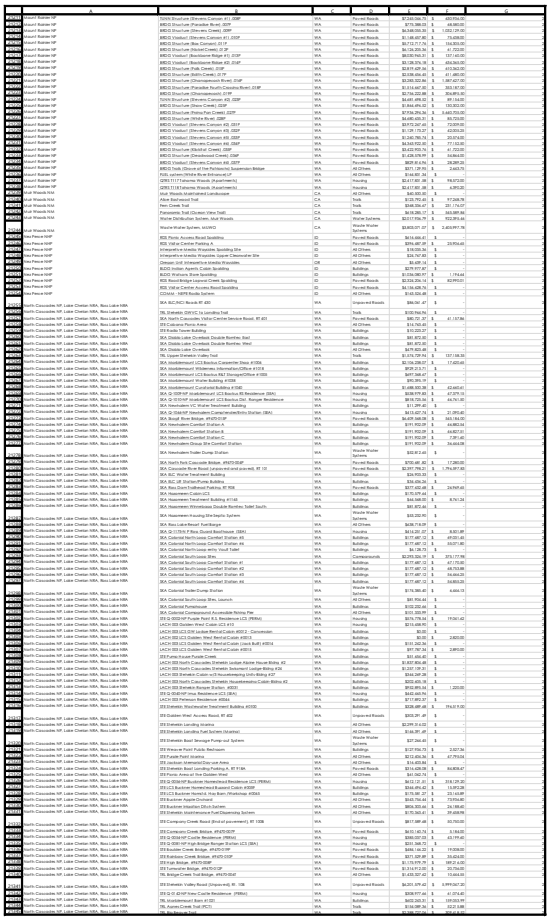

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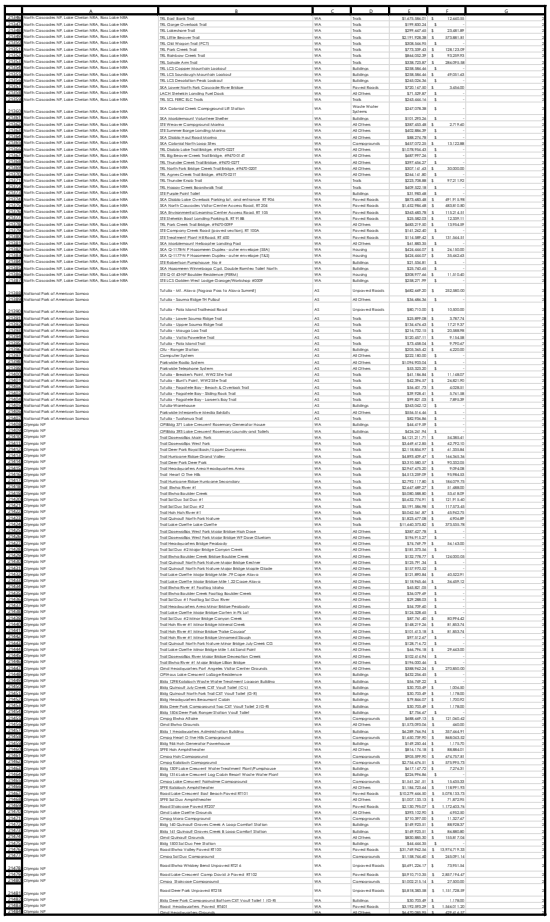

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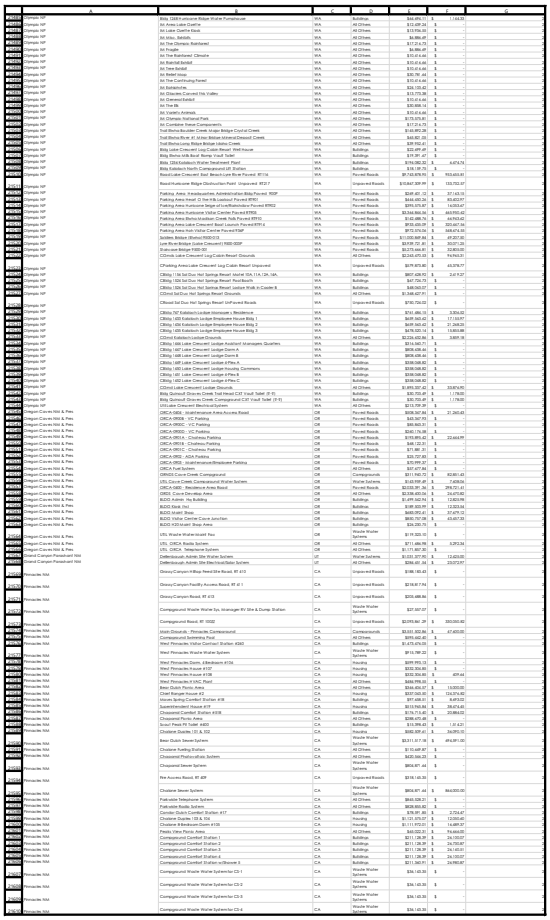

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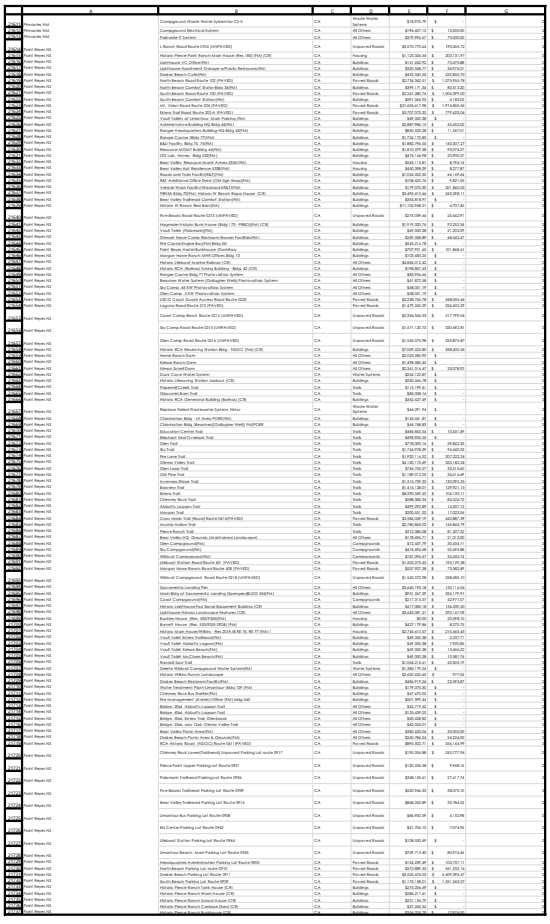

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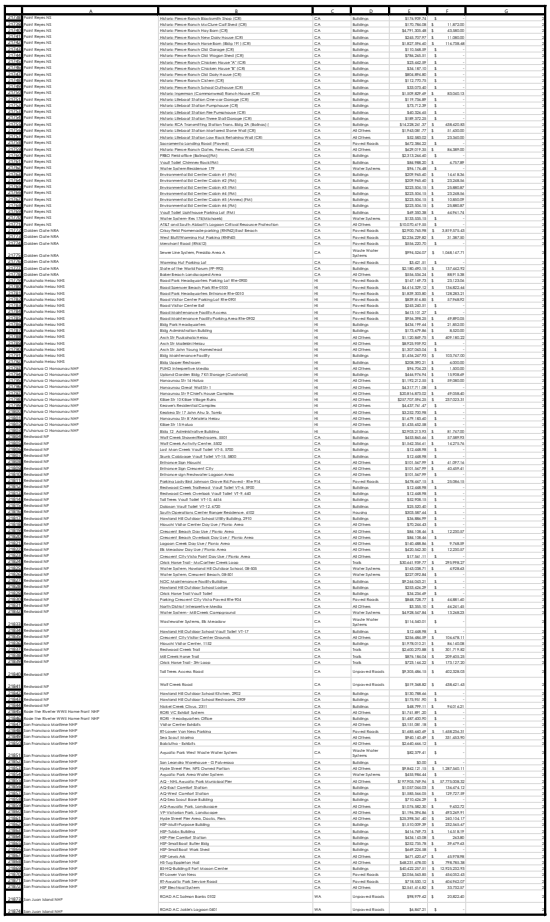

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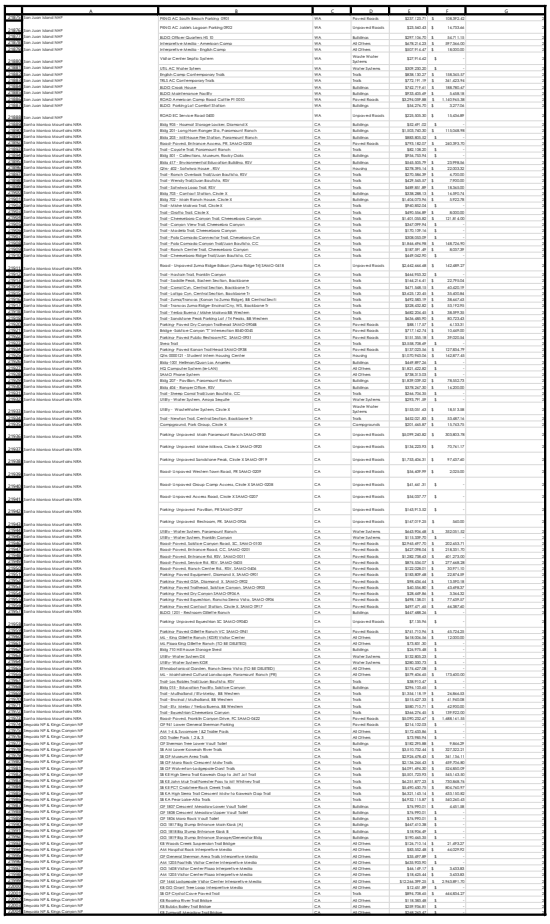

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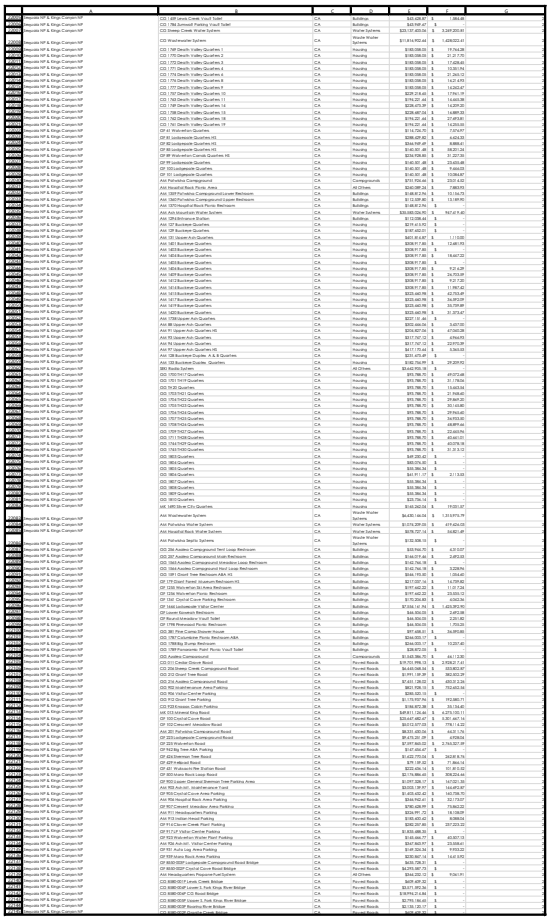

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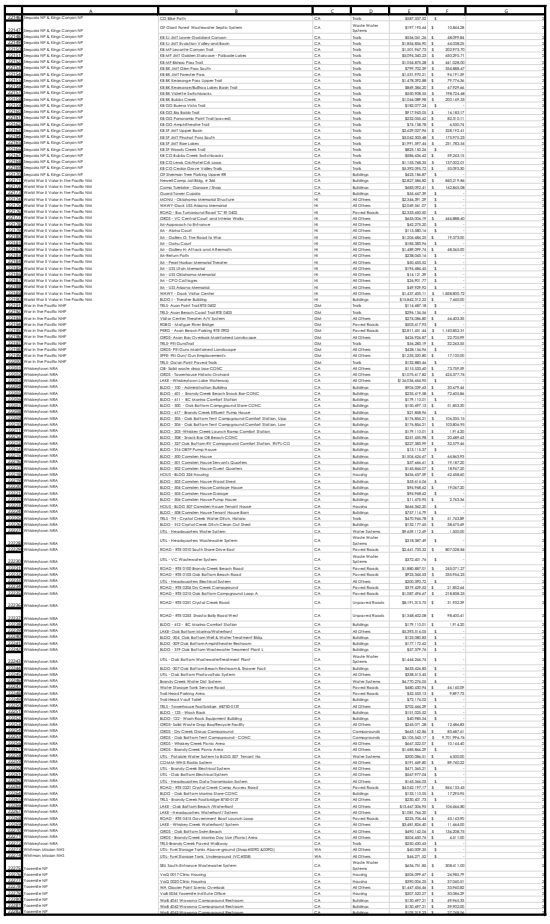

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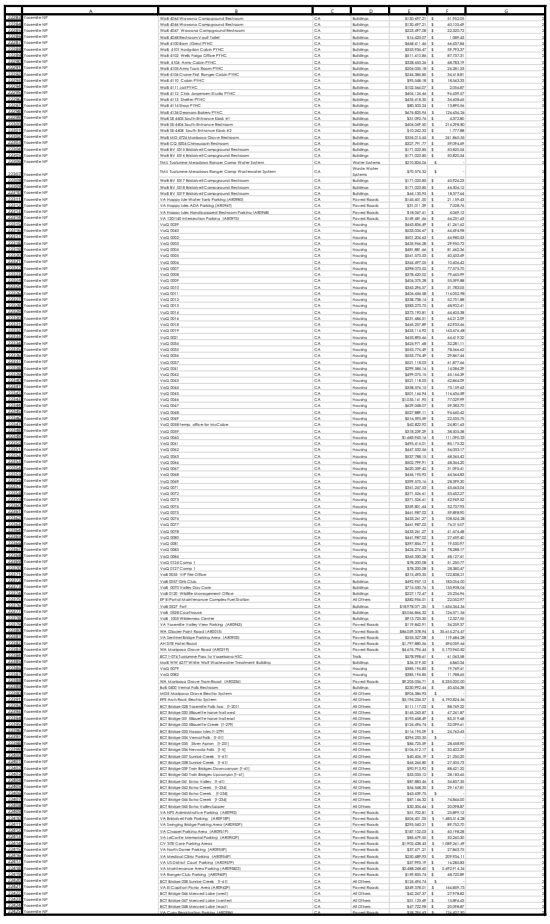

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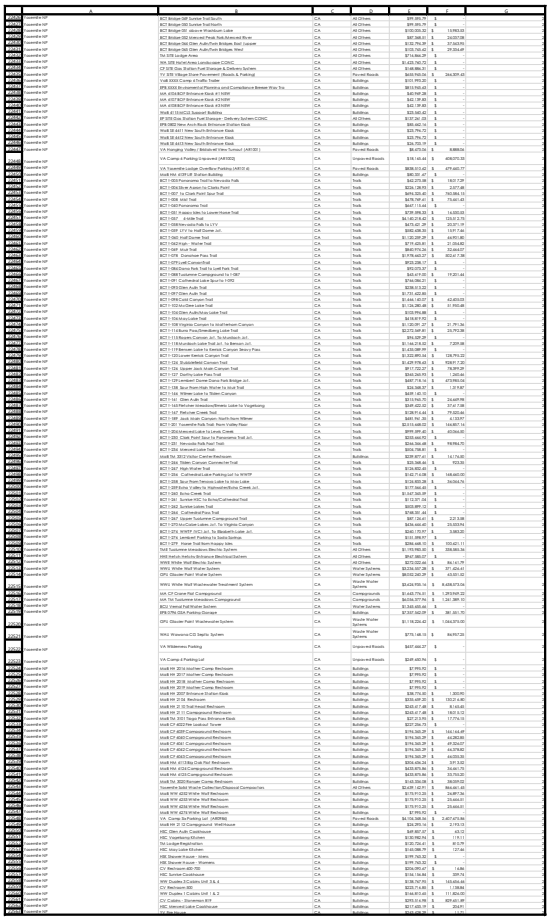

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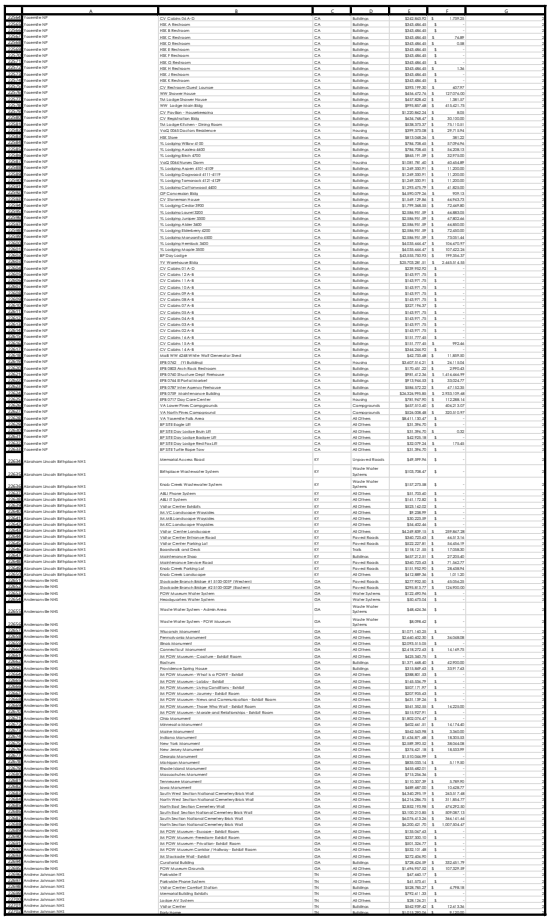

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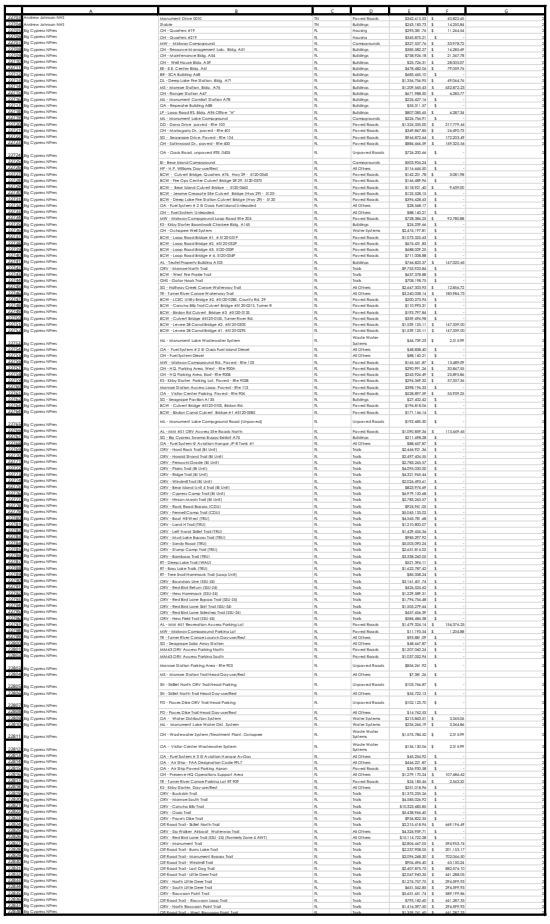

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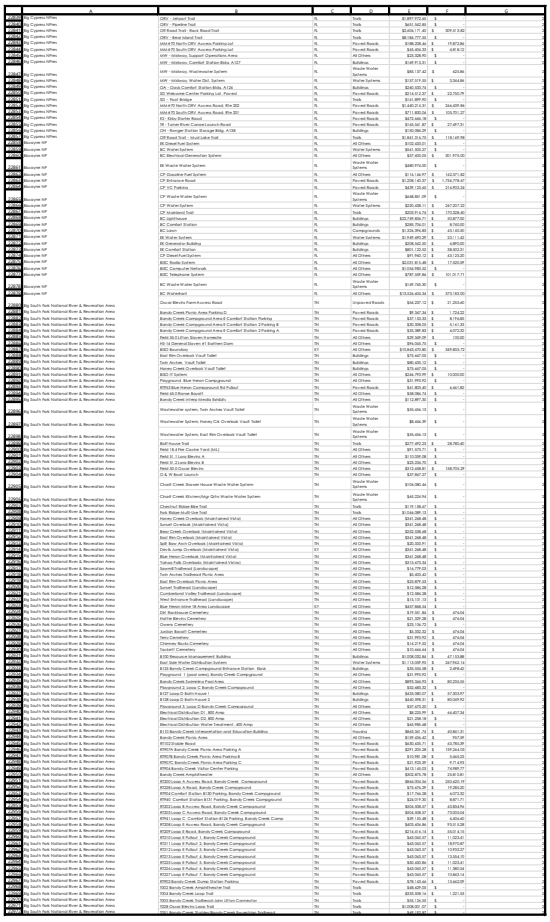

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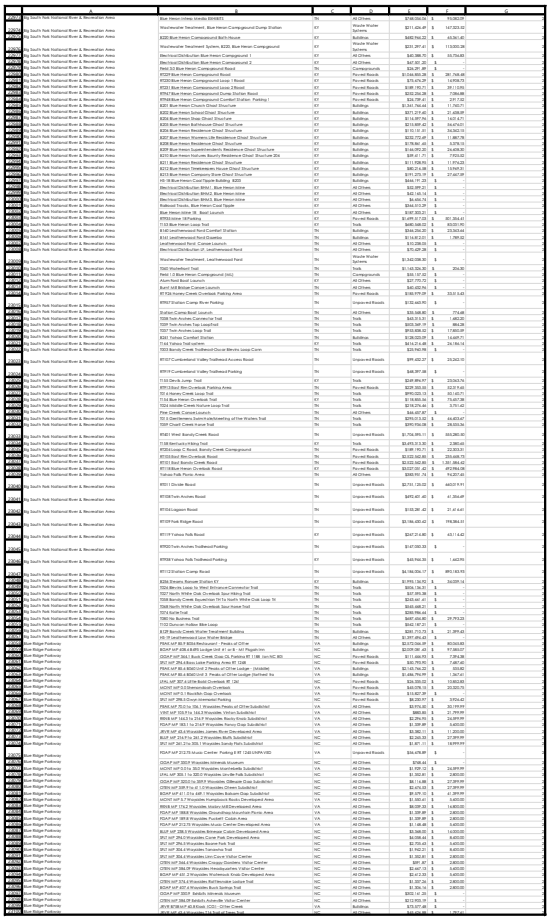

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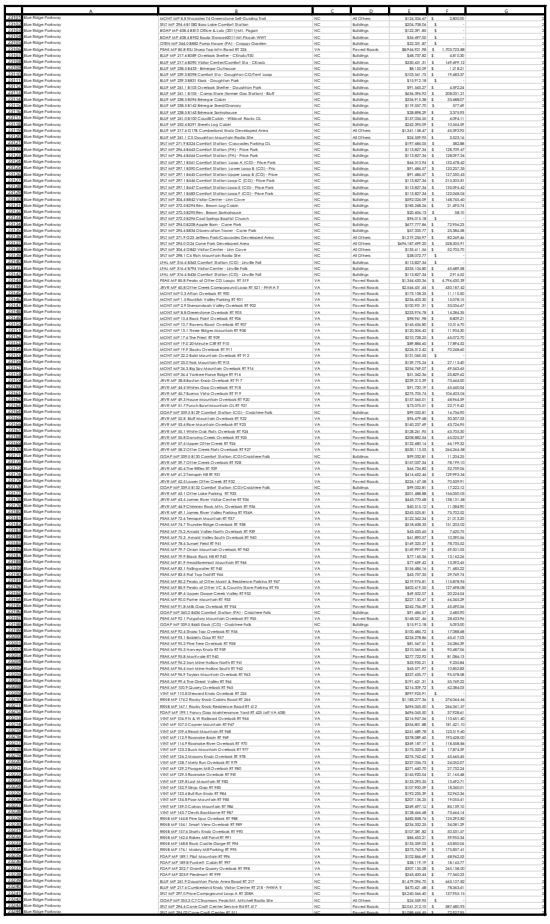

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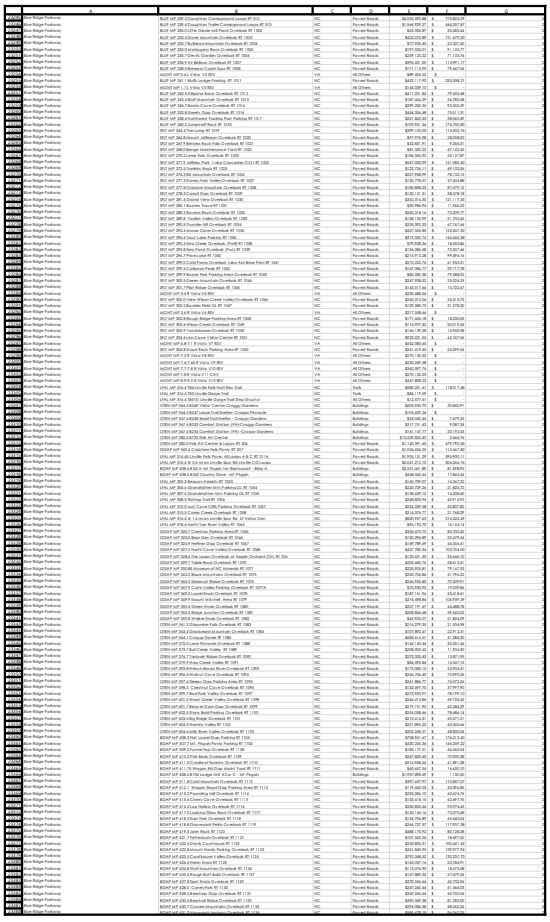

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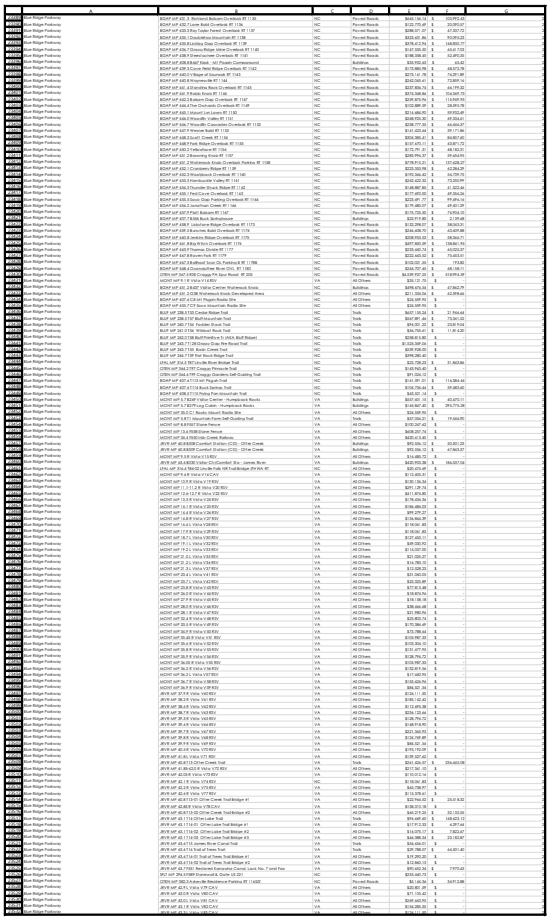

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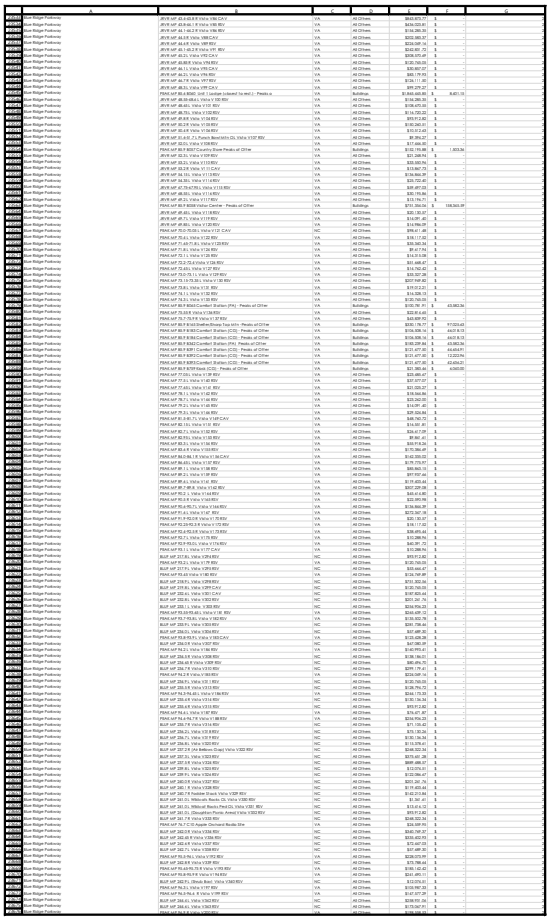

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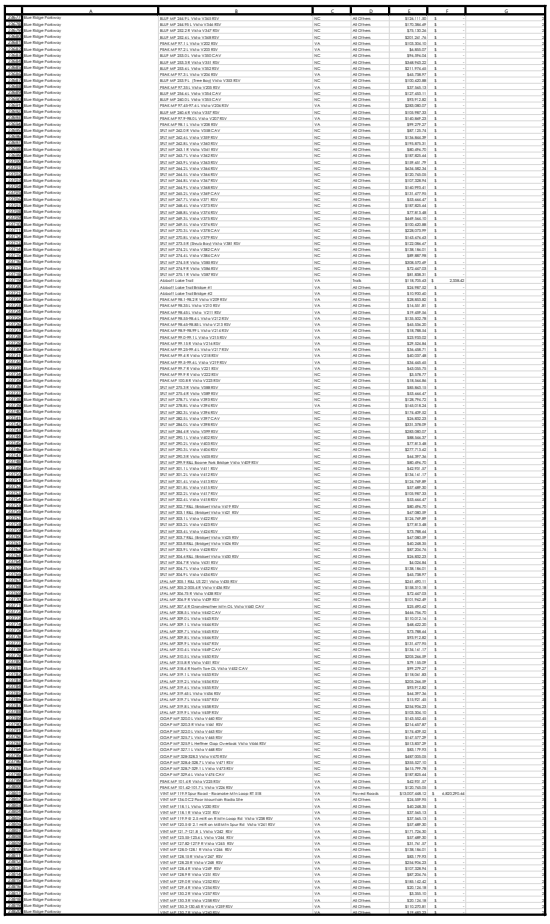

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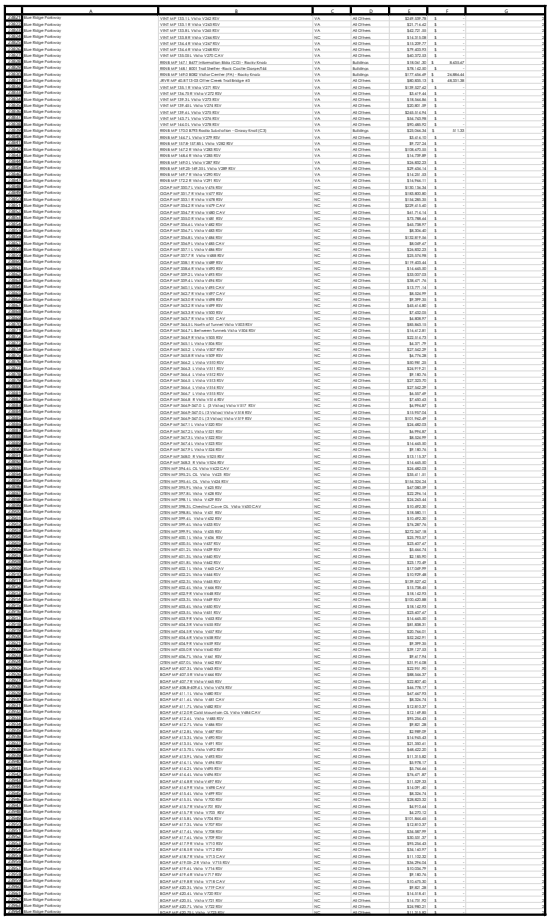

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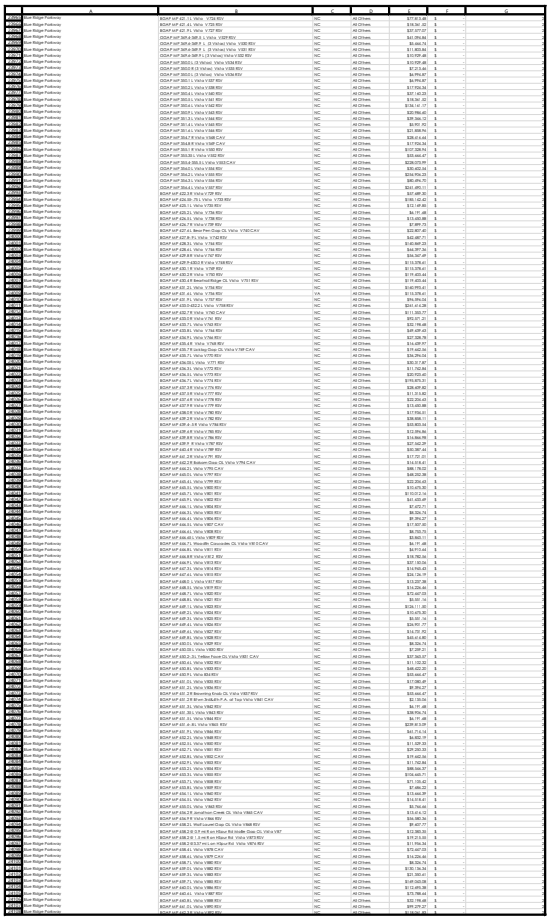

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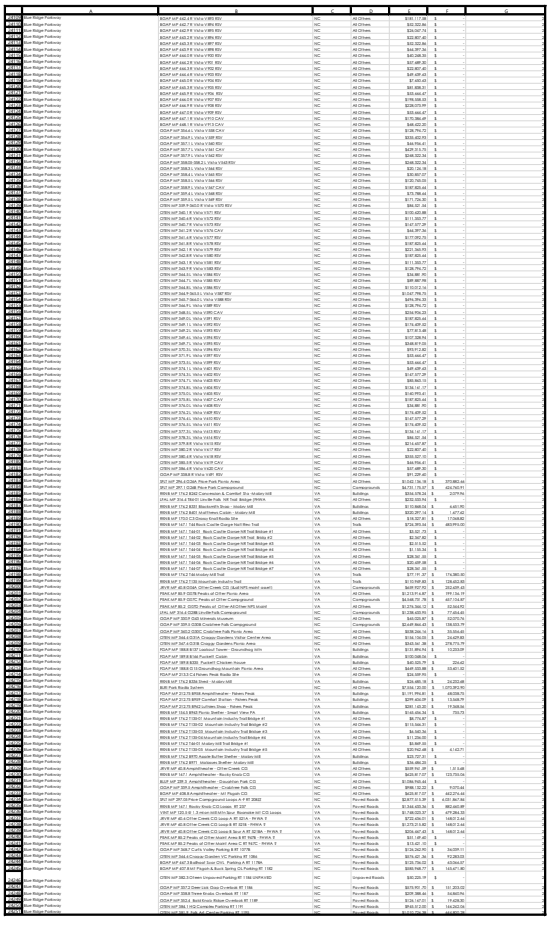

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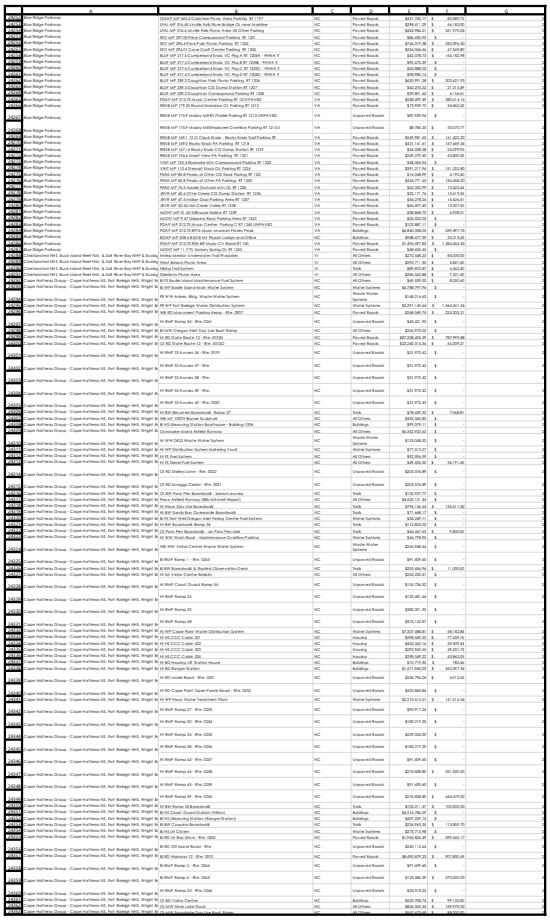

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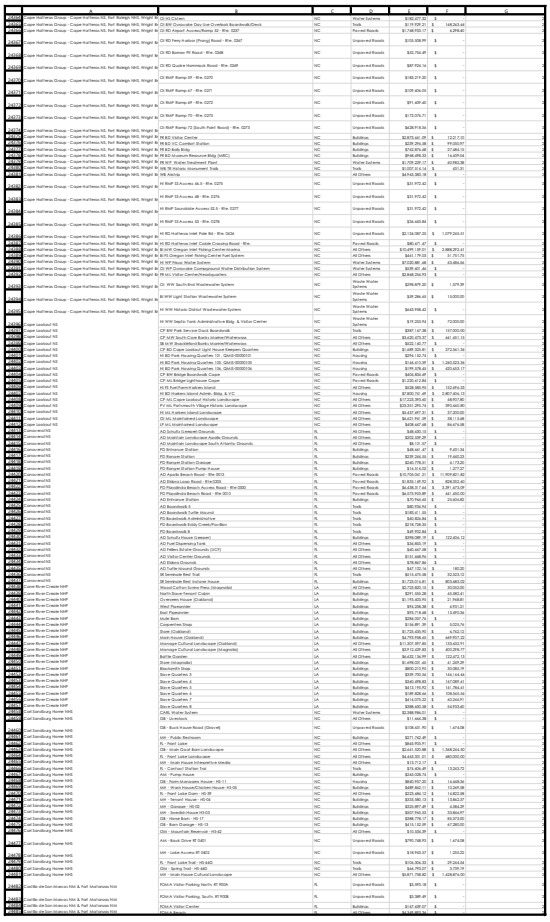

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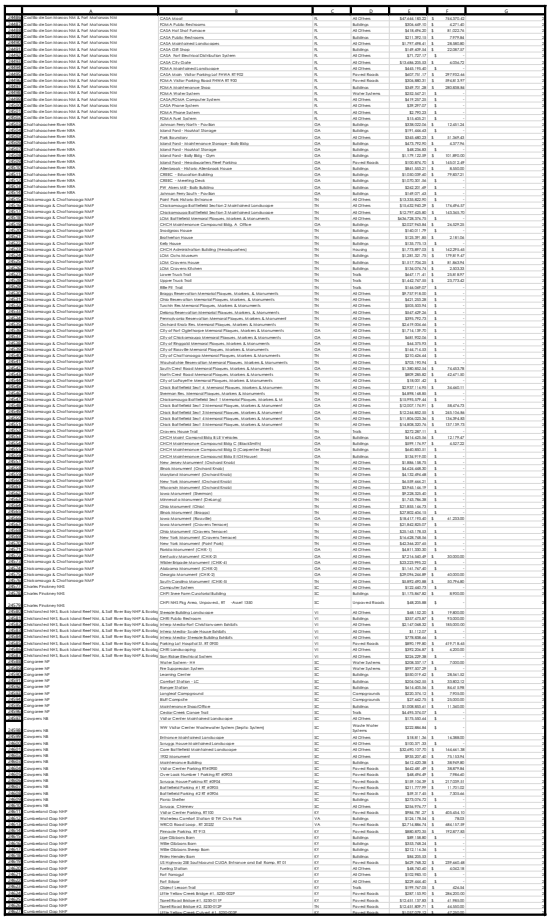

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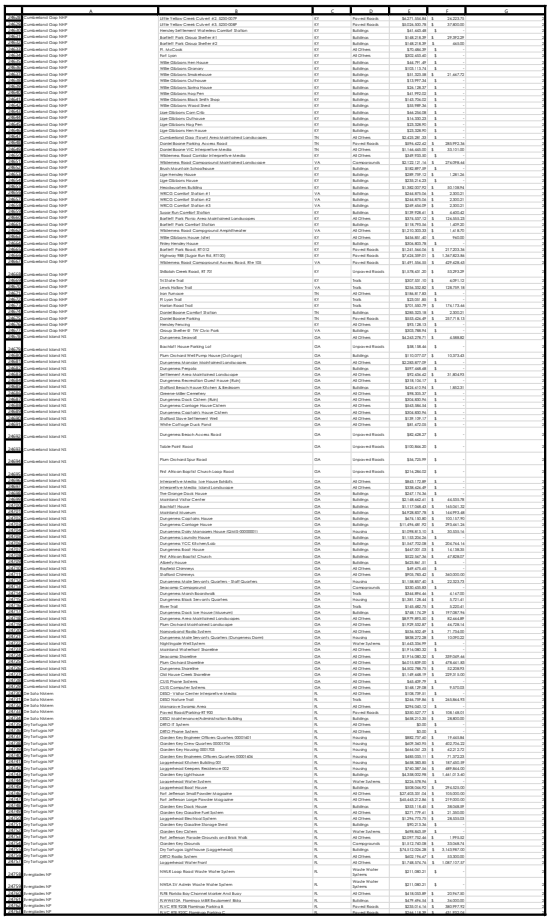

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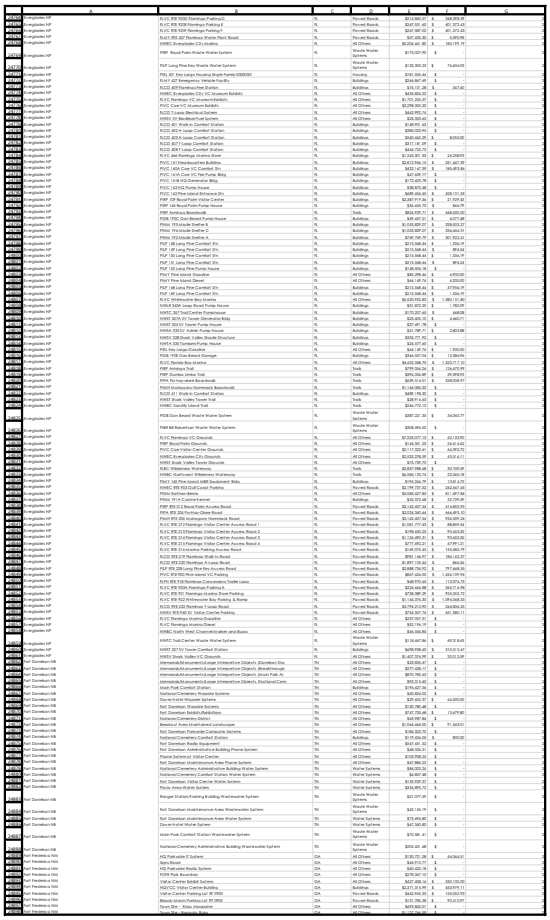

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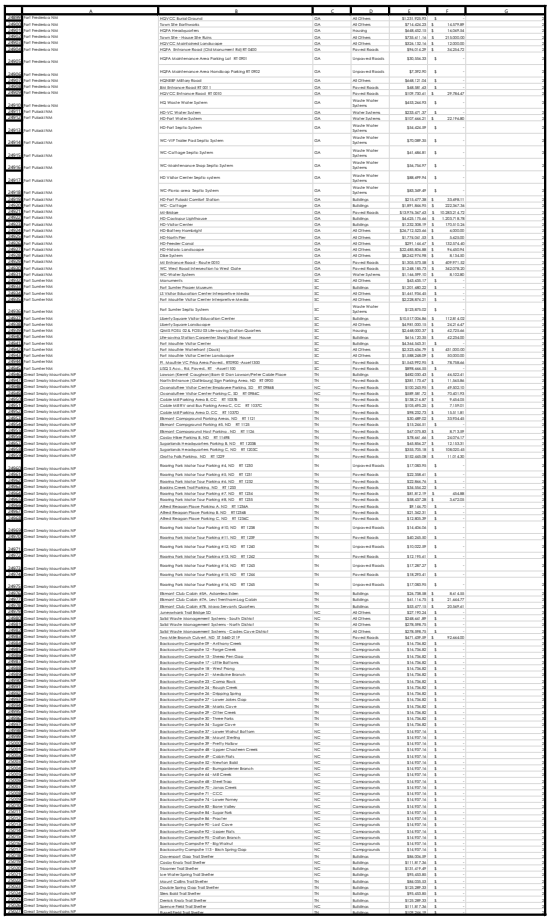

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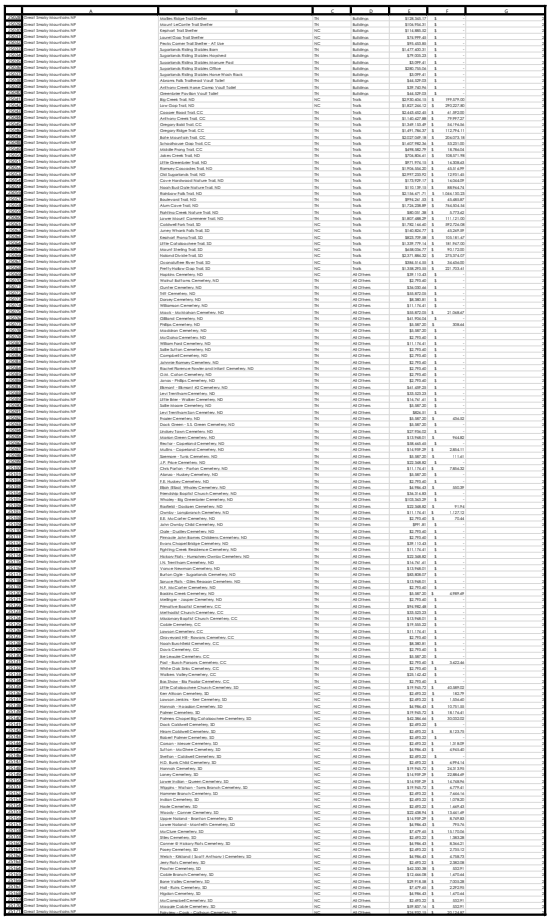

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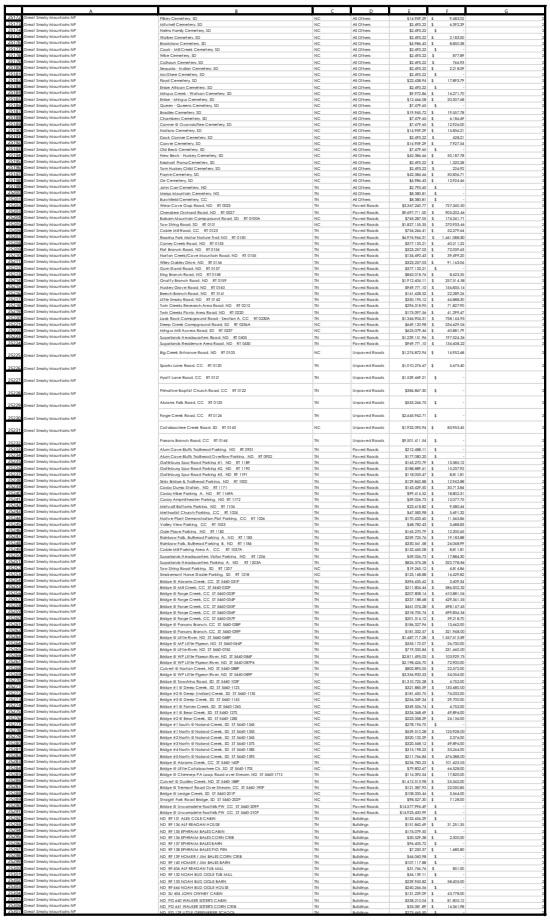

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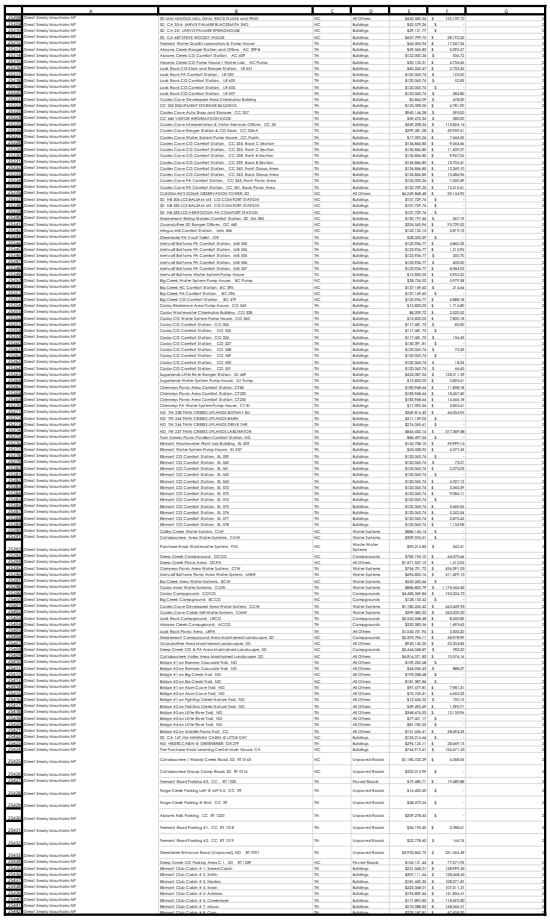

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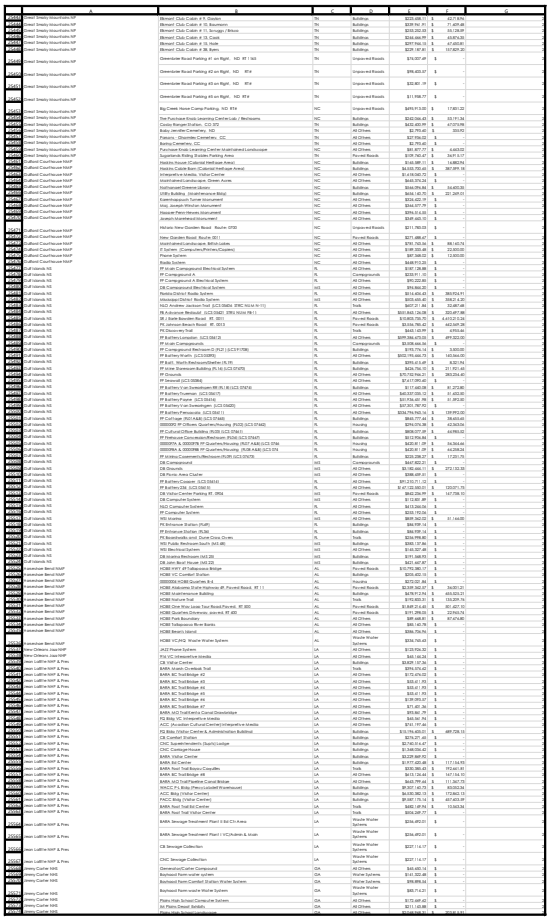

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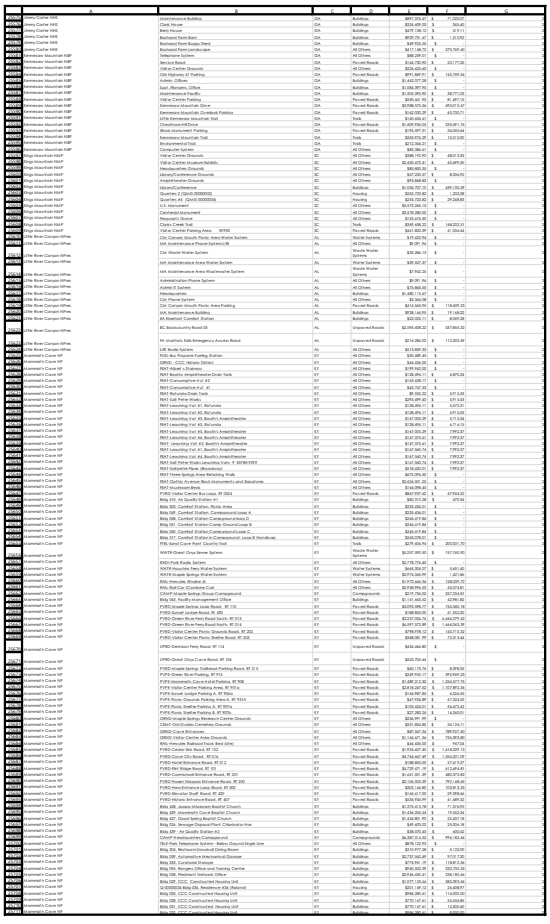

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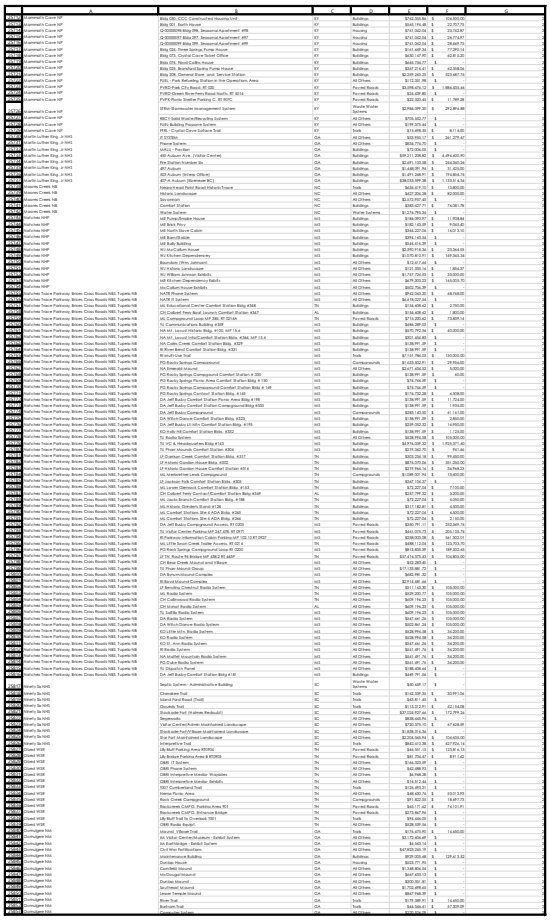

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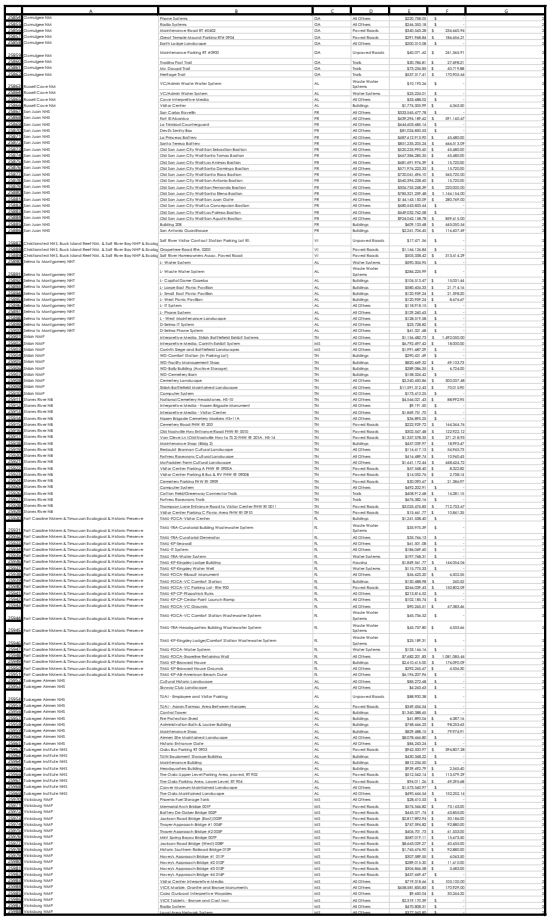

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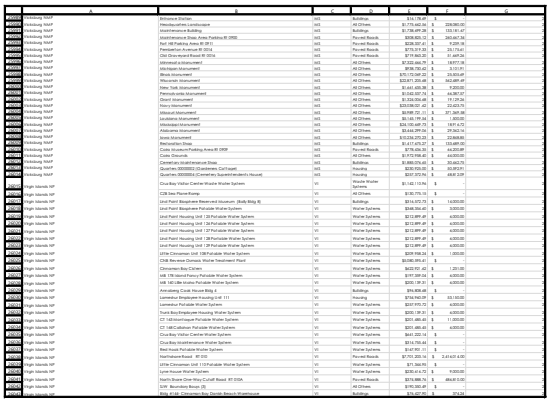

	A	B	C	D	E	F	G
46000	Kirkbilsig WAF	Alchemist Shelter	M3	Buildings	$ 54,178.87	$ -	
46001	Kirkbilsig WAF	Headquarters Landscape	M3	All Others	$ 2,775,340.34	$ 229,560.00	
46002	Kirkbilsig WAF	Maintenance Building	M3	Buildings	$ 1,736,497.26	$ 153,161.47	
46003	Kirkbilsig WAF	Maintenance Shed, Arabs Padding 80 DRB	M3	Paved Roads	$ 936,825.12	$ 240,647.34	
46004	Kirkbilsig WAF	Rail -NB Parking Area 80 DR 01	M3	Paved Roads	$ 228,337.41	$ 9,295.38	
46005	Kirkbilsig WAF	Pemberton Avenue 80 DR 04	M3	Paved Roads	$ 775,317.30	$ 29,175.61	
46006	Kirkbilsig WAF	Old Chrysanth Road 80 DR 04	M3	Paved Roads	$ 219,845.25	$ 51,645.24	
46007	Kirkbilsig WAF	Memorial Monument	M3	All Others	$ 2,120,466.75	$ 19,917.56	
46008	Kirkbilsig WAF	Michigan Monument	M3	All Others	$ 936,750.42	$ 3,131.91	
46009	Kirkbilsig WAF	Texas Monument	M3	All Others	$ 1,267,911.00	$ 5,000.00	
46010	Kirkbilsig WAF	Wisconsin Monument	M3	All Others	$ 24,971,205.48	$ 642,685.48	
46011	Kirkbilsig WAF	New York Monument	M3	All Others	$ 1,443,489.36	$ 9,200.00	
46012	Kirkbilsig WAF	Peninsula Arms Monument	M3	All Others	$ 2,542,597.74	$ 44,967.47	
46013	Kirkbilsig WAF	Grant Monument	M3	All Others	$ 1,339,554.66	$ 19,129.34	
46014	Kirkbilsig WAF	Navy Monument	M3	All Others	$ 29,539,597.40	$ 22,423.75	
46015	Kirkbilsig WAF	Missouri Monument	M3	All Others	$ 4,598,721.11	$ 371,365.36	
46016	Kirkbilsig WAF	Louisiana Monument	M3	All Others	$ 2,185,795.84	$ 1,600.00	
46017	Kirkbilsig WAF	Mississippi Monument	M3	All Others	$ 24,105,449.75	$ 7,871.42	
46018	Kirkbilsig WAF	Alabama Monument	M3	All Others	$ 1,111,111.00	$ 1,111.11	
46019	Kirkbilsig WAF	Fleets Entertainment	M3	All Others	$ 6,556,275.23	$ 23,868.80	
46020	Kirkbilsig WAF	Reclamation Shop	M3	Buildings	$ 1,417,475.27	$ 133,489.00	
46021	Kirkbilsig WAF	Cable Museum Padding Arena 80 DRP	M3	Paved Roads	$ 778,439.39	$ 44,200.89	
46022	Kirkbilsig WAF	Cuies Grounds	M3	All Others	$ 1,772,768.40	$ 44,000.00	
46023	Kirkbilsig WAF	Cemetrium Maintenance Shop	M3	Buildings	$ 2,989,579.45	$ 33,642.75	
46024	Kirkbilsig WAF	Quarters 00000002 (Caretakers Cot house)	M3	Housing	$ 230,103.00	$ 33,972.01	
46025	Kirkbilsig WAF	Quarters 00000003 (Cemetery Superintendent's House)	M3	Housing	$ 247,372.74	$ 48.61 3.09	
46026		Cruz Bay Visitor Center Waste Water System	VI	Waste Water Systems	$ 1,142,110.74	$ -	
46027	Virgin Islands NP	CCB Sea Plane Ramp	VI	All Others	$ 56,775.72	$ -	
46028	Virgin Islands NP	Und Point Biosphere Reserved Museum (Molly Bldg 8)	VI	Buildings	$ 914,472.75	$ 14,000.00	
46029	Virgin Islands NP	Und Point Biosphere Potable Water System	VI	Water Systems	$ 948,356.40	$ 3,000.00	
46030	Virgin Islands NP	Und Point Housing Unit 126 Potable Water Systems	VI	Water Systems	$ 212,899.49	$ 4,000.00	
46031	Virgin Islands NP	Und Point Housing Unit 134 Potable Water Systems	VI	Water Systems	$ 212,899.49	$ 4,000.00	
46032	Virgin Islands NP	Und Point Housing Unit 137 Potable Water Systems	VI	Water Systems	$ 212,899.49	$ 4,000.00	
46033	Virgin Islands NP	Und Point Housing Unit 138 Potable Water Systems	VI	Water Systems	$ 212,899.49	$ 4,000.00	
46034	Virgin Islands NP	Und Point Housing Unit 139 Potable Water Systems	VI	Water Systems	$ 212,899.49	$ 4,000.00	
46035	Virgin Islands NP	Little Cinnamon Unit 136 Potable Water Systems	VI	Water Systems	$ 209,158.34	$ 1,000.00	
46036	Virgin Islands NP	Cliff Reverse Osmosis Water Treatment Plant	VI	Water Systems	$ 2,595,385.41	$ -	
46037	Virgin Islands NP	Cinnamon Bay Cistern	VI	Water Systems	$ 420,151.42	$ 1,251.00	
46038	Virgin Islands NP	MB 139 Island Fancy Potable Water System	VI	Water Systems	$ 197,397.04	$ 4,000.00	
46039	Virgin Islands NP	MB 140 Little Water Potable Water System	VI	Water Systems	$ 200,139.31	$ 4,000.00	
46040	Virgin Islands NP	Ambulance Comb House Bldg 4	VI	Buildings	$ 84,606.48	$ -	
46041	Virgin Islands NP	Lameshur Employee Housing Unit 111	VI	Housing	$ 744,940.09	$ 63,150.00	
46042	Virgin Islands NP	Lameshur Potable Water System	VI	Water Systems	$ 247,970.72	$ 4,000.00	
46043	Virgin Islands NP	Trunk Bay Employee Housing Water System	VI	Water Systems	$ 200,139.31	$ 4,000.00	
46044	Virgin Islands NP	CT 128 Hurricane Portable Water System	VI	Water Systems	$ 201,480.40	$ 11,250.00	
46045	Virgin Islands NP	CT 146 Caribbean Portable Water System	VI	Water Systems	$ 201,480.40	$ 4,000.00	
46046	Virgin Islands NP	Cruz Bay Visitor Center Water System	VI	Water Systems	$ 640,222.14	$ -	
46047	Virgin Islands NP	Cruz Bay Maintenance Water System	VI	Water Systems	$ 514,750.44	$ -	
46048	Virgin Islands NP	Red Hook Portable Water System	VI	Water Systems	$ 147,167.11	$ -	
46049	Virgin Islands NP	Northshore Road - RT 104	VI	Paved Roads	$ 2,703,255.14	$ 2,414,67 4.00	
46050	Virgin Islands NP	Little Cinnamon Unit 113 Potable Water System	VI	Water Systems	$ 71,164.76	$ -	
46051	Virgin Islands NP	Lime House Water System	VI	Water Systems	$ 238,414.73	$ 9,000.00	
46052	Virgin Islands NP	North Shore One-Way Cutoff Road RT 01DA	VI	Paved Roads	$ 574,988.74	$ 484.81 0.00	
46053	Virgin Islands NP	VIP Boundary Recon 20	VI	All Others	$ 190,383.81	$ -	
46054	Virgin Islands NP	Bldg #132 Cinnamon Bay Double Bench Warehouse	VI	Buildings	$ 74,227.82	$ 214.52	

To: Jorjani, Daniel[daniel_jorjani@ios.doi.gov]
Cc: Foster, Maureen[maureen_foster@ios.doi.gov]; Virginia Johnson[virginia_johnson@ios.doi.gov]; Casey Hammond[casey_hammond@ios.doi.gov]; Jim Kurth[jim_kurth@fws.gov]; Navaro, Ann[ann.navaro@sol.doi.gov]
From: Frazer, Gary
Sent: 2017-03-14T16:19:30-04:00
Importance: Normal
Subject: Re: Mitigation Policy
Received: 2017-03-14T16:20:03-04:00
FWS Mitigation Policy.pdf
ESA Compensatory Mitigation Policy.pdf

Dan -- Here you go. And FYI, I also sent these both to Jim Cason a couple weeks ago, at his request. Let me know if you have any questions or want to discuss further.
I'll pass on your question about an MBTA stepdown to Jerome Ford. -- GDF

Gary Frazer
Assistant Director -- Ecological Services
U.S. Fish and Wildlife Service
(202) 208-4646

On Tue, Mar 14, 2017 at 1:02 PM, Jorjani, Daniel <daniel_jorjani@ios.doi.gov> wrote:

> Gary -
> When you have a chance, please send me a copy of - or link to - the overarching FWS Mitigation Policy, first established in 1981 and for which revisions were finalized in November of last year. It is the one that applies to all FWS program areas that are engaged in mitigation in some way.
>
> If possible, please also send the ESA Compensatory Mitigation Policy, which updates the 2003 conservation banking guidance and provides policy direction to ensure that all forms of mitigation considered under the ESA are held to equivalent standards. I understand that there is not MBTA stepdown to date, but would welcome learning more about that possibility.
>
> No rush on any of this and I hope you get a chance to enjoy the snow.
>
> Best wishes,
>
> Dan

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2015–0126; FXHC11220900000–156–FF09E33000]

U.S. Fish and Wildlife Service Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of final policy.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce revisions to our Mitigation Policy, which has guided Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants, and their habitats since 1981. The revisions are motivated by changes in conservation challenges and practices since 1981, including accelerating loss of habitats, effects of climate change, and advances in conservation science. The revised Policy provides a framework for applying a landscape-scale approach to achieve, through application of the mitigation hierarchy, a net gain in conservation outcomes, or at a minimum, no net loss of resources and their values, services, and functions resulting from proposed actions. The primary intent of the Policy is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales.

DATES: This Policy is effective on November 21, 2016.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this Policy, including an environmental assessment, are available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2442.

SUPPLEMENTARY INFORMATION: The revised Policy integrates all authorities that allow the Service either to recommend or to require mitigation of impacts to Federal trust fish and wildlife resources, and other resources identified in statute, during development processes. It is intended to serve as a single umbrella policy under which the Service may issue more detailed policies or guidance documents covering specific activities in the future. Citations for the many statutes and other authorities referenced in this document are in Appendix A.

Background

The primary intent of revising the 1981 Mitigation Policy (1981 Policy) is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales, consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013), and the Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015). Within this context, our revisions of the 1981 Policy: (a) Clarify that this Policy addresses all resources for which the Service has authorities to recommend mitigation for impacts to resources; and (b) provide an updated framework for applying mitigation measures that will maximize their effectiveness at multiple geographic scales.

By memorandum, the President directed all Federal agencies that manage natural resources to avoid and minimize damage to natural resources and to effectively offset remaining impacts, consistent with the principles declared in the memorandum and existing statutory authority. Under the memorandum, all Federal mitigation policies shall clearly set a net benefit goal or, at minimum, a no net loss goal for natural resources, wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resource objectives. This Policy implements the President's directions for the Service.

Secretarial Order 3330 established a Department-wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure development projects and in conserving natural and cultural resources. The Order charged the Department's Energy and Climate Change Task Force with developing a report that addresses how to best implement consistent, Department-wide mitigation practices and strategies. The report of the Task Force, ''A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior'' (April 2014), describes guiding principles for mitigation to improve process efficiency, including the use of landscape-scale approaches rather than project-by-project or single-resource mitigation approaches. This revision of the Service's Mitigation Policy complies with a deliverable identified in the Strategy that seeks to implement the guiding principles set forth in the Secretary's Order, the corresponding Strategy, and subsequent 600 DM 6.

In 600 DM 6, the Department of the Interior established policy intended to improve permitting processes and help achieve beneficial outcomes for project proponents, affected communities, and the environment. By implementing this Manual Chapter, the Department will:

(a) Effectively mitigate impacts to Department-managed resources and their values, services, and functions;

(b) provide project developers with added predictability and efficient and timely environmental reviews;

(c) improve the resilience of resources in the face of climate change;

(d) encourage strategic conservation investments in lands and other resources; increase compensatory mitigation effectiveness, durability, transparency, and consistency; and

(e) better utilize mitigation measures to help achieve Departmental goals.

The final Policy implements the Department's directions for the Service. As with the 1981 Policy, the Service intends, with this revision, to conserve, protect, and enhance fish, wildlife, plants, and their habitats for future generations. Effective mitigation is a powerful tool for furthering this mission.

Changes From the Draft Policy

This final Policy differs from the proposed revised Policy in a few substantive respects, which we list below, and contains many editorial changes in response to comments we received that requested greater clarity of expression regarding various aspects of the Policy purpose, authorities, scope, general principles, framework for formulating mitigation measures, and definitions. The most common editorial change to the final Policy addresses the concern that the proposed revised Policy was unclear regarding the Service's authorities to either recommend or require mitigation. The proposed revised Policy frequently used the phrase ''recommend or require'' as a general descriptor for Service-formulated mitigation measures, because we have authority to require mitigation in some contexts, but not in others. The final Policy adds new text to the Authority section that identifies those circumstances under which we have specific authority to require, consistent with other applicable laws and regulations, one or more forms of

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mitigation for impacts to fish and wildlife resources.

This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation, but the Policy cannot and does not alter or substitute for the regulations implementing any of our authorities. We summarize below the few substantive changes to the proposed revised Policy, listed by section.

In section 4 of the Policy, General Policy and Principles, we added a principle to emphasize the importance of the avoidance tier of the mitigation hierarchy. This new principle reinforces existing direction in the proposed revised Policy that Service staff will recommend avoidance of all impacts to high-value habitats as the only effective means of mitigating impacts at these locations.

In section 5.5, Habitat Valuation, we clarify that habitats of ''high-value'' to an evaluation species are scarce and of high suitability and high importance. As with the proposed revised Policy, the final Policy directs Service personnel to seek avoidance of all impacts to high-value habitats.

In section 5.6.3, Compensation, we added a paragraph that describes onsite compensation and distinguishes it from rectifying impacts. We added another paragraph that indicates how third parties may assume the responsibilities for implementing proponent-responsible compensation. Other revisions to this section are editorial in nature, intended to better communicate Service intentions about the use of compensation in mitigating impacts to species. These revisions include reorganizing material into new subsections at 5.6.3.1, Equivalent Standards, and at 5.6.3.2, Research and Education.

In section 6, Definitions, we added definitions for ''baseline'' and ''habitat credit exchange'' and modified the definition of ''practicable.''

In Appendix A, Authorities and Direction for Service Mitigation Recommendations, we updated the listed authorities, regulations, and guidance documents where necessary. To better reflect their relationship with this Policy and to respond to comments received, we have modified the discussions of the Bald and Golden Eagle Protection Act, Clean Water Act, Fish and Wildlife Conservation Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, and Natural Resource Damage Assessment and Restoration processes.

We made clarifying edits and additions to Appendix C, Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service. We added a sentence in the first paragraph recognizing that the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as a match in the National Coastal Wetlands Conservation Program. In part B, we added ''the proposed use of mitigation funds on land acquired with Federal financial assistance'' as a common issue related to mitigation in financial assistance. In part G, we clarified the circumstances under which the Service can approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments. In part H, we revised the topic question from ''Can a mitigation proposal be located on land acquired under a Service financial assistance award?'' to ''Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?'' and revised the answer accordingly. We added a topic to those included in the proposed revised Policy at part I: ''Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?'' This addition describes the various circumstances in which this question is relevant.

Discussion

The Service's motivations for revising the 1981 Policy include:

- Accelerating loss, including degradation and fragmentation, of habitats and subsequent loss of ecosystem function since 1981;
- Threats that were not fully evident in 1981, such as effects of climate change, the spread of invasive species, and outbreaks of epizootic diseases, are now challenging the Service's conservation mission;
- The science of fish and wildlife conservation has substantially advanced in the past three decades;
- The Federal statutory, regulatory, and policy context of fish and wildlife conservation has substantially changed since the 1981 Policy; and
- A need to clarify the Service's definition and usage of mitigation in various contexts, including the conservation of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (ESA), which was expressly excluded from the 1981 Policy.

Mitigation Defined

In the context of impacts to environmental resources (including their values, services, and functions) resulting from proposed actions, ''mitigation'' is a general label for measures that a proponent takes to avoid, minimize, and compensate for such impacts. The 1981 Policy adopted the definition of mitigation in the Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) regulations (40 CFR 1508.20). The CEQ mitigation definition remains unchanged since codification in 1978 and states that ''Mitigation includes:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- compensating for the impact by replacing or providing substitute resources or environments.''

This definition is adopted in this Policy, and the use of its components in various contexts is clarified. In 600 DM 6, the Department of the Interior states that mitigation, as enumerated by CEQ, is compatible with Departmental policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts. The 1981 Policy further stated that the Service considers the sequence of the CEQ mitigation definition elements to represent the desirable sequence of steps in the mitigation planning process. The Service generally affirms this hierarchical approach in this Policy. We advocate first avoiding and then minimizing impacts that critically impair our ability to achieve conservation objectives for affected resources. We also provide guidance that recognizes how action- and resource-specific circumstances may warrant departures from the preferred mitigation sequence; for example, when impacts to a species may occur at a location that is not critical to achieving the conservation objectives for that species, or when current conditions are likely to change substantially due to the effects of a changing climate. In such

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circumstances, relying more on compensating for the impacts at another location may more effectively serve the conservation objectives for the affected resources. This Policy provides a logical framework for the Service to consistently make such choices.

Scope of the Revised Mitigation Policy

The Service's mission is to conserve, protect, and enhance fish, wildlife, and plants, and their habitats for the continuing benefit of the American people. This mission includes a responsibility to make mitigation recommendations or to specify mitigation requirements during the review of actions based on numerous authorities related to specific plant and animal species, habitats, and broader ecological functions. Our authorities to engage actions that may affect these resources extends to all U.S. States and territories, on public and on private property. This unique standing necessitates that we clarify our integrated interests and expectations when seeking mitigation for impacts to fish, wildlife, plants, and their habitats.

This Policy serves as overarching Service guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. In most cases, applications of this Policy are advisory. Service recommendations provided under the guidance of this Policy are intended to help action proponents incorporate appropriate means and measures into their actions that will most effectively conserve resources affected by those actions. As necessary and as budgetary resources permit, we intend to adapt or develop Service program-specific policies, handbooks, and guidance documents, consistent with the applicable statutes, to integrate the spirit and intent of this Policy.

New Threats and New Science

Since the publication of the Service's 1981 Policy, land use changes in the United States have reduced the habitats available to fish and wildlife. By 1982, approximately 72 million acres of the lower 48 States had already been developed. Between 1982 and 2012, the American people developed an additional 44 million acres for a total of 114 million acres developed. Of all historic land development in the United States, excluding Alaska, over 37 percent has occurred since 1982. Much of this newly developed land had been existing habitats, including 17 million acres converted from forests.

A projection that the U.S. population will increase from 310 million to 439 million between 2010 and 2050 suggests that land conversion trends like these will continue. In that period, development in the residential housing sector alone may add 52 million (42 percent more) units, plus 37 million replacement units. By 2060, a loss of up to 38 million acres (an area the size of Florida) of forest habitats alone is possible. Attendant pressures on remaining habitats will also increase fragmentation, isolation, and degradation through myriad indirect effects. The loss of ecological function will radiate beyond the extent of direct habitat losses. Given these projections, the near-future challenges for conserving species and habitats are daunting. As more lands and waters are developed for human uses, it is incumbent on the Service to help project proponents successfully and strategically mitigate impacts to fish and wildlife and prevent systemic losses of ecological function.

Accelerating climate change is resulting in impacts that pose a significant challenge to conserving species, habitat, and ecosystem functions. Climatic changes can have direct and indirect effects on species abundance and distribution, and may exacerbate the effects of other stressors, such as habitat fragmentation and diseases. The conservation of habitats within ecologically functioning landscapes is essential to sustaining fish, wildlife, and plant populations and improving their resilience in the face of climate change impacts, new diseases, invasive species, habitat loss, and other threats. Therefore, this Policy emphasizes the integration of mitigation planning with a landscape approach to conservation.

Over the past 30 years, the concepts of adaptive management (resource management decisionmaking when outcomes are uncertain) have gained general acceptance as the preferred science-based approach to conservation. Adaptive management is an iterative process that involves: (a) Formulating alternative actions to meet measurable objectives; (b) predicting the outcomes of alternatives based on current knowledge; (c) conducting research that tests the assumptions underlying those predictions; (d) implementing alternatives; (e) monitoring the results; and (f) using the research and monitoring results to improve knowledge and adjust actions and objectives accordingly. Adaptive management further serves the need of most natural resources managers and policy makers to provide accountability for the outcomes of their efforts, *i.e.,* progress toward achieving defensible and transparent objectives.

Working with many partners, the Service is increasingly applying the principles of adaptive management in a landscape approach to conservation. Mitigating the impacts of actions for which the Service has advisory or regulatory authorities continues to play a significant role in accomplishing our conservation mission under this approach. Our aim with this Policy is to align mitigation with conservation strategies at appropriate landscape scales so that mitigation most effectively contributes to achieving the conservation objectives we are pursuing with our partners, and to align mitigation recommendations and requirements with Secretarial Order 3330 and 600 DM.

A Focus on Habitat Conservation

Although many Service authorities pertain to specific taxa or groups of species, most specifically recognize that these resources rely on functional ecosystems to survive and persist for the continuing benefit of the American people. Mitigation is a powerful tool for sustaining species and the habitats upon which they depend; therefore, the Service's Mitigation Policy must effectively deal with impacts to the ecosystem functions, properties, and components that sustain fish, wildlife, plants, and their habitats. The 1981 Policy focused on habitat: ''the area which provides direct support for a given species, population, or community.'' It defined criteria for assigning the habitats of project-specific evaluation species to one of four resource categories, using a two-factor framework based on the relative scarcity of the affected habitat type and its suitability for the evaluation species, with mitigation guidelines for each category. We maintain a focus on habitats in this Policy by using evaluation species and a valuation framework for their affected habitats, because habitat conservation is still generally the best means of achieving conservation objectives for species. However, our revisions of the evaluation species and habitat valuation concepts are intended to address more explicitly the landscape context of species and habitat conservation to improve mitigation effectiveness and efficiency. In addition, we recognize that some situations warrant measures that are not habitat based to address certain species-specific impacts.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Applicability to the Endangered Species Act

The 1981 Policy did not apply to the conservation of species listed as threatened or endangered under the ESA. Excluding listed species from the 1981 Policy was based on: (a) A recognition that all Federal actions that could affect listed species and designated critical habitats must comply with the consultation provisions of section 7 of the ESA; and (b) a position that ''the traditional concept of mitigation'' did not apply to such actions. This Policy supersedes this exclusion for the Service. Mitigation, which we define in this Policy as measures to avoid, minimize, and compensate for impacts, is an essential means of achieving the overarching purpose of the ESA, which is to conserve listed species and the ecosystems upon which they depend.

Effective mitigation prevents or reduces further declines in populations and/or habitat resources that would otherwise slow or impede recovery of listed species. It is fully consistent with the purposes of the ESA for the Service to identify measures that mitigate the impacts of proposed actions to listed species and designated critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA or its implementing regulations.

Under ESA section 7, the Service has consistently recognized or applied mitigation in the form of:

(a) Measures that are voluntarily included as part of a proposed Federal action that avoid, minimize, rectify, reduce over time, or compensate for unavoidable (also known as residual) impacts to a listed species;

(b) components of reasonable and prudent alternatives (RPAs) to avoid jeopardizing the continued existence of listed species or destroying or adversely modifying designated critical habitat; and

(c) reasonable and prudent measures (RPMs) within an incidental take statement to minimize the impacts of anticipated incidental taking on the affected listed species.

As another example, the 1982 amendments to the ESA created incidental take permitting provisions (section 10(a)(1)(B)) with specific requirements (sections 10(a)(2)(A)(ii) and 10(a)(2)(B)(ii)) for applicants to minimize and mitigate impacts to listed species to the maximum extent practicable.

Summary of Comments and Responses

The March 8, 2016, notice announcing our proposed revisions to the U.S. Fish and Wildlife Service (Service) Mitigation Policy (Policy) (81 FR 12380) requested written comments, information, and recommendations from governmental agencies, tribes, the scientific community, industry groups, environmental interest groups, and any other interested members of the public.

That notice established a 60-day comment period ending May 9, 2016. Several commenters requested an extension of time to provide their comments, asked the Service to revise and recirculate the Policy for comment, or asked the Service to withdraw the Policy to allow interested parties additional time to comment. We subsequently published a notice on May 12, 2016 (81 FR 29574), reopening the comment period for an additional 30 days, through June 13, 2016.

During the comment period, we received approximately 189 comments from Federal, State, and local government entities, industry, trade associations, conservation organizations, nongovernmental organizations, private citizens, and others. The range of comments varied from those that provided general statements of support or opposition to the draft Policy, to those that provided extensive comments and information supporting or opposing the draft Policy or specific aspects thereof. The majority of comments submitted included detailed suggestions for revisions addressing major concepts as well as editorial suggestions for specific wording or line edits.

All comments submitted during the comment period have been fully considered in preparing the final Policy. All substantive information provided has been incorporated, where appropriate, directly into this final Policy or is addressed below. The comments we received were grouped into general issues specifically relating to the draft Policy, and are presented below along with the Service's responses to these substantive comments.

A. Clarify How the Policy Guides Formulation of Service Mitigation Recommendations vs. Requirements

Comment (1): Many commenters indicated that the proposed Policy was unclear regarding the Service's authorities to require mitigation, and requested clarification to distinguish between requirements and recommendations. Several of these commenters noted that various authorities cited for the Policy, such as the ESA, Fish and Wildlife Coordination Act (FWCA), and NEPA, do not require actions to maintain or improve the status of affected resources, or to apply a landscape approach to their conservation, which are features of the Policy.

Response: We agree with comments that the proposed Policy provided an unclear distinction between circumstances under which the Policy would guide the Service's formulation of: (a) Mitigation requirements, *i.e.,* measures that the Service may impose upon an action proponent as conditions of Service funding, approval, or regulatory decision; vs. (b) mitigation recommendations, *i.e.,* measures that we advise an action proponent to adopt for conservation purposes. We used the phrase ''recommend or require'' because the Service has authority to require mitigation in some contexts, but not in others, and our aim with this Policy is to provide a common framework for the Service to implement across the full range of our authorities. However, we recognize the need to clearly distinguish these two general contexts, and have revised the final Policy accordingly.

Circumstances under which the Service currently has specific authority to *require,* consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include the following:

1. Actions that the Service carries out, *i.e.,* the Service is the action proponent;

2. Actions that the Service funds;

3. Actions to restore damages to fish and wildlife resources caused by oil spills and other hazardous substance releases, under the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);

4. Actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impacts of incidental taking on the species);

5. Actions that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);

6. Fishway prescriptions under section 18 of the Federal Power Act (FPA), which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;

7. License conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;

8. Actions that require a Letter of Authorization or Incidental Harassment Authorization under the Marine Mammal Protection Act (MMPA); and

9. Actions that require a permit for non-purposeful (incidental) take of eagles under the Bald and Golden Eagle Protection Act (BGEPA).

The circumstances cited above under which the Service currently has specific authority to *require,* consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources are further clarified in subsequent responses to comments, the Policy, and its appendices.

In all other circumstances not listed above, the Policy will guide the Service's formulation of recommendations, not requirements, to proponents of actions that cause impacts to fish and wildlife resources and which are within the defined scope (section 3) of the Policy.

B. Policy Is Based on Existing Authority

Comment (2): Several commenters stated that the draft Policy attempted to inappropriately create new authority for the Service to engage in mitigation processes, circumventing appropriate legislative or rulemaking processes. They stated that the Policy could not be used to expand Service authority to take actions beyond those authorized by Congress, noting that the Policy itself is not an independent grant of authority and the imposition of any mitigation measures advocated by it would be constrained by authority provided by the applicable statute. The commenters requested we clarify that the Policy does not expand existing Service authorities.

Response: The commenters are correct that the Policy cannot create or assume new authority for making mitigation recommendations. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations remain in effect and are not superseded by this Policy. In implementing this Policy and carrying out our broader mission, the Service recognizes these authorities and processes, and their limitations.

C. Scope of the Policy

Comment (3): One commenter stated their concerns that the scope of the Policy appeared to limit the discretion of an action agency, potentially holding the action agency or applicant responsible for mitigation beyond an action agency's own authority, mission, and responsibilities.

Response: The Service recognizes that the authorities and processes of different agencies may limit or provide discretion regarding the level of mitigation for a project. This Policy is not controlling upon other agencies. There may be limitations (*e.g.,* agency-specific authorities and 600 DM 6) on the implementation of measures that would achieve the Policy's goal of net conservation gain or a minimum of no net loss, when the costs of such mitigation are reimbursable by project beneficiaries under laws and regulations controlling agencies' activities (*e.g.,* Bureau of Reclamation).

Comment (4): Two commenters stated their belief that the Policy inappropriately expands Service authority to lands beyond National Wildlife Refuges or other Service-managed lands, and beyond the authorities of the ESA.

Several commenters wanted the Policy to contain explicit guidance on the function of the Service's mitigation authorities under each statute and on implementation of the new Policy in relation to those authorities. Two commenters were concerned about the way the Service will coordinate its responsibilities with similar duties carried out by other agencies and how the Policy applies in situations when more than one statute applies to a particular action.

Response: The Service's authorities to recommend mitigation are described in section 2 and in Appendix A. The Policy's overall coverage is described in the Scope, section 3. The commenters are correct that the Policy's coverage is dictated by the underlying statutory authorities. If a relevant statute provides the Service with authority to make mitigation recommendations, the Service may provide recommendations that cover the resources that are described in that statute. The Policy cannot create or assume new authority for making mitigation recommendations or exceed existing statutory or regulatory authority, and it does not extend the geographic or taxonomic extent of coverage beyond existing Service practice. Authorities for making mitigation recommendations may be applicable, regardless of the location of the action, and whether the action has an effect on a species listed under the ESA. For example, the Service routinely reviews projects to provide mitigation recommendations for inter-jurisdictional fish under NEPA, FWCA, FPA, and the Clean Water Act (CWA) for projects that are planned on lands and waters not owned or managed by the Service.

This Policy covers engagement under all of the Service's mitigation authorities, and does not replace interagency procedure established in another document. The Policy was developed in accordance with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), and the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013). Having multiple agency mitigation policies using common principles, terms, and approaches provides greater consistency and predictability for the public.

Comment (5): Two commenters stated that the Service cannot prioritize fish, wildlife, plants, and their habitats above all other resources. One said that the Policy must incorporate the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a) that states that it is the policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, and to promote the orderly and economic development of domestic mineral resources and reserves. They also stated the Policy must incorporate the National Materials and Minerals Policy, Research and Development Act, (30 U.S.C. 1601 *et seq.*), which states it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being, and industrial production, with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs. The commenter noted that the Service ignored these statutes and proposed requirements that restrict and discourage mineral development in violation of these laws. They added that any mitigation must be balanced against Congress' policy of encouraging mineral development.

Response: The Service recognizes the national importance of resource development referenced by the commenter, along with many other types of economic development and activities. Statutes that encourage such development are not modified by this Policy. By enacting the various statutes

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

that provide for natural resource mitigation authority across multiple Federal agencies, Congress has recognized that fish and wildlife resources provide commercial, recreational, social, and ecological value to the American people. These statutes providing mitigation authority do not supersede statutes encouraging economic development. Conversely, statutes encouraging economic development do not supersede those providing mitigation authorities. Mitigation is a process by which agencies, proponents, and partners can facilitate sustainable development while simultaneously addressing the long-term conservation of native plants, animals, and ecosystems.

Comment (6): One commenter stated there were constitutional limits on requiring mitigation, referencing the *Koontz* v. *St. Johns River Water Management District* case decided by the U.S. Supreme Court 570 US 2588 (2013). This commenter noted that any compensatory mitigation measures must have an essential nexus with the proposed impacts and be roughly proportional, or have a reasonable relationship between the permit conditions required and the impacts of the proposed development being addressed by those permit conditions.

Response: Like all agencies, the Service has responsibility to implement its authorities consistent with any applicable case law. The Service will implement the Policy in a manner that is consistent with the *Koontz* case and any other relevant court decisions. We have included the following language in the Policy in section 5.6, Means and Measures: All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

D. Trust Resources

Comment (7): Several commenters addressed the concept of Federal trust fish and wildlife resources. They noted that in section 3.2, the Policy states that it applies to Service trust resources, but gives Service staff discretion to engage in mitigation processes on an expanded basis under appropriate authorities. They were unclear what authorities were being referenced and recommended that they be clarified, especially if they were expanding the Service's efforts. They asked that we clarify what the term ''expanded basis'' means.

Commenters stated that the Service's authority is limited to migratory birds, threatened or endangered species, eagles, and certain marine mammals. They said that States have authority for all other species. They also requested acknowledgement that States have sole authority for resource management and that the Service should restrict the Policy to only federally protected species.

Response: This Policy applies to all resources listed or described within the Service's various mitigation authorities. The language used within those authorities to describe the covered resources determines the scope of Service recommendations made under each authority. Some authorities apply to resources defined very broadly. The types of resources for which the Service is authorized to recommend mitigation include those that contribute broadly to ecological functions that sustain species. For example, the definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment, including fish and wildlife resources, while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

In this Policy, we note that the Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Our engagement in mitigation processes is likely to focus on those trust resources, but under certain authorities, the Service's recommendations are not strictly limited to covering only trust resources. This Policy does not establish new authority. We respect the role of States and State authorities. We have revised section 3.2 to replace the term ''expanded basis'' to avoid the perception that the Policy is expanding authorities.

E. Applicability to Endangered and Threatened Species

Comment (8): Several commenters recommended excluding species that are listed as endangered or threatened under the ESA as resources to which the Policy would apply, and several others supported such applicability. Reasons cited by the commenters for excluding listed species included: (a) The Service does not explain the circumstances that have changed and warrant reversing the listed-species exclusion of the 1981 Policy; (b) the Policy cannot substitute for ESA-specific requirements; (c) the ESA does not provide authority to require mitigation; and (d) Policy concepts such as ''net conservation gain,'' ''high-value habitat,'' and a ''landscape approach'' to conservation are inconsistent with ESA statutory authority and regulatory requirements.

Response: The Policy addresses all fish and wildlife resources for which the Service has authority to recommend or require mitigation, including ESA-listed species, because of our need to more strategically provide such recommendations. The primary purpose of the ESA is to provide a means for conserving the ecosystems upon which listed species depend. Avoiding, minimizing, and compensating for impacts is as important, if not more so, to the conservation of listed species as it is to any other resource of conservation concern (*e.g.,* wetlands), because listed species are in danger of extinction or are likely to become so in the foreseeable future. The Service can and should advise others about how they may help conserve listed species when their proposed actions would cause impacts to their populations, because conserving listed species is part of our agency's mission. Identifying those means and measures that would, at minimum, result in no net loss to the status of affected listed species will inform action proponents about what they can do, consistent with their authorities and abilities, to prevent further status declines or contribute to their recovery. As mentioned earlier, the 1982 amendments to the ESA are another example of the changed circumstances since the 1981 Policy, and changes in knowledge, conservation, and management of listed species support this Policy's concepts.

Comment (9): In ESA section 7(a)(2) consultations, several commenters noted that reasonable and prudent alternatives (RPAs) to actions that jeopardize listed species or destroy or adversely modify designated critical habitat are not required to meet the no-net-loss or net gain goal of the Policy.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Response: When an agency has proposed an action that the Service has determined in a biological opinion is likely to jeopardize listed species or destroy or adversely modify designated critical habitat, we agree that RPA(s) to that action are not required to meet the no-net loss/net gain goal of the Policy. The definition of RPAs at 50 CFR 402.02 applies to the formulation of RPAs, not this Policy. In discussions with both the action agency and any applicant involved, the Service is required to suggest RPAs, if available, to the action agency and to rely on the expertise of both in identifying RPAs.

The ESA does not prohibit impacts to critical habitat, but section 7(a)(2) does prohibit Federal actions from destroying or adversely modifying critical habitat, without special exemption under section 7(h). We do not anticipate conflicts between the advisory recommendations under this Policy provided in advance of the initiation of consultation and subsequent review of actions under section 7(a)(2) relative to critical habitat. However, we have added language in the Policy that specifically cautions Service personnel about providing compensation recommendations in the context of actions that may affect designated critical habitat. Recommendations for measures that mitigate impacts (all five types) to the listed species *within* critical habitat will receive preference over compensation *outside* critical habitat to avoid the possibility that adverse effects to the physical and biological features of critical habitat could appreciably diminish its conservation value.

Comment (10): In ESA section 7(a)(2) consultations, several commenters requested that the Service clarify whether the reasonable and prudent measures (RPMs) and the accompanying nondiscretionary terms and conditions that the Service includes in incidental take statements may require compensating for the impacts of take on the species. Most stated that RPMs are limited to actions that minimize take, and may not include requirements to compensate for taking impacts. In support of such comments, some quoted the Services' 1998 Consultation Handbook language at page 4–50, which states in a section about RPMs: ''Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take.''

Response: The Service's authority to require or recommend mitigation, including all forms of mitigation covered by the CEQ's definition of mitigation, are governed by the ESA and the regulations addressing consultations at 50 CFR part 402. While this Policy addresses ESA compensatory mitigation to a limited extent, further detail regarding the role of compensatory mitigation in implementing the ESA will be provided through authority-specific step-down policy (see proposed Endangered Species Act—Compensatory Mitigation Policy at 81 FR 61032–61065, September 2, 2016).

Comment (11): Two commenters asked that we clarify this sentence in the Discussion material on Applicability to the Endangered Species Act: ''This Policy encourages the Service to utilize a broader definition of mitigation where allowed by law.''

Response: We removed the sentence from the Discussion material in this final Policy.

F. Policy Addresses Multiple Authorities

Comment (12): Several commenters addressed aspects of the Service's authority under the Bald and Golden Eagle Protection Act (BGEPA). One commenter supported the acknowledgement that compensatory mitigation for bald and golden eagles may include preservation of those species' habitats and enhancing their prey base. They noted that existing regulations establishing a permit program for the non-purposeful take of bald and golden eagles recognize these options but that these options have not been used. One commenter stated the Service was incorrect in stating in the proposed Policy: ''the statute and implementing regulations allow the Service to require habitat preservation and/or enhancement as compensatory mitigation for eagle take.'' They said that Congress has not exercised jurisdiction over the habitats of eagles, meaning the Service lacks authority to require mitigation for impacts to eagle habitats. One commenter suggested the Policy should articulate whether compensatory mitigation would be in addition to current requirements of a 1-for-1 take offset.

Response: The Service has revised the BGEPA material in Appendix A section (A)(1) to address the concepts raised by the commenters. Although BGEPA does not directly protect eagle habitat beyond nest structures, nothing in the statute precludes the use of habitat restoration, enhancement, and protection as compensatory mitigation. Because golden eagle populations are currently constrained by a high level of unauthorized human-caused mortality rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction to a human-caused source of mortality. However, habitat restoration and enhancement could potentially offset permitted take in some situations, once standards and metrics are developed to ensure the habitat-based mitigation provided will adequately compensate for the detrimental impacts of the permit.

As we developed this Policy, the Service is simultaneously in the process of developing revised regulations that will establish the specific mitigation ratio (prior to being adjusted to account for uncertainties and risks in the mitigation method) for eagle permits.

Comment (13): Three commenters stated that section 404(m) of the CWA does not provide the Service with any substantive authority to ''secure mitigation'' as stated in Appendix A (A)(2). They suggested the Service's role is limited to commenting upon section 404 permits and providing recommendations to the U.S. Army Corps of Engineers (Corps) and that final decisionmaking rests with that agency.

Response: We have edited Appendix A to remove the word ''secure,'' replacing it with ''recommend.'' This change better reflects the Service's authority, provided in the CWA, to provide mitigation recommendations during permitting processes. The Service makes such recommendations with the intention that they be considered and adopted by the Corps as their permit conditions or requirements, but the commenters are correct that the Service's recommendations themselves are advisory.

Comment (14): Two commenters were concerned that the language in the Policy provides an inappropriate method of requiring mitigation measures on projects permitted under CWA section 404 where the Service could not do so under its own authority, by asking the Corps to impose them.

Response: The language regarding the CWA in Appendix A (A)(2) does not introduce any new authority or process. It describes the existing means by which the Service, under statutory authority in the CWA, provides recommendations to the Corps. The Service uses those recommendations to advise the Corps on the effects of proposed permitting actions on aquatic habitats and wildlife and how to mitigate those effects. The Corps then decides whether to adopt the Service's advice in making their CWA permitting decision.

Comment (15): One commenter was concerned that the Policy could be applied to activities authorized under CWA section 404 Nationwide Permits (NWP) that have only minimal environmental impacts. They said that the Service should expressly exclude

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

activities authorized by NWPs from the Policy because such activities have only minimal environmental impacts and any current mitigation requirements are unwarranted.

Response: Mitigation does apply to the NWP program. The Corps addresses mitigation for NWP-authorized activities in General Condition 23 (77 FR 10285, February 21, 2012). Activities authorized by NWPs are not excluded from this Policy. Also see the agency coordination provisions of General Condition 31, Pre-construction Notification, in the NWPs issued by the Corps on February 21, 2012 (77 FR 10286). For the listed NWPs and in the circumstances described in General Condition 31, the Service is afforded a review opportunity, after which the U.S. Army Corps District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

Comment (16): One commenter suggested clarifying the application of the Policy to the Service's role in CWA section 404 permits and mitigation by adding the following sentence to Section 3.4, Applicability to Service Actions: This Policy applies to the Service's review of all CWA permits, both in coordination and consultation roles.

Response: We agree with the commenter that the Policy applies to the Service's review of CWA section 404 permits. We did not add the suggested sentence but address the Service's application of our statutory authority to make recommendations that mitigate the impacts of these permitted actions on aquatic environments in Appendix A (A)(2).

Comment (17): Two commenters addressed the Service's authority under the Fish and Wildlife Coordination Act. One commenter said the Policy should acknowledge that the FWCA is advisory in nature. Another commenter said that the Policy should acknowledge that the FWCA provides a basis for recommending mitigation of impacts to ecological functions.

Response: Mitigation recommendations the Service makes under the FWCA to Federal agencies planning water resource development projects are advisory. Section 2(a) of the FWCA requires agencies to consult with the Service whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, channelized, controlled, or modified for any purpose whatever, with a view to the conservation and development of fish and wildlife resources. Section 2(b) of the FWCA requires that Service reports and recommendations be given full consideration and included in project reports to Congress or to any other relevant agency or person for authorization or approval. These aspects of FWCA compliance are required. Adoption of Service recommendations by the Federal water resource construction agency is not required.

The FWCA applies to those resources described in section 8 of the statute, where the terms ''wildlife'' and ''wildlife resources'' are defined to include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. In practice, Service recommendations made under FWCA are likely to focus on linkages of effects to trust resources, as prioritized by Service field and regional offices, but recommendations can cover resources as the statute defines. Because of the breadth of this coverage, we agree with the commenter that Service recommendations under the FWCA can include measures intended to address systemic ecological functions and agree that the purposes of the statute envision this application.

Comment (18): Several commenters addressed the Service's authority under the Migratory Bird Treaty Act (MBTA). One commenter said the Service was incorrect in describing implied authority to permit incidental take of migratory birds under the MBTA and noted that the Service has no authority to require compensatory mitigation for incidental take of migratory birds. Several commenters said that mitigation for migratory birds exceeds MBTA authority and that the Policy should exclude potential incidental impacts to migratory birds under the MBTA until the Service establishes statutory or regulatory authority to require landowners to obtain incidental take authorization prior to undertaking otherwise lawful activities. They added that the MBTA does not directly address mitigation or habitat impacts.

One commenter said the Service was incorrect in writing that the Fish and Wildlife Conservation Act implicitly provided for mitigation of impacts to migratory birds. They said that the language does not authorize the Service to engage in any management activities associated with migratory birds, particularly over private parties, only directing the Service to monitor and assess population trends and species status of migratory nongame birds.

Response: The Service has consistently interpreted the MBTA to apply to the incidental take of migratory birds. Currently, there is no express authority to permit the incidental take of migratory birds under the MBTA. Thus, the Service uses an enforcement discretion approach whereby the Service provides technical assistance to project proponents with strategies to avoid or minimize project-related take of migratory birds that is not the purpose of the otherwise legal action. Under this approach, the Service recommends voluntary measures that can mitigate the direct take of migratory birds and works with project proponents to address impacts to migratory bird habitat, including voluntary compensation for loss of migratory bird habitat. In May 2015, the Service published a notice of intent to conduct a National Environmental Policy Act review of a proposed rule that would establish the authority to permit incidental take as provided by the Act itself. An environmental impact statement will evaluate multiple alternatives for authorizing the incidental take of migratory birds. Subsequently, the Service will develop a regulation that provides the clear authority to permit incidental take and require mitigation measures to avoid and minimize incidental take, and compensation for unavoidable take. Until the regulation is finalized, the Service will continue working with project proponents and industries to manage impacts to migratory birds and their habitats.

The Service does not have specific statutory authority pursuant to the MBTA to *require* Federal action agencies and/or their permittees to provide compensatory mitigation for unavoidable impacts to (loss of) migratory bird habitat resulting from federally conducted or approved, authorized, or funded projects or activities. However, many Federal agency-specific authorities, as well as procedural authorities such as NEPA and the FWCA, require consultation with the Service, State natural resource agencies, and others, and evaluation of environmental effects of proposed actions, which may include considering impacts to migratory bird habitat. Through these authorities, the Service may recommend compensatory mitigation for unavoidable impacts to migratory bird habitat. Federal action agencies may include terms and conditions in permits, licenses, and certificates that mitigate a full range of adverse environmental effects, such as recommendations to compensate for

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

unavoidable impacts to migratory bird habitat, if they determine they have authority, consistent with their statutes and regulations, to require such compensatory mitigation.

In addition, Executive Order (E.O.) 13186 directs Federal agencies ''taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations'' to sign a Memorandum of Understanding (MOU) with the Service ''that shall promote the conservation of migratory bird populations.''

In Appendix A, we have modified the text of section (A)(7) to clarify the requirements of the Fish and Wildlife Conservation Act and have made minor clarifying edits to the MBTA text of section (A)(10).

Comment (19): Four commenters addressed the Marine Mammal Protection Act (MMPA) discussion in Appendix A (A)(9). One commenter suggested that the Service provide more clarification on existing authorities under the MMPA. These included specifying that this section of Appendix A only discusses incidental take authorizations for non-commercial fishing activities; clarifying requirements as they apply to military readiness activities; providing additional information on other means of affecting the least practicable adverse impact; and clarifying that the permissible methods of taking and the mitigation and reporting are required measures as provided under Incidental Take Regulations (ITRs) and Incidental Harassment Authorizations (IHAs).

Response: Although the MMPA section of Appendix A was intended to provide a general overview for part of this Act, we agree that Appendix A of the Mitigation Policy could benefit from these additional clarifications. We have revised Appendix A to address these points as appropriate.

Comment (20): Commenters stated that the Policy is incompatible with the MMPA in that it adopts a new position inconsistent with the existing regulations or otherwise effects a substantive change in the MMPA.

Response: This Policy does not alter or amend any existing regulation, law, or policy other than the 1981 Policy itself. Instead, where mitigation measures are compatible with the standards of other statutes, *e.g.,* the MMPA, the Service would recommend their use. On the other hand, there are mitigation measures that may be required under statutes besides the MMPA regardless of this Mitigation Policy, *e.g.,* mitigation measures to ensure the least practicable adverse impact on a marine mammal species or stock and its habitat, and on their availability for subsistence use.

Comment (21): Commenters stated that the draft mitigation Policy is incompatible with the MMPA in that it indicates that recipients of incidental take authorizations would be required to take actions to achieve a net conservation gain or no net loss to the affected marine mammal species or stock. They commented that the Service does not have such authority under the MMPA.

Response: The MMPA states that species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. In this manner, the mitigation Policy is compatible with the MMPA in that it implies there should be no conservation loss. However, the Service agrees that the MMPA does not require recipients to achieve a net conservation gain or no net loss to marine mammals. It was not the intent of this Policy to make such a requirement. Instead, should the Service make the required findings under section 101(a)(5) of the MMPA and authorize incidental take, it would prescribe the permissible methods of taking and other means of ensuring the least practicable adverse impact on the marine mammal species or stock and its habitat, and on the availability for subsistence use as a part of that authorization. We have revised Appendix A of the Policy to clarify this point.

Comment (22): One commenter suggested that the Policy should include language to ensure that review and consultation under Section 106 of the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, takes place at the early planning stage of the action and not wait until mitigation is being considered.

Response: We have revised section 3.4 of the Policy to state that the Service's responsibilities begin ''during early planning for design of the action.'' In addition, we have added the following language: ''Consistent with the NEPA, and the NEPA and NHPA Section 106 Handbook, these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action rather than wait until mitigation is considered.''

Comment (23): One commenter said that in Appendix B, to help meet its overarching Tribal Trust Doctrine responsibilities under the NHPA, the Service should initiate Section 106 consultation with Indian tribes early within the time of mitigation planning for the FWS proposed action (instead of after the preferred mitigation approach is selected).

Response: We have revised Appendix B accordingly. The Service will initiate Section 106 consultation with Indian tribes during early planning for Service-proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation, and will follow the Service's Tribal Consultation Handbook and the Service's Native American Policy.

Comment (24): One commenter specifically questioned the treatment of Natural Resource Damage Assessment actions conducted under CERCLA, OPA, and the CWA, stating that the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, dated November 3, 2015, requires that separate guidance be developed for when restoration banking or advance restoration would be appropriate.

Response: When a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, or Federal agencies, the type of restoration conducted depends on the resources injured by the release and, by nature of the action, must happen after impacts occur. Thus, this Policy's preference for compensatory mitigation measures that are implemented and earn credits in advance of project impacts cannot apply. However, pending promulgation of further DOI guidance, the tools provided in section 5 maintain flexibility useful in implementing restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals. Therefore, in agreement with the commenter, we have made edits to section 5.6 and to Appendix A to clarify the relationship of this Policy with Natural Resource Damage Assessment and the Presidential Memorandum on Mitigation.

Comment (25): Two commenters said that combining the fish and wildlife resources provisions of the Stream Protection Rule under the Surface Mining Control and Reclamation Act (SMCRA) with the language of the proposed Mitigation Policy could result in the Service inserting mitigation

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

requirements not otherwise called for in a SMCRA permit.

Response: At the time this Policy was completed, the proposed Stream Protection Rule, published July 27, 2015 (80 FR 44436), was not yet finalized. The statutory language of SMCRA and its implementing regulations, including the Stream Protection Rule when finalized, will determine the scope of resources covered by Service recommendations under that statute. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations are not superseded by this Policy.

G. Exemptions

Comment (26): Several commenters provided observations regarding exemptions from the Policy. One commenter said that the Policy should further identify those activities and projects that are exempt, adding that the Policy should make clear that any new procedural or other requirements apply only to new project applications or proposals. Several commenters said that the Policy should not apply to actions for which a complete application is already submitted. They stated that the Policy should apply neither to actions already under review nor to actions where coordination was initiated prior to publication of the final Policy.

Response: In section 3.3, Exclusions, we describe the circumstances when the Policy does not apply, but we do not specifically exempt any category of action. The Policy applies when one or more of our authorities apply to the review of a particular action for purposes of making mitigation recommendations. It is the language of those authorities that specifies their coverage of particular actions and resources. In section 3.3, we establish that the Policy does not apply when the Service has already agreed to a mitigation plan for pending actions, except in the specified circumstances. Complete applications that are submitted prior to the finalization of this Policy, but that are not yet under review, do not satisfy those circumstances. If an action is under active review as of the date of final publication of this Policy, Service personnel may elect to apply this Policy to that action. For actions where coordination was initiated prior to the final Policy, Service personnel would determine whether that coordination constitutes active review.

Comment (27): Two commenters said the Policy should exempt landowners who have participated or are currently participating in voluntary programs designed to conserve endangered species.

Response: We do not specifically exempt any category of action in section 3.3. This Policy, as an umbrella policy, integrates all of the Service's authorities for engaging in mitigation. We cannot legally exempt the landowners referenced by the commenters on the basis of their status pursuant to an agreement entered into under a single authority, because their future actions may trigger applicability of one or more other authorities. The Policy does not, however, override or modify any such agreements or substitute for the regulations governing those agreements.

Comment (28): Four commenters stated that the Policy should explicitly exempt activities with *de minimus* impacts. They said that projects with small and/or temporary impacts should not be burdened by mitigation measures.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of the size of activities planned or on the size of their impacts. The Policy provides a framework to guide Service personnel in their review of actions, including their application of the mitigation hierarchy and their recommendations for mitigation. Application of this guidance will assist Service personnel in determining whether to engage actions in mitigation planning and then in the formulation of mitigation recommendations. Application of this guidance could result, in appropriate circumstances, in a decision not to engage in mitigation planning for actions with *de minimus* impacts, but we do not specifically exempt actions based on the scale of anticipated impacts.

Comment (29): One commenter stated the Policy should include an exemption for conservation projects sponsored by local, State, or Federal resource agencies that seek beneficial restoration and implement conservation objectives.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of their primary purpose. We acknowledge that actions designed to restore or create habitats are generally less likely to require, for example, compensatory mitigation, and support their role in fulfilling the Service's larger mission. The Policy does not establish new or increased scrutiny of conservation or restoration actions than under existing statutes and regulations. The Service may apply this Policy in review of a conservation action that is intended to benefit one resource, but may adversely affect others for which the Service is authorized to provide mitigation recommendations and/or mitigation requirements.

Comment (30): Two commenters stated that this Policy should not apply to military testing, training, or readiness activities. They stated that such an exclusion is necessary to be consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015).

Response: The Service interprets the Presidential Memorandum, which instructs agencies to develop or update their mitigation policies, to exempt agencies that conduct military testing, training, and readiness activities from the requirement to update or create policies for those activities. The Presidential Memorandum cannot exempt any particular activity from the applicability of existing statutory authority that provides for mitigation.

Comment (31): One commenter stated the Policy should define or describe ''habitat'' and recommended that the Service exclude dredge material placement sites, and other such manmade areas, from mitigation planning processes.

Response: Habitat develops on sites with a history of human manipulation, including levees, reclaimed mine sites, timber harvest sites, agricultural areas, and dredged material placement sites. The commenter does not reference a particular timeframe over which their proposed exemption would be valid. We note that sites with a history of human manipulation may have been disturbed or modified hundreds of years prior, with multiple episodes of habitat recovery and re-disturbance in the intervening years. The Policy does not exclude areas solely because they are manmade or disturbed habitats. Mitigation requirements and recommendations will be informed by the framework established in this Policy, including section 5.5, Valuation.

H. Net Conservation Gain/No Net Loss

Comment (32): Many commenters addressed the Policy's mitigation planning goal to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources. A number of commenters supported the goal while a number of commenters opposed the inclusion of a net conservation gain. Many commenters stated that the Service lacks the statutory authority to implement the

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

net gain goal for mitigation planning. Several commenters suggested that a net gain goal imposes a new standard for mitigation and that mitigation requirements should be commensurate with the level of impacts. Others expressed concern about the costs associated with achieving a net gain.

Response: The Policy applies to those resources identified in statutes and regulations that provide the Service with the authority to make mitigation recommendations or specify mitigation requirements and are described in section 2 and in Appendix A. The purpose of the net conservation goal in mitigation planning is to improve conservation outcomes to affected resources, but the Policy does not require project proponents to achieve those outcomes. The Policy provides a framework for Service recommendations to conserve fish, wildlife, plants, and their habitats that are negatively affected by proposed actions. The identification of those means and measures that would result in a net conservation gain to the affected resources will not only help prevent further declines but contribute to a net improvement in the status of affected species and their habitats. The Service will seek a net gain in conservation outcomes in developing mitigation measures consistent with our mission to identify and promote opportunities to decrease the gap between the current and desired status of a resource.

Comment (33): Several commenters questioned the ability to achieve the net conservation gain and how it would be measured. Other commenters stated that the Policy should provide the methodology to assess or measure the net conservation gain.

Response: It is beyond the scope of the Policy to provide specific quantifiable measures to achieve the net conservation gain goal. The Service's mitigation goal is to achieve a net conservation gain or, at a minimum, no net loss of the affected resources. The Policy provides the framework for assessing the effects of an action and formulating mitigation measures (sections 5.1 through 5.9) to achieve this goal, which will be specific to the conservation objectives of the affected resources.

Comment (34): Several commenters stated that neither no net loss, nor net conservation gain, are compatible with the standards of the ESA sections 7 and 10. One commenter asked that we clarify that the net conservation gain goal does not modify or expand proponents' obligations under ESA sections 7 or 10 permitting programs. One commenter stated that the Policy's goal would have limited relevance to section 10 decisions other than serving as an aspiration or goal for negotiating conservation measures. One commenter asked that we specify how the Policy's goal will be applied to processing incidental take permit applications under section 10(a)(2)(B)(ii), especially for projects predicted to directly kill listed species. This commenter added that neither no net loss nor net gain is an appropriate goal under section 10 if the goal implies that impacts at the individual level will not be minimized to the maximum extent practicable.

Response: This Policy is intended to guide mitigation for impacts to listed species. It does not expand the Service's authorities for recommending or requiring mitigation under the ESA. As an administrator of the ESA, the Service has an obligation to work with others to recover listed species and preclude the need to list species, including guiding compensatory mitigation to offset the adverse impacts of actions to threatened and endangered species. The Service anticipates further defining the mitigation goal in relation to compensatory mitigation for impacts to listed species and designated critical habitat in the forthcoming Endangered Species Act Compensatory Mitigation Policy.

Comment (35): One commenter recommended the use of regional conservation goals and objectives in developing landscape-scale mitigation where the conservation goals and objectives are clear, explicit, and defensible. The commenter recommended that the Policy define a conservation goal as a ''formal statement describing the future status of a species or habitat.''

Response: We acknowledge that there may be variability in conservation plans developed by different entities, and agree that the commenter's descriptions are among the possibilities. This Policy describes an overall goal of a net conservation gain. The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate. Service mitigation recommendations or requirements will specify the means and measures that achieve this goal, as informed by established conservation objectives and strategies. This Policy defines conservation objectives as a measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

I. Landscape-Scale Approach

Comment (36): Two commenters stated the Policy should include nearshore, estuarine, and marine habitats in describing landscapes. They asked that we clarify that the concept is inclusive of ecologically connected areas of the aquatic environment, such as watersheds.

Response: We concur with the commenters that the definition of and concept of landscape and a landscape approach must include aquatic environments. The concept does include ecologically connected areas of the aquatic environment such as watersheds. The existing definition of landscape in section 6 accommodates this inclusion.

Comment (37): Three commenters suggested providing more clarity regarding what it means to take a landscape approach to mitigation in the absence of an existing conservation plan. They said that a landscape approach in the absence of an appropriate plan will necessitate an analytical process and the Policy should identify the information that should be used in such a process. They suggested adopting language from the rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (Corps) and 40 CFR part 230 (Environmental Protection Agency (EPA)), 33 U.S.C. 1344, that describes the Corps and EPA watershed approach in the absence of appropriate plans.

Response: The availability of plans will be variable, and the Policy's instruction to Service staff to take a landscape approach when conservation plans are not available is sound. The diversity in the habitats, species, project impacts, and mitigation in the implementation of the Service's suite of mitigation authorities make detailed specification of landscape approach instructions beyond the scope of this umbrella policy. In concurrence with the commenters, we have added text to the end of section 5.1, Integrating Mitigation with Conservation Planning.

Comment (38): Multiple commenters expressed concerns regarding how the landscape approach will be

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

implemented, suggesting that clarity be provided through specific criteria, guidance on process, and how data will be used or appropriateness of data, for consistent application.

Response: The Service has written the national Policy in a manner that facilitates further clarification on a regional scale. As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies including landscape scale must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that allows comparison of present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

J. Advance Mitigation Planning at Larger Scales

Comment (39): Two commenters stated that the term ''Advance Mitigation Planning at Larger Scales'' in section 5.1, Integrating Mitigation with Conservation Planning, might be confused with the Policy's preference for Advance Mitigation in section 5.7.1, Preferences.

Response: We agree and have changed the term within section 5.1 to read ''Proactive Mitigation Planning at Larger Scales.''

K. Climate Change

Comment (40): Many commenters addressed the Policy's inclusion of climate change in assessing the effects of a proposed action and mitigation. One commenter stated the Policy should make it a requirement that climate change be assessed, while others urged the Service to refrain from using climate change projections to govern mitigation efforts. Several commenters stated that climate change predictions and the effects to species and their habitats are uncertain and that the current state of climate projections are not of a scale sufficient to assess project-related impacts or mitigation. Several commenters suggested the Policy include guidance on how the effects of climate change should be determined. One commenter stated the Service should ensure that the temporal scope of the analyses is well defined and supported by data and that the impacts to species and their habitats can be assessed with reliable predictability.

Response: Consistent with the Departmental Manual Chapter (600 DM 6), this Policy recommends that climate change be considered when evaluating the effects of an action and developing appropriate mitigation measures. The Service recognizes that the science of climate change is advancing and assessment methodologies are continually being refined to address the effects of climate change to specific resources and at differing scales. Because of the broad scope of resources covered by this Policy and the evolving state of climate change science and assessment methodologies, including specific information on these topics is beyond the scope of the Policy. Therefore, the Policy is written with language to ensure that it does not become quickly outdated as methodologies evolve. As stated in section 5.3, Assessment, the Service will use the best available information and methodologies when considering the effects of climate change to the resources covered by this Policy and in designing mitigation measures.

Comment (41): One commenter provided an in-depth discussion of the broad-scale consequences of greenhouse gas emissions, climate change, and carbon sequestration.

Response: The Service shares the commenter's emphasis of the importance of climate change as a systemic challenge that must be a focus of integrated natural resource management. That is why it is written in the Policy to inform the scale, nature, and location of mitigation measures when employing the Policy's fundamental principle of using the landscape approach (section 4.c). It is not possible to provide exhaustive details for addressing climate change in this umbrella policy. Our mitigation authorities give us ability to recommend mitigation for impacts to species and habitats, but we do not have explicit authorities to recommend offsets for carbon emissions. In the course of integrating mitigation with conservation planning (section 5.1), assessing project impacts and formulating mitigation measures (section 5.3), and recommending siting of compensatory mitigation (section 5.7.1), this Policy directs Service staff to integrate consideration of climate change.

L. Collaboration and Coordination

Comment (42): Several commenters supported the Policy's clear desire for collaboration and coordination with stakeholders. However, other commenters were concerned with the lack of detail in regard to coordination with State, tribal, or other local conservation partners during various steps in the process, and the extent to which data, analyses, and expertise of these entities will be used, and conflict with existing planning efforts avoided. Multiple comments indicated the importance of early coordination with State, tribal, and Federal organizations, local conservation partners, and private landowners, especially to avoid delay in the process. Some commenters requested minimum standards for plans or data, and indicated multiple types of plans or data that would be useful (*e.g.,* ESA Recovery Plans, State Wildlife Action Plans, watershed plans, State natural heritage data, and plans associated with State or metropolitan transportation planning processes). One commenter in particular pointed to the importance of collaborating to avoid conflicts and ''negative externalities'' for Alaska and its citizens. Multiple commenters requested we specifically list State and local entities in section 5.2.

Response: State and local conservation partners often have data or planning documents important to project mitigation scenarios. Thus, we acknowledge the benefits of collaboration and coordination in the early planning and design of mitigation in section 5.2. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek mutual goals and avoid inconsistency. Therefore, we revised the text in sections 4(c) and 5.2(a) and (d) to better reference local government entities.

Comment (43): One commenter requested reaffirmation that States can, with guidance and participation of the Service, develop and implement mitigation programs to achieve Service mitigation goals, while aligning with local conservation plans and multiple use objectives. Several commenters requested identification of specific Service representatives to engage in these planning efforts, and clarification on process, especially to avoid disputes related to inconsistency. One commenter requested the Service require State concurrence with recommendations when related to resources under State authority; others were specifically concerned with the Policy's interface with current mitigation systems.

Response: We agree that alignment with local mitigation efforts mutually

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

benefits conservation agencies, and this Policy formally recognizes the shared responsibility with State, local, and tribal governments, and other Federal agencies and stakeholders. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek common goals and avoid inconsistency.

Comment (44): Several commenters requested more information specifically on how conflicts between agencies or regulations, plans, or mitigation or permitting requirements would be handled.

Response: Conflicts between agencies are handled through direct engagement and through existing mechanisms that will be unchanged by this Policy. For example, in NEPA, regulations at 40 CFR part 1504 establish procedures for referring Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects to the Council on Environmental Quality. The same regulations provide means for early resolution of such disagreements. In CWA permitting processes, disagreements over issuance of specific permits or on policy issues between the Service and Corps or between EPA and the Corps are resolved following procedures established at section 404(q) of that act and detailed within a Memorandum of Agreement between the agencies. The Corps/EPA joint 2008 Compensatory Mitigation Rule also features a dispute resolution process for agencies to resolve disagreements concerning the approval of mitigation banks or in-lieu-fee programs. We will continue to use existing processes.

Comment (45): One commenter requested that the Service include requirements that all mitigation data, including data associated with amount and type of mitigation, ecological outcomes, landscape scale and conservation plans used in mitigation planning, and monitoring be made public in an easily accessible manner, such as being submitted electronically to publicly available databases.

Response: We agree that data should be made broadly available to facilitate future conservation at a landscape level, dependent on the relevant regulations under which the mitigation is required. If there is the potential for disclosure of personal, private, or proprietary information, there are limitations on the Service's or other agencies' ability to require public availability. While most of the Service's mitigation authorities allow for recommendations, the ability to disclose monitoring data may be at the discretion of another agency. A blanket requirement to post all monitoring data to public databases would, therefore, be beyond the scope of this Policy.

M. Assessment

Comment (46): One commenter stated that indirect effects from some actions are greater than the direct effects and should, therefore, be made more prominent in the Policy.

Response: We added indirect and cumulative impacts to section 5.3 of the Policy.

Comment (47): Several commenters expressed concern regarding the use of best professional judgment during and as subjective predictions of impact, as described in section 5.3.4. Some commenters seemed particularly concerned about coincidental changes in magnitude of probable impacts caused by indirect sources, or those falling outside Service jurisdiction, such as climate change.

Response: The Service, in section 5.3, allows use of ''best professional judgment'' using information described in the remainder of that section (recognition of and adjustment for uncertainty, use of information provided by the action proponent, and best available methodologies to predict impact). Thus, even where predictions may be uncertain, the Service will support decisions on the best available scientific information. As with many of the decisions made in impact analysis, prediction of impacts through time must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (48): Multiple commenters stated that assessment methodologies should be designed to ensure predictable mitigation credits, measure both beneficial and adverse effects, and be based on biological and/or habitat conditions that are accurate, sensitive, repeatable, and transparent. Two commenters were concerned that the Service should provide additional guidance to Federal and State agencies to avoid inefficiencies, and provide clarification in methodologies.

Response: As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that compares present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (49): One commenter suggested that ''key ecological attributes'' (KEA) be used as a landscape-scale mitigation framework to guide impact assessment and ensure ''like for like'' benefits. The commenter categorized KEAs as: (1) Size (measure of a resource's area of occurrence or population abundance); (2) condition (measure of the biological composition, structure, and biotic interactions that characterize the space in which the resource occurs); and (3) landscape context (assessment of the resource's environment including the ecological processes and regimes that maintain it, and connectivity that allows species to access habitats and resources or allows them to respond to environmental change through dispersal or migration).

Response: While use of the assessment approach involving application of KEAs would be consistent with the assessment principles and attributes of the best available effect assessment methodologies that we describe in section 5.3, we do not specify use of specific methodologies because the Policy's breadth of geographical, ecological, and authority coverage warrant flexibility.

Comment (50): One commenter stated the Policy should provide science quality standards while another commenter stated that science provided by a project proponent to support a mitigation action should be evaluated fairly.

Response: As stated in the Policy, the Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy. This will include an objective evaluation of science-based information provided by the project proponent.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

N. Evaluation Species

Comment (51): Numerous commenters expressed opinions and concerns on how the evaluation species should be selected. Suggestions focused on coordination with States and other parties and on selecting species identified in local government plans that have met appropriate standards or in State Wildlife Action Plans.

Response: The Policy is not meant to be exhaustive in identifying the resources or characteristics of evaluation species. The Service recognizes that there may be existing plans (*e.g.,* local government plans, State Wildlife Action plans) other than those identified in the Policy as well as other characteristics that may be useful in mitigation planning depending on the specific action and the affected resources. We agree that the use of existing plans such as State Wildlife Action plans or other sources that have established species conservation objectives will be useful in selecting evaluation species within the affected area. The Service will work with project proponents and other stakeholders in reviewing existing plans and identifying evaluation species for a specific action following the guidance outlined in section 5.4, Evaluation Species.

Comment (52): One commenter stated that section 5.4, Evaluation Species should be expanded to focus beyond evaluation species to species and their habitats for use in impact assessments and mitigation planning.

Response: Section 5.4 in the Policy adequately addresses the identification and characteristics of evaluation species, and does not need to be expanded. The purpose of selecting evaluation species is part of the Policy's framework to evaluate affected habitats and make mitigation recommendations based on their scarcity, suitability, and importance to achieving conservation objectives as discussed in section 5.5, Habitat Valuation.

Comment (53): A number of commenters suggested that the Policy's approach to evaluation species will expand the Service's jurisdiction to all wildlife and that mitigation will be required for species (and habitats) for which there is no direct statutory or regulatory obligation.

Response: Evaluation species are a utility used by agencies in mitigation planning. The Service defines them as the fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning. We need evaluation species because we cannot exhaustively assess all impacts and formulate mitigation for all resources affected by a proposed action. The purpose of Service mitigation planning is to develop a set of recommendations that, if implemented with the proposed action as a package, would achieve conservation objectives for the affected resources. Accordingly, the Service would select evaluation species for which conservation objectives have the greatest overlap with the effects of a proposed action. The Service will select others to represent the suite of fish and wildlife impacts caused by an action. The Policy provides guidance for selecting evaluation species and is not a means of expanding our jurisdiction. Evaluation species are, in effect, a planning tool and were a major feature of the 1981 Policy.

Comment (54): A number of commenters addressed the selection of evaluation species in those instances identified in the Policy where an evaluation species does not need to occur within the affected habitat: Species identified in an approved plan that includes the affected area, or the species is likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession. One commenter stated that the Policy places clear and defined limits on what constitutes both the ''reasonably foreseeable future'' and ''natural species succession'' when selecting evaluation species so mitigation actions are not overly expansive. Some commenters questioned the Service's authority to expand the scope of analysis to species that do not occur in the affected area but could occur at some point in the foreseeable future due to natural species succession.

Response: The selection of evaluation species that is not currently present in the affected area was a component of the Service's 1981 Policy. Under this Policy, the Service retains the ability to consider such selections, as authorities permit. Such selections will be subject to the conditions described in section 5.4 and are not a means of expanding the Service's authorities.

Comment (55): A few commenters stated that there is no basis for evaluating other non-listed species when assessing actions under the ESA, while another commenter expressed concern that the consultation and permitting for specific species will be complicated by the addition of evaluation species resulting in additional analysis and costs.

Response: Nothing in this Policy supersedes statutes and regulations governing treatment of federally listed species. Section 5.4, Evaluation Species, provides guidance on the selection of evaluation species that the Service will recommend in the assessment of affected resources and mitigation planning. The Service will recommend the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for a specific species, that species will be, at a minimum, identified as an evaluation species. The recommendation to use additional evaluation species will depend on the specific project and affected resources. Use of evaluation species beyond federally listed species will improve conservation outcomes for other resources affected by an action, but the Policy does not require such usage.

Comment (56): One commenter stated that the Policy creates a new category of species by using evaluation species.

Response: Evaluation species is not a new term and has been brought forth from the Service's 1981 Policy. Section 5.4, of the Policy, Evaluation Species, provides additional guidance on the selection and use of evaluation species to assess impacts and develop mitigation strategies.

O. Habitat Valuation

Comment (57): Several commenters requested the Service provide additional details on habitat valuation in section 5.5 of the Policy. To avoid the potential for ''lengthy disputes'' between the Service and other stakeholders in mitigation planning, some recommended including measurable/repeatable metrics in the Policy for quantifying habitat scarcity, suitability, and importance. Others wanted a very clear standard for identifying ''habitats of high-value,'' for which the Policy guidance is to avoid all impacts.

Response: The scope of the Policy covers all authorities that give the Service a role in mitigating the impacts of actions to fish and wildlife resources, which encompasses a broad range of action types and species. The types and quality of available information vary widely across this range; therefore, highly prescriptive methods of habitat valuation are not advisable. Scarcity, suitability, and importance are the characteristics most relevant to our purpose for habitat valuation, which is to inform the relative emphasis we place on avoiding, minimizing, and compensating for impacts to the conservation of evaluation species. Our definitions of these parameters are sufficiently clear to provide useful guidance to Service personnel in

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

formulating mitigation recommendations to action proponents. However, we have revised the Policy to clarify that ''habitats of high-value'' are those that are rare and both highly suitable for, and important to, the conservation of the evaluation species.

Our authority to require specific mitigation actions of action proponents is limited, and is governed by the regulations of the statute that confers such authority, not this Policy. Our goal with this Policy is to provide a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities to promote better conservation outcomes for species. Service personnel are obligated to explain mitigation recommendations, including our valuation of the affected habitats. Action proponents may adopt or reject Service recommendations about how they may maintain or improve the status of species as part of their proposed actions. Therefore, we do not anticipate ''lengthy disputes'' between the Service and action proponents over habitat valuations.

Comment (58): Several commenters recommended that the Service use habitat valuation as the basis for variable mitigation standards or goals, similar to the 1981 Policy.

Response: This Policy adopts a minimum goal of no-net-loss for mitigating impacts to evaluation species, regardless of the value of the affected habitat, which is a fundamental change relative to the 1981 Policy. Instead of determining variable objectives that apply to affected habitats, variable habitat value informs the priority we assign to avoid, minimize, and compensate for impacts to evaluation species. Our rationale for this change is that all occupied habitats contribute to the current status of an evaluation species. Discounting the contribution of lower value habitat would increase the difficulty of achieving conservation objectives for evaluation species. However, we recognize that to maintain or improve a species' status, it is more efficient to avoid and minimize impacts to higher value habitats, and to minimize and strategically compensate for impacts to lower value habitats. The Service will engage action proponents in mitigation planning only when we have authority to do so and when an action may adversely affect resources of conservation interest to a degree that warrants application of the Policy.

Comment (59): Two commenters recommended the Service retain the four Resource Categories of the 1981 Policy.

Response: In the 1981 Policy, the Resource Categories established variable mitigation objectives based on habitat value, which was a function of scarcity and suitability. Under this Policy, the objective is a minimum of no net loss, regardless of habitat value. Instead, habitat value informs the priority we assign to avoid, minimize, and compensate for impacts. By adding habitat ''importance'' to the scarcity and suitability parameters of the 1981 Policy, the revised Policy more explicitly integrates mitigation recommendations with conservation strategies applicable to the evaluation species. Our valuation considers all three parameters, and we will seek to avoid and minimize impacts to habitats of higher value, and to minimize and compensate for impacts to habitats of lower value. We considered prescribing a prioritization of mitigation types through a revised resource category system but determined that it added little practical value beyond stating that we should recommend avoiding impacts to rare habitats that are of both high suitability and importance (the equivalent of Resource Category 1 in the 1981 Policy) and give greater emphasis to compensating for impacts to low-value habitats.

Comment (60): Three commenters expressed specific concerns about the three habitat-valuation parameters, each recommending possible revisions/substitutions. One stated that our definition of importance was mostly a function of scarcity and/or suitability, and suggested substituting ''irreplaceability'' and ''landscape position'' as more independent parameters. Another suggested that ''unique and irreplaceable'' was the criterion for recommending avoiding all impacts to a habitat, as opposed to high-value assessed by all three valuation parameters. The third urged the Service to use ''vulnerability'' as an additional parameter.

Response: Our definitions of the three habitat-valuation parameters are distinct and do not overlap, but we recognize potential correlations between the parameters (*e.g.,* rare habitats of high suitability are very likely also of high importance). Our definition of importance captures the significance of a location in the conservation of a species, regardless of its scarcity or suitability, and we disagree that importance is mostly a function of scarcity and suitability. The definition of importance refers to both the ability to replace the affected habitat and its role in the conservation of the evaluation species as a core habitat, a linkage between habitats, or its provision of a species-relevant ecological function. Therefore, ''irreplaceability'' and ''landscape position'' are already considered in the importance parameter.

A ''unique'' habitat is the rarest valuation possible on the scarcity parameter, and an ''irreplaceable'' habitat rates high on the importance parameter. The third parameter, suitability, is defined as ''the relative ability of the affected habitat to support one or more elements of the evaluation species' life history compared to other similar habitats in the landscape context.'' A unique habitat would have no other similar habitats in the relevant landscape context for comparative purposes; therefore, its suitability is not assessable. In practice, if a unique and irreplaceable habitat is supporting an evaluation species, we will consider it as a ''high-value'' habitat under this Policy.

Our view of ''vulnerability'' as a habitat-valuation parameter is that it is difficult to define and assess consistently. A workable definition would likely overlap substantially with the scarcity parameter, which is more readily evaluated given data about the spatial distribution of a habitat type in the relevant landscape context, and also with the replicability concept under the importance parameter. Regardless whether a non-overlapping definition is possible, adding vulnerability as a fourth habitat-valuation parameter would then dilute the influence of the other three. Scarcity and suitability, which were features of the 1981 Policy, and importance, which is applicable to interpreting how conservation plans describe the significance of particular areas, are each amenable to reasonably consistent assessment by Service personnel. These three parameters sufficiently serve the purpose of habitat valuation under this Policy, which is to prioritize the type of mitigation we recommend.

Comment (61): One commenter suggested that when more than one evaluation species uses an affected habitat, some situations may warrant not using the highest valuation to govern the Service's mitigation recommendations, contrary to the Policy's guidance in section 5.6.3. The commenter offered the following example of such a situation. An affected habitat is used by two evaluation species; but regulatory requirements (*e.g.,* ESA compliance) apply to the species associated with the lower habitat valuation, and conservation bank credits are available to compensate for impacts to this species. Two other commenters requested clarification of

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

the Service's methodology for valuation of a habitat used by multiple evaluation species.

Response: Because the goal of the Policy is to improve, or at minimum, maintain the current status of evaluation species, the Policy's guidance to assign the highest valuation among evaluation species associated with an affected habitat most efficiently achieves this goal for all evaluation species. Avoiding or minimizing impacts to the higher value habitat reduces the level of compensation necessary to achieve the Policy goal for both species. The availability of conservation bank credits, while advantageous, should not dictate Service recommendations for achieving the Policy goal.

Although species to which regulatory requirements apply, such as species listed under the ESA, are automatic evaluation species under the Policy, the Policy does not assign priorities among evaluation species. Accordingly, our habitat-valuation methodology is the same whether one or multiple evaluation species use an affected habitat. The scarcity parameter is not species-specific; however, the suitability and importance parameters are. A particular affected habitat is not necessarily of the same suitability for and importance to different evaluation species and may, therefore, receive different valuations. The highest valuation informs the relative priority for avoiding, minimizing, and compensating for impacts.

P. Mitigation Hierarchy

Comment (62): We received comments from many entities related to our use of the mitigation hierarchy concept in the Policy. Most expressed support for strict adherence to the avoid-minimize-compensate sequence of the hierarchy and concern that the Policy's recognition of circumstances warranting a departure from this preferred sequence provides Service personnel an inappropriate amount of discretion. Others supported such departures and requested greater specificity in defining the circumstances that would justify greater emphasis on compensation.

Response: The first three general principles listed in section 4 will guide the Service's application of the mitigation hierarchy: (a) The goal is to improve or, at minimum, to maintain the current status of affected resources; (b) observe an appropriate mitigation sequence; and (c) integrate mitigation into a broader ecological context with applicable landscape-level conservation plans. Action- and resource-specific application of these principles under the framework of section 5 will determine the relative emphasis that Service mitigation recommendations afford to measures that avoid, minimize, and compensate for impacts.

We are clarifying Service determinations of ''high-value habitat,'' for which the Service recommendation is to avoid all impacts. Consistent with our commitment to the mitigation hierarchy under Principle ''b'' of section 4, the Service will not recommend compensation as the sole means of mitigating impacts when practicable options for avoiding or minimizing impacts are available. However, to achieve the Policy's goal of maintaining or improving the status of evaluation species, all Service mitigation recommendations will necessarily include some degree of compensation, unless it is the rare circumstance where it is possible to avoid all impacts while still accomplishing the purpose of the action or we are compelled to recommend the no-action alternative. Our habitat-valuation guidance (section 5.5) informs the relative emphasis we place on the mitigation types in the hierarchy. Higher valued habitats warrant primarily avoidance and minimization measures, in that order, to the maximum extent practicable. Compensation is likely, but not necessarily, a more effective means of maintaining or improving the status of species affected in lower valued habitats. Applicable conservation plans for the evaluation species (Principle ''c'' of section 4) will inform Service personnel whether compensation should receive greater emphasis. Service personnel are obligated to explain recommendations per the guidance of section 5.8, Documentation.

Comment (63): One commenter stated the Policy should include a mechanism to credit a project proponent for implementing avoidance or minimization measures.

Response: Avoidance and minimization are components of the mitigation hierarchy. Impacts that are avoided will negate the need for further mitigation measures. Impacts that are minimized will lessen the need to reduce, rectify, and compensate for residual impacts.

Comment (64): One commenter requested the Policy clarify how mitigation credits will be calculated at banking sites and that the Policy should provide for the ability to ''stack'' credits. Another commenter suggested the Policy include the definition of the term ''credit.''

Response: This is not a compensatory mitigation policy. It is beyond the scope of this Policy to provide detailed procedural or operational information. Based on the applicable authority, such implementation detail for compensatory mitigation processes is provided in other regulatory or policy documents. For example, details for CWA processes is provided through regulation (Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344). For ESA processes, the Service expects to finalize such guidance through policy (see proposed ESA Compensatory Mitigation Policy at (81 FR 61032–61065, September 2, 2016)).

Q. Avoidance

Comment (65): Several commenters strongly supported the Policy's statements on avoidance, or said the Policy should increase the emphasis on avoidance generally, and especially with respect to the most highly valued resources. They suggested the Policy more strongly acknowledge that some habitats are unique and irreplaceable, making the ''no action'' alternative the only way of achieving conservation goals for species that depend on those habitats. They added that ensuring the long-term protection of high-value habitat is especially critical for imperiled species.

Some commenters said the Policy should not require avoidance of all impacts to high-value habitats, as strict adherence to this measure has the potential to stop crucial infrastructure projects. They said requiring avoidance of high-value habitats and imposing limitations on timing, location, and operation of the project will result in added project costs. They proposed that avoidance recommendations be made or implemented on a case-by-case basis. Some commenters suggested the Policy clarify the Service's authority for recommending a ''no action'' alternative. One commenter said the Service cannot recommend avoidance of all impacts when such a position would deny a property owner any beneficial use of their property. Otherwise, a regulatory taking would result. Commenters said that because the Service has no basis to deny an action, the Policy should expressly state it does not allow for the Service to veto proposed projects on which it consults.

Response: We agree the proposed Policy's existing statements regarding recommendation of avoidance of impacts to high-value habitats are important themes, as they were in the 1981 Policy. For clarity, we have edited section 4, General Policy and Principles, to add a principle highlighting the

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Service's policy of recommending avoidance of high-value habitats.

This Policy provides a common framework for identifying mitigation measures. It does not create authorities for requiring mitigation measures to be implemented. The authorities for reviewing projects and providing mitigation recommendations or requirements derive from the underlying statutes and regulations. On a case-by-case basis, as noted in the Policy at section 5.7, Recommendations, we may recommend the ''no action'' alternative when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available. These recommendations will be linked to avoiding impacts to high-value habitats. Depending on the spatial configuration and location of habitats relative to project elements, recommending avoidance of all impacts to high-value habitats will not always equate to recommending no action.

Also, we note that the Policy does not indicate avoidance of all high-value habitats is required. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. If we provide such materials to an action agency for consideration in their authorization process, a regulatory taking would not result from making recommendations. This Policy will not effectively compel a property owner to suffer a physical invasion of property and will not deny all economically beneficial or productive use of the land or aquatic resources. This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation. This broad program direction for the Service's application of its various authorities does not itself result in any particular action concerning a specific property. In addition, this Policy substantially advances a legitimate government interest (conservation of species and their habitat) and does not present a barrier to all reasonable and expected beneficial use of private property.

Comment (66): Three commenters said identifying and requiring avoidance of all high-value habitat conflicts with the statutory and regulatory requirements of the ESA. They pointed out that regulations at 50 CFR 402.14(i)(2) state reasonable and prudent measures cannot alter basic design, location, scope, duration, or timing of an action. They said the Service would prohibit any activity impacting areas determined to be high-value habitat and that no such parallel requiring complete avoidance exists under the ESA. They said the Service has no authority to mandate the complete avoidance of designated critical habitat or require all impacts to critical habitat be offset with mitigation measures that achieve a net gain or no net loss.

Response: The Policy does not prohibit any activity impacting areas determined to be high-value habitat. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. Through the Policy, we are neither requiring nor mandating the complete avoidance of designated critical habitat. Regulations and procedures that implement the ESA are not superseded. The Policy does apply to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although the Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing in it replaces, supersedes, or substitutes for the ESA implementing regulations. In early stages of interagency consultation under the ESA, we routinely provide advice to action agencies on avoiding impacts to listed species and designated critical habitats that may be reflected in subsequent project descriptions or in action agency permits or authorizations. The provision of that advice is consistent with the Policy's guidance to Service staff on recommending avoidance of all high-value habitats.

Comment (67): One commenter said requiring onsite avoidance can lead to piecemeal mitigation and undermines the goal of supporting regional mitigation planning. They suggested removing the preference for onsite avoidance over compensatory mitigation to better support regional mitigation planning goals.

Response: The Service agrees that defaulting to avoidance can, in some cases, result in a less desirable outcome than pursuing compensatory mitigation elsewhere that better serves broader landscape-level conservation goals. However, in the Policy, we note that those cases involve impacts to lower value habitats. Even then, the Service will consider avoidance, consistent with the mitigation hierarchy. For the most highly valued habitats, the Policy guides Service staff to recommend avoidance. If adopted, recommendations to avoid impacts to high-value habitats directly support regional mitigation planning by ensuring the scarcest, most suitable, and most important habitats within a landscape remain unaltered.

Comment (68): Three commenters discussed whether avoidance of all impacts to high-value habitats is always necessary or desirable. They asked what the Service's response would be when an action is likely to be implemented despite recommendations to avoid high-value habitats. They suggested the Policy recognize that avoidance of all impacts to high-value habitats is not always necessary or practicable, and that unavoidable impacts to those resources will sometimes be authorized.

Response: Through this Policy, we provide guidance to Service staff that recommendations should seek to avoid all impacts to habitats they determine to be of high-value. Therefore, our policy is that it is always desirable to avoid impacts to high-value habitats. We recognize circumstances will vary, and in section 5.7, Recommendations, we note that when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative. We further recognize that our recommendations, either to avoid all impacts to high-value habitats or to adopt the no action alternative if necessary, will not be adopted or implemented by action agencies in all cases.

R. Compensatory Mitigation

Comment (69): Several commenters said they strongly supported application of equivalent standards for compensatory mitigation mechanisms as advocated by the Policy. One commenter said that, without equivalency, mitigation programs with lower standards will have competitive pricing advantages that create a ''race to the bottom'' as developers seek the lowest cost compliance option, producing lower conservation outcomes and undermining chances of species recovery. Several said the Policy should give greater emphasis to the sentence: ''The Service will ensure the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms.'' These commenters felt that, while the Policy's intent to support equivalent standards is clear, the statement is not easily located within a paragraph in section 5.6.3. They suggested creating a new paragraph with this sentence as the lead, or creating a new subsection titled ''Equivalent Standards'' under the existing section 5.6. Two commenters said equivalent standards should be

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

required by the Policy. One commenter said a monitoring and verification process should be required of all mitigation.

Response: We agree with the commenters that equivalent standards must be applied to ensure compensatory mitigation is successfully implemented regardless of the mechanism used to provide the mitigation. A level playing field allows for more transparency, fairness, and a greater likelihood of successful mitigation. In this Policy, we do not state that equivalent standards are required because of the breadth of authorities and processes it covers. In many cases, our authority is advisory, with the permitting authority resting with another agency. In such cases, requiring equivalent standards is another agency's provision to implement or enforce. This Policy covers multiple authorities, so it would be inaccurate to state that it can require equivalent standards in all cases. However, the Policy's statement of support for application of equivalent standards is accurate in all cases. Similarly, we support the monitoring and verification processes suggested by one commenter, but cannot provide a blanket requirement for such processes through this Policy. We agree with the commenters who suggested that our support for equivalent standards is not well highlighted or located within the Policy. We have now placed the information under a header for a new section 5.6.3.1, Equivalent Standards.

Comment (70): One commenter supported the Policy's definition of ''additionality,'' while two commenters expressed concern for the use of the term ''baseline'' in defining additionality and suggested the Policy distinguish between baseline and pre-project or pre-existing conditions.

Response: For purposes of the Policy, the baseline is the existing condition that will be used as the starting point by which to compare the adverse or beneficial effects of an action. In assessing compensatory mitigation, the Service will evaluate if the proposed mitigation measures are demonstrably new and would not have occurred without the compensatory mitigation measure and if they provide a conservation benefit above the baseline condition (*i.e.,* additionality). We have included the definition of baseline in section 6.

Comment (71): Several commenters requested the Service recognize in the Policy the ability of proponents to transfer responsibility for compensatory mitigation actions they initiate to a third party.

Response: We have revised the Policy to recognize that third parties may assume responsibility for implementing proponent-responsible compensation. This Policy advocates equivalent ecological, procedural, and administrative performance standards among all compensatory mitigation mechanisms. Therefore, conversion of a proponent-responsible plan to one administered by a third party is inconsequential relative to the Policy's goals. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations to ensure success and durability.

Comment (72): One commenter suggested the Policy indicate that Service-approved conservation banks for aquatic and aquatic-dependent species may also serve the purpose of compensating for impacts to waters regulated under the CWA, but that the Corps has discretion to use a conservation bank for those purposes.

Response: We agree that a wetland protected and managed as a conservation bank to compensate for impacts to species may also serve as a wetland mitigation bank, provided the Corps has approved the bank for that purpose. Because the Policy addresses mitigation for impacts to fish and wildlife species and not impacts to regulated wetlands, per se, the comment exceeds the scope of this Policy and does not warrant a specific revision. However, we intend to address operational considerations for compensatory mitigation mechanisms in step-down policies, such as the proposed ESA Compensatory Mitigation Policy (81 FR 61032–61065, September 2, 2016).

Comment (73): One commenter questioned whether measures that are considered ''onsite compensation'' in the context of permitting processes under the CWA (*i.e.,* restoring, enhancing, and/or preserving wetlands on or adjacent to the impact site) are considered a form of minimization under the Policy. The commenter noted section 5.6.3 indicates that compensation occurs ''generally in an area outside the action's affected area,'' but also refers to compensation sites that are either ''within or adjacent to the impact site.''

Response: The Policy adopts the five mitigation types defined in the NEPA regulations. We include ''rectifying the impact by repairing, rehabilitating, or restoring the affected environment'' (rectify) and ''reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action'' (reduce) under the ''minimizing'' label, but have not discarded these definitions, which have specific utility for species conservation. Our purpose for consolidating the five NEPA mitigation types into three was to align the general language of this Policy with that of the existing three-tiered DOI and CWA mitigation policies (avoid, minimize, and compensate). We group ''rectify'' and ''reduce'' with ''minimization'' to recognize the priority of these types of measures over compensation in the mitigation hierarchy, because such measures are, by definition, onsite measures focused specifically on the action-affected resources. We recognize that, unlike proactive minimization measures, measures to rectify and reduce impacts over time occur after impacts and are, therefore, more similar to compensation measures. Compensation replaces, or provides substitute resources or environments for, the affected resources, not necessarily within the affected area. Replacing or providing an onsite substitute for an affected resource meets the definition of rectify, but in the three-tier scheme of mitigation under CWA processes, is typically called onsite compensation. Because this Policy addresses species and not waters of the United States, some differences in terminology with mitigation under the CWA are unavoidable.

Under this Policy, which has not discarded the definition of rectify, ''onsite compensation'' has a narrower meaning. Onsite compensation involves provision of a habitat resource within the action area that was *not* adversely affected by the action, but would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but water availability in dry years is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status over some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. This Policy would identify measures to restore food resources as rectification and measures to increase water availability as onsite compensation.

Comment (74): Five commenters addressed the Policy's reference to habitat credit exchanges among available compensatory mitigation mechanisms. Two commenters expressed support for the inclusion of habitat credit exchanges, but one commenter said that they should be excluded because there are no existing

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

examples that demonstrate the viability of the concept. Three commenters said the Policy should emphasize that equivalent standards apply to habitat credit exchanges as well as all other compensatory mitigation mechanisms. Two commenters said the Policy should further define habitat credit exchanges.

Response: We agree with the majority of the commenters that defining and clarifying the role of habitat credit exchanges as a potential compensatory mechanism is prudent. In section 6, we have added the definition of habitat credit exchange. We confirm that all compensatory mitigation mechanisms, including habitat credit exchanges, must meet equivalent standards. Habitat credit exchanges in concept are not new. They are the species equivalent to the environmental market mechanisms established for carbon and water quality trading. Exchanges are emerging where wide-ranging species cross multiple natural and geo-political boundaries and a mechanism to engage vast numbers of participants is desired. At its core, a habitat credit exchange is a trading platform and, therefore, may encompass other compensatory mitigation mechanisms such as conservation banks.

Comment (75): One commenter expressed concern that ''performance standards'' are included among the 12 considerations for compensatory mitigation mechanisms in section 5.6.3, but are not mentioned in section 5.8 about documenting final Service recommendations. The commenter recommended the Service require performance standards in mitigation plans that address the full range of measures adopted (avoidance, minimization, and compensation), not just compensatory measures.

Response: We agree mitigation plans should include performance standards that address the effectiveness (degree to which objectives are achieved) of any mitigation means and measures (avoid, minimize, compensate) for which the outcome is relatively uncertain. Although such uncertainty is generally greatest for compensatory measures involving future habitat improvements to offset unavoidable impacts, the success of planned avoidance and minimization measures is not always assured and may require monitoring. To handle uncertainty, section 5.8 indicates that Service-recommended/approved mitigation plans should specify measurable objectives, associated effectiveness monitoring, and additional adaptive management (*i.e.,* corrective) actions as indicated by monitoring results. These final plans address the full range of mitigation means and measures that are reasonable and appropriate to ensure the proposed action improves or, at minimum, maintains the current status of affected species and their habitats. We did not use the phrase ''performance standards'' in section 5.8 as we did in section 5.6.3, and it is not necessary to do so. A compensatory mitigation plan that is prepared independently of a general mitigation plan for an impact-causing action (*e.g.,* the instrument for operating a conservation bank or in-lieu fee program) will serve the compensation needs of one or more such actions, and both types of plans require objectives and appropriate effectiveness monitoring (*i.e.,* performance standards).

Comment (76): One commenter recommended the Policy explicitly require an equivalent assessment of impacts and offsets (*i.e.,* the amount of compensation necessary to, at minimum, maintain the current status of the affected species after applying avoidance and minimization measures).

Response: Section 5.3, Assessment, provides general guidance for estimating impacts and benefits. This guidance applies to assessing the effects of actions both with and without mitigation options. Section 5.3 directs Service staff to use best available effects-assessment methodologies that meet various criteria, including the ability to estimate adverse and beneficial effects using ''common'' (*i.e.,* shared or equivalent) metrics. We have revised this language to clarify that ''common'' means ''equivalent,'' and have added an example to illustrate the concept. The example involves assessing effects to a species' food resource. The metric is the density or spatial extent of the food resource. Predicted decreases and increases in this metric represent adverse and beneficial effects, respectively.

Comment (77): One commenter stated that the Service should not require the use of a mitigation or conservation bank over other mitigation mechanisms, and that the Service lacks authority to require financial assurances of action proponents.

Response: We are clarifying the circumstances under which the Service may require the implementation of mitigation under the guidance of this Policy. Such circumstances are limited, and we expect our application of the Policy will most often occur in an advisory capacity to action proponents. The Policy expresses a preference for compensatory mitigation in advance of impacts, but the use of conservation banks or other compensation in advance of impacts is not a firm requirement, even when the Service is funding, approving, or carrying out the proposed action. To the same extent that the Service cannot require mitigation under all of the authorities that apply to a particular action, the Service cannot require financial assurances of action proponents in all cases (*e.g.,* outside the ESA Habitat Conservation Plan context). Nevertheless, we are retaining the reference to financial assurances throughout the Policy as a prudent component of mitigation plans. Such assurances are a reasonable and practicable underpinning for reducing the uncertainty about achieving the objectives associated with mitigation plans, especially with compensatory activities intended to secure future benefits to the affected species.

Comment (78): One commenter believed the Policy preference to compensate for impacts in advance of actions causing impacts would discourage voluntary actions to conserve species in order to avoid the need to list them as endangered or threatened under the ESA. The commenter suggested Service listing decisions would discount any habitat improvements that are identified, or could serve as advance compensation, presumably because the proponents of future actions causing impacts to the species would seek to claim such improvements as compensatory offsets. Over time, advance compensation improves the status of the species only to the extent that its benefits exceed the impacts of those future actions relying upon it; therefore, advance compensation does not necessarily preclude the need to list a species.

Response: This Policy does not address listing decisions under the ESA. This comment addresses the purposes of the Service's proposed ''Policy Regarding Voluntary Prelisting Conservation Actions'' (79 FR 42525–42532, July 22, 2014), which is not yet finalized. The proposed Voluntary Prelisting Conservation Actions policy describes the Service's proposal to give credit to such actions in the event of a subsequent listing of the species. In the context of both section 7 and section 10 of the ESA, the Service proposes to recognize a proponent's previous conservation actions as offsets to the adverse effects of a proposed action within the framework of an established conservation plan for the species in States that participate in the prelisting conservation program. Regardless how the Service finalizes the Voluntary Prelisting Conservation Actions policy, this Policy expresses Service support for compensation in advance of impacts to species, and the Service will account for

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

advance compensation actions in its formulation of mitigation recommendations.

Comment (79): Several commenters recommended the Policy address preferences for ''in-kind'' vs. ''out-of-kind'' compensatory measures. Some urged the Service to explicitly endorse out-of-kind measures, while others advised us to express a strong preference for in-kind measures as in the 2008 Mitigation Policy for CWA section 404 permitting.

Response: We do not use the terminology of ''in-kind'' vs. ''out-of-kind'' compensation in this Policy. Unlike the Mitigation Policy for CWA section 404 permitting, where the subject resources are waters of the United States, the subject resources of this Policy are species. All compensatory mitigation recommended by the Service under this Policy is ''in-kind'' for the affected evaluation species (*i.e.,* it must offset an action's unavoidable impacts to the same species). We do not express a preference for implementing compensatory measures in the same type of habitat(s) affected by the action. Based on a species' conservation needs and applicable plans/strategies to address those needs, Service personnel will determine whether in-kind or out-of-kind habitat compensation will provide the most practicable means of ensuring a proposed action improves or, at minimum, maintains the current status of the affected evaluation species.

Comment (80): Two commenters recommended that the Policy recognize an action proponent's authorities/abilities to implement all mitigation measures onsite only, or to implement compensatory measures only within a particular jurisdiction.

Response: The Service should not provide recommendations that others have no discretion to consider, and this Policy does not direct Service personnel to do so. Measures that avoid and minimize impacts apply within the area affected by the action, and proponents should generally have sufficient discretion to adopt and implement all such measures. The Service will respect the jurisdictional limitations of proponents to implement compensatory measures outside the affected area.

Comment (81): A few commenters expressed concern that early or voluntary mitigation actions would not be recognized or given the appropriate crediting.

Response: The Service supports early and voluntary mitigation actions and is committed to collaborating and coordinating with project proponents to assess the accrual of additional conservation benefits from such actions.

Comment (82): A number of commenters addressed the concept of duration in relation to the durability of mitigation measures. Several commenters questioned the standard to maintain the intended purpose of the mitigation measure ''for as long as the impacts of the action persist on the landscape.'' These commenters suggested the duration of the mitigation site be correlated to the monitoring and maintenance period after which the mitigation sites should be allowed to evolve through natural successional processes rather than be required to maintain a specific condition. Another commenter recommended more objective or established timeframes such as length of the ''planning horizon'' or ''in perpetuity'' to characterize the duration of the mitigation. One commenter suggested the burden of proof be on the project proponent to demonstrate that impacts of a temporary duration have been removed before being released from a mitigation obligation.

Response: The Service will recommend or require that mitigation measures be durable, and at minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service acknowledges site-specific conditions may need to evolve through natural processes. For example, we expect riverine systems to scour and revegetate in cycles, causing species composition to vary at any one point in time but supporting targeted resources in the long term. In other circumstances, active management (*e.g.,* controlled burning, grazing) may be needed to retain the intended purpose of the mitigation site for affected resources. Mitigation measures for permanent impacts will rely on permanent mitigation. When it can be demonstrated that impacts to affected resources are temporary, durability accounts for the time the effects of the action persist.

Comment (83): One commenter noted the definition of ''durability'' only includes the concept of duration and not the implementation assurances needed to ensure the mitigation is durable, while another commenter suggested that reference be made to the elements ''a. thru i.'' as set forth in 81 FR 12380 at 12391 (March 8, 2016) as essential to the definition.

Response: Durability is one of the fundamental principles that will guide Service mitigation recommendations to ensure mitigation measures maintain their intended purpose for affected resources for as long as impacts persist on the landscape. We agree with the commenters that implementation assurances are needed to ensure mitigation is durable. Section 5.6.3 identifies those elements intended to ensure successful implementation and durability of compensatory mitigation measures, including site-protection mechanisms, performance standards, monitoring, long-term and adaptive management, and provisions for financial assurances.

Comment (84): Several commenters supported the approach described in the Policy regarding the limits on use of research or education as compensatory mitigation. Three commenters suggested that use of research/education as compensatory mitigation should be expanded. One commenter suggested we add additional implementation detail. For clarity, one commenter suggested moving the research/education material under a new header or section.

Response: We agree with the commenters who said compensatory mitigation should provide tangible benefits and that research/education should be included in a mitigation package only in those limited circumstances described in the Policy. Exhaustive implementation detail on this topic is beyond the scope of this umbrella policy, which covers all Service mitigation authorities wherever they are carried out. Such detail may be contained in future step-down guidance or will be determined on a case-by-case basis by Service staff. We have reorganized the material into a new section 5.6.3.2.

S. Adaptive Management

Comment (85): In general, commenters appeared to agree with the concept of adaptive management, as discussed in the Background section and other areas of the Policy. Several commenters suggested refinements to the Policy to increase certainty for project proponents. One commenter was concerned with regard to adaptive management's nexus with protections for federally listed species.

Response: We agree the iterative process used during adaptive management serves to facilitate progress toward achieving defensible and transparent objectives. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation, including those related to adaptive management. Nothing in this Policy supersedes statutes and

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

regulations governing treatment of federally listed species.

T. Documentation

Comment (86): Commenters asked that final recommendations include, in writing, all steps and clearly identify party responsibilities regarding implementation and performance of mitigation measures. One commenter requested more consistency between the 12 elements identified in section 5.6.3 and the section on final recommendations. Another commenter requested clarification of whether information provided by the Service through the Policy is a requirement or considered technical assistance.

Response: The Policy indicates that documentation should be commensurate in scope and level of detail with the significance of the potential impacts to resources, in addition to providing an explanation of the basis for Service recommendations. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation. Section 5.6.3 describes the use of compensatory mitigation, one of the five general types of impact mitigation described under section 5.6, Means and Measures. Section 5.6.3 includes several measures meant to ensure successful implementation and durability, specific to instances where compensatory mitigation is employed. The text in section 5.8, Documentation, has been modified to include the phrase: ''Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.''

U. Monitoring

Comment (87): Many commenters were concerned how this Policy would add predictability, efficiency, and timeliness. Some were particularly concerned about potentially variable interpretation among Service field offices. One recommended actual Policy implementation elements be separated due to complexity and provided as guidance, while two others stated the Policy was not specific enough to evaluate and ensure consistency. Several commenters requested a standardized process or system, with clear guidelines and methods for implementation, be established to determine effectiveness, monitor durability, and track performance to ensure compliance and deliver conservation benefits. One commenter was concerned that wildlife and habitat assessments envisioned by the Policy could entail complex analyses, while others said mitigation should be based on biological conditions and reliable, repeatable, and quantitative science-based methods to measure benefits and outcomes and inform adaptive management. Others suggested use of key ecological attributes (KEAs) to measure outcomes. Some were concerned that there was no requirement for monitoring, while others supported standardized self-reporting. One commenter noted the monitoring requirement may conflict within the Policy itself (Appendix B, section C) with regard to the responsibility of the Service to monitor compliance.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such (a) system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. The principle articulated in paragraph (f) of section 4 specifically states: ''The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.'' The principle articulated in paragraph (f) states ''The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape.'' Thus, where appropriate, a process using KEAs may be applied. Regarding requirements for monitoring, the Policy states the Service's final mitigation recommendations should communicate in writing ''c. effectiveness monitoring; d. additional adaptive management actions as may be indicated by monitoring results; and e. reporting requirements.'' Regarding the statement indicating the need or inability to ''require'' monitoring, this Policy serves as an overarching guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. The text in the Policy was modified to clarify its intent with regard to monitoring compliance. This includes Appendix B, which now clarifies Service responsibilities for applying the Policy when formulating our own proposed actions under the NEPA decisionmaking process, versus being used as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA.

V. Recommendations and Preferences

Comment (88): One commenter was concerned that certain language in the Policy appeared to devalue proponent-responsible compensatory mitigation and cautioned against conflating preferences with standards. This commenter pointed to the Department of the Interior's Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015), that lists the high and equivalent standards to which all mechanisms for compensatory mitigation should be held in section 6.7. They noted preferences are not included in that list, so while the ideas of ''equivalent standards'' and a policy's ''preferences'' are both principles, a preference is not an equivalent standard. They said each mitigation measure does not need to adhere to each preference, only to each equivalent standard. They suggested that the following statement be removed from section 5.6.3 of the Policy, as it seemingly asserts all mitigation measures must achieve the preferences: ''As outlined by DM 6.6 C, this means that compensatory mitigation measures will. . .implement and earn credits in advance of impacts . . . .''

Response: We do not intend to devalue proponent-responsible mitigation, and we recognize it is a vital compensatory-mitigation mechanism, whether implemented by private project developers, agencies, or third-party mitigation implementers. We acknowledge flexibility is warranted in recommendations for the compensatory mitigation measures and mechanisms most likely to achieve the Policy's goal, and we established a preference for advance mitigation because it is the compensatory mitigation timing most likely to achieve that goal. We recognize either concurrent mitigation or mitigation occurring after impacts may be necessary in some cases, and may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banks or other compensatory mitigation mechanisms. Conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, but any other compensatory mitigation mechanism that does so is also consistent with the Service's preference. We agree with the

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

suggestion to remove reference of our preference for advance mitigation from the language that precedes the list of equivalent standards, located in the new section 5.6.3.1, Equivalent Standards, and have made that targeted edit to avoid further confusion between preferences and equivalent standards.

Comment (89): One commenter asked for clarification of the following statement on advance compensatory mitigation within section 5.7.1, Preferences: The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Response: The sentence the commenter mentions addresses temporal loss. Temporal loss is the delay between the loss of resource functions caused by an impact and the replacement of resource functions at a compensatory mitigation site. Additional compensatory mitigation may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the impacts, additional compensation for temporal loss may not be necessary, unless the resource has a long development time. We have added an additional sentence to clarify the statement.

Comment (90): One commenter said the Policy should use a priority and preference, similar to the Corps' and EPA's joint rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332, and 40 CFR part 230 (EPA), 33 U.S.C. 1344. In that regulation, the agencies establish an explicit preference for mitigation banking, followed by in-lieu fee programs, and finally, proponent-responsible mitigation.

Response: This Policy is an umbrella policy that integrates all of the Service's authorities for engaging in mitigation processes. One reason we have not pursued an outright preference for banks or other mechanisms is that our authorities to recommend mitigation extend beyond the current track record for banks, which is limited to aquatic habitats and listed species. Instead of following the regulatory model from the CWA practice of stating an explicit, hierarchical preference that begins with banks, we establish a preference for advanced mitigation. While conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, any compensatory mitigation mechanism that secures resource benefits before impacts occur may also be consistent with the Service's preference.

We expect additional detail regarding compensatory mitigation mechanisms will be included in future step-down policies that are specific to compensatory mitigation. In this Policy, we use terminology that supports and accommodates future Service policies rather than pre-determines their content. For example, we do not yet know what compensatory mitigation mechanisms will be preferred in future Bald and Golden Eagle Protection Act regulations, so it would be inappropriate to state firm preferences here.

Comment (91): One commenter suggested we revise section 5.7, Recommendations, to indicate that compensatory mitigation should encourage more sustainable contributions of the goods and services provided to the public. This commenter said mitigation can have larger public benefits and services and that the Service should encourage mitigation actions that have additional natural, cultural, historical, or recreational values and benefits.

Response: We agree mitigation actions can provide the benefits the commenter describes. In section 5.1, we describe our support of the development of mitigation plans that identify high-priority resources prior to specific proposed actions. The most effective early mitigation planning is integrated with conservation planning and planning for human infrastructure, including transportation; water and energy development; as well as working lands, recreation, and cultural values. Although such integration is not a requirement of a process under any particular mitigation authority, the Service recognizes the potential power of plans that simultaneously addresses multiple ecological and human needs from broad stakeholder perspectives.

W. Advance Mitigation

Comment (92): Several commenters addressed the Policy's inclusion of a preference for advance mitigation. Several said they strongly endorsed statements throughout the Policy that recognize the value of compensatory mitigation completed in advance of impacts. Others said the preference should be removed or altered, but their reasoning differed. Some opposed a categorical requirement that mitigation be implemented prior to impacts, while others suggested the Policy go further than a preference and make advance mitigation a requirement. Some commenters said a preference was appropriate, but suggested the Policy use consistent language in referring to a preference.

Response: Section 5.7.1 describes a preference for advance mitigation. It is not a requirement. As policy, we prefer that compensatory mitigation be implemented before the impacts of an action occur, making affected resources less vulnerable to temporal impacts and a net loss. Advance mitigation reduces risk and uncertainty. Demonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or following, the impacts of an action. Most of the Service's mitigation authorities provide the ability to specify mitigation recommendations rather than requirements, and the Service would not be able to create a requirement for advance mitigation through policy. Accordingly, when providing mitigation recommendations to another action agency for consideration in their permitting or project decision, this Policy's guidance to Service staff is that they indicate their preference for advance mitigation. We have made minor edits to more consistently refer to this preference.

Comment (93): Several commenters said the Policy's preference for advance mitigation is incompatible with project-planning realities, is not feasible or appropriate for some projects, and is not always possible. They suggested we revise the Policy to allow mitigation to occur concurrent with, and in some circumstances following, impacts to be consistent with the Corps' mitigation framework. Some commenters suggested simultaneous construction of the project and mitigation remain an option.

Other commenters expressed the need for flexibility regarding the preference for conservation reasons. One commenter said overemphasizing the timing of mitigation could limit the Policy's goal of net conservation gain. They suggested the Policy de-emphasize mitigation timing in favor of tailored mitigation that addresses the needs of unique species and habitats. They were also concerned that a preference for advance mitigation would give priority to for-profit conservation/mitigation banks, and may not adequately tailor mitigation for the impacted resources. Another commenter noted that some initial flexibility may be necessary as new mitigation programs are created at the State and local levels.

Response: Because advance mitigation is the Service's preference and not a requirement, the Policy is compatible with circumstances where

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

compensatory mitigation is concurrent with or after project impacts. It is our preference that compensatory mitigation be implemented prior to project impacts, but we recognize that authorities and project planning circumstances might prevent implementation of advance mitigation in some cases. While concurrent mitigation is an option when circumstances allow, proponents may expect advance mitigation to remain the Service's preference in most cases.

We agree that flexibility is necessary in recommendations for compensatory mitigation measures and mechanisms that are most likely to successfully secure resources. Advance mitigation is the Service's preference, as it is the compensatory mitigation timing that is most likely to achieve success in regard to procuring funding. We recognize that concurrent mitigation or mitigation occurring after impacts may be necessary in some cases or may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banking or other compensatory mitigation mechanisms. Conservation or mitigation banking typically secures resources before impacts occur, but any compensatory mitigation mechanism that does so may also be considered consistent with the Service's preference.

Comment (94): One commenter wrote that it is possible for in-lieu fee programs to implement advanced mitigation, although they have not done so historically. This commenter also said a preference for advanced mitigation applied to in-lieu fee programs would increase their likelihood of success.

Response: The Policy's preference for advance mitigation applies to all compensatory mitigation mechanisms. Although conservation or mitigation banking secures resources before impacts occur, any compensatory mitigation mechanism implemented before impacts occur may also satisfy this preference. In-lieu fee programs can implement a ''jump-start'' that establishes and maintains a supply of credits that offer mitigation in advance of impacts.

X. Public and Private Lands

Comment (95): Several commenters focused on the way the Policy addresses siting of compensatory mitigation relative to land ownership status in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. Several expressed support for the Policy's statement that mitigation will generally be required on lands with the same ownership classification as those where impacts occur. Some commenters believe the Policy should establish even stronger controls on public land mitigation, saying that impacts on private lands should not be mitigated on public lands. These commenters reasoned that mitigation on public lands has limited value and should not be allowed. One commenter said the Policy should recognize that when any compensatory mitigation is sited on Federal lands, unless a full-cost compensation is made for the fair market value (at a minimum) of the land utilized, then the public is subsidizing the development that caused the resource impacts. One commenter said no policy should create unfair competition with private industry, or create a disincentive to private investment in compensatory mitigation. They felt this could occur if there were no restrictions on siting compensatory mitigation for private-land impacts on public land locations. One commenter noted that some land managers would like to use compensatory mitigation funds to resolve preexisting problems on public lands, usually unrelated to the action and resources under active analysis. The commenter said this view is understandable but contrary to the mitigation hierarchy.

Several commenters suggested fewer barriers or checks on mitigating private-land impacts on public lands, and the removal of the statement that compensatory mitigation should generally occur on lands with the same ownership classification as at the location of impacts. These commenters said requiring mitigation on lands with the same ownership classification is unnecessarily restrictive, adding that, when implemented, the standards for compensatory mitigation will force a positive result regardless of land ownership. One commenter said public land managers do not and will not have the funding necessary to stabilize and recover some resources, and it is, therefore, imperative that private conservation investments, including mitigation for adverse activities, be applied on public lands if it will provide maximum conservation benefit for the affected resource.

Response: Compensatory mitigation can occur on public lands, and in some cases, such siting may lead to the best ecological outcome. Compensatory mitigation for impacts on public lands can be sited on both public and private lands. Also, compensatory mitigation for impacts on private lands can be located on public lands, but it is that combination, or that particular change in ownership classification, where Service staff should be attentive to additional considerations before confidently making such a recommendation. Section 5.7.2 describes factors Service staff should consider. This cautious approach is warranted within the Policy's instruction to Service staff, for the reasons described below.

We recognize that funds to properly manage or restore public lands are often insufficiently available today, absent infusion of mitigation dollars. This argument may have merit in some cases, but we remain concerned about consequences. It is possible that funding availability is reduced and opportunities to restore or protect at-risk habitats on private lands are precluded when compensatory mitigation is sited on public lands. If passed, those opportunities on private lands are often permanently gone. Given the irregular footprint of public lands across much of the United States, we are also concerned about strategic conservation of wildlife if the aggregation of mitigation onto public lands is further streamlined without articulating at least some test or application of criteria prior to making such recommendations. If we remove all checks on locating compensatory mitigation for private land impacts on public lands, we may risk making the ''export'' of habitats from private to public lands a routine practice, as it may often be the lower cost option. This outcome would counter the Service's intent that the Policy be applied using a landscape-level approach.

We agree with the commenters who said there is potential for the public to subsidize the development that causes resource impacts if access to public lands for compensatory mitigation is streamlined to an inappropriate extent. This could potentially facilitate impacts or de-incentivize avoidance on private lands by artificially reducing the costs of compensatory mitigation for project proponents.

We are also concerned about the unintended consequence of reducing private conservation investment. Streamlined access to public lands for proponents needing to provide mitigation for impacts on private lands could undermine private conservation investment and banking opportunities, or weaken the economic conditions necessary for bank establishment by artificially reducing proponents' mitigation costs (*e.g.,* land acquisition costs might not be fully incorporated).

Comment (96): Several commenters discussed conditions or means for ensuring compensatory mitigation on public lands is durable and held to the

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

same standards as when conducted on private lands.

One commenter said the Policy should require the public land agency include the compensatory mitigation requirements as specific conditions in the special use permit or other required authorizations. This commenter also said a long-term management plan should be included in the use authorization, permit, or other legally binding document. They said that in order to ensure long-term management plans are binding, they should be established through a contractual agreement between the public land management agency and a third party with a conservation mission.

One commenter said compensatory mitigation on Federal lands for impacts on private lands must include full-cost compensation for the use of public lands, either through monetary compensation or implementation of additional projects to further the purposes of the Federal lands.

One commenter said land managers must demonstrate that actions taken in already-protected areas meet mitigation objectives and are not used solely for the benefit of existing protected area management goals. They added that when compensatory mitigation is sited within protected areas, land managers must uphold accountability by maintaining a ledger of mitigation actions undertaken and completed in addition to existing conservation obligations.

One commenter said the Policy, at minimum, should give preference to private lands with high conservation potential yet currently lacking conservation assurances (*i.e.,* legal and financial assurances in place to achieve protection in perpetuity) before considering the use of public lands for mitigation.

Two commenters said the Policy should require public land managers commit to long-term protection and management, and that they implement and fully fund alternative compensatory mitigation in the event of a change in law that allows incompatible uses to occur on mitigation lands. They said this would provide better certainty to project proponents when mitigating on public lands.

Response: We agree that the identification of mechanisms for ensuring the durability and additionality of compensatory mitigation on public lands is both important and challenging. As an umbrella policy, this Policy integrates all of the Service's authorities for engaging in all aspects of mitigation, and is not specifically a compensatory mitigation policy. It is beyond the scope of the Policy to provide detailed procedural information for all compensatory mitigation scenarios. Also, as many of our mitigation authorities are advisory, it would be inappropriate to present detailed compensatory mitigation procedures in this Policy for such advisory authorities, when that information may already be presented in the existing regulations or guidance of other agencies. We agree that compensatory mitigation on Federal lands for impacts occurring on private lands must incorporate accounting for the difference between the cost of using public lands compared to private lands. Otherwise, agencies will not be able to maintain a level playing field for both public and private lands and for all types of compensatory mitigation mechanisms. Detailed specification of measures to ensure such accounting is beyond the scope of this Policy.

Public lands that are proposed for siting compensatory mitigation may include Federal, State, county, and municipal lands. The existence and nature of mechanisms to ensure durability and additionality varies widely across land management agencies. Given this variation, it is prudent for this Policy to provide general guidelines for Service staff to examine before recommending mitigation of private land impacts on public lands. As described in section 5.7.2, these include additionality, durability, legal consistency, and whether the proposal would lead to the best possible conservation outcome.

Comment (97): One commenter addressed the Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999). They said siting compensatory mitigation for impacts permitted under the CWA on National Wildlife Refuge System lands is not appropriate and that those lands were not established for fulfilling private wetland impact mitigation requirements. They added that the Service must fulfill its responsibility for fully functioning Federal lands and should in no instances lower its standards when contemplating compensatory mitigation; to do otherwise would subsidize private mitigation. This commenter was concerned that section 5.7.2 undermined the 1999 Policy.

Response: We appreciate the commenter's observations and share their concerns regarding compensatory wetland mitigation on National Wildlife Refuge System lands. Those concerns led to, and were addressed by the 1999 Policy. Section 5.7.2 does not undermine the 1999 Policy. Regardless of the content of section 5.7.2, when the public land proposed for siting compensatory mitigation for permitted impacts under the CWA is a National Wildlife Refuge, that proposal is specifically covered by, and must comply with, the 1999 Policy. Our revisions of the 1981 Policy do not modify or supersede the 1999 Policy.

Y. Implementation

Comment (98): One commenter recommended an economic analysis because they believed there would be additional burdens and cost of implementing the Policy.

Response: We understand that confusion regarding whether the Service's comments are requirements or merely recommendations may have led some to believe the scope of the Policy has been substantially expanded. The burdens and costs associated with this Policy will remain largely the same as under the 1981 Policy and under existing agency practice.

Comment (99): Commenters requested the Service articulate a clear timeline in which the Policy will be implemented across the agency. A 2-year timeline was recommended, as it would allow enough time to sufficiently (a) adopt the Policy, (b) train and educate staff, and (c) apply the Policy in the field. Others questioned the undue burden to staff and availability of funding to implement the Policy. Similarly, commenters requested information on how the Service plans to implement the Policy, given staffing and budget constraints.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such a system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. During development of such guidance, the Service will facilitate discussions and training with staff to ensure consistency and reduce workload.

Comment (100): Many expressed concern with how the Policy may be inconsistent or conflict with regulations or policies from States, and other Federal agencies responding to the Presidential Memorandum on Mitigation (National Marine Fisheries Service, Corps, National Atmospheric and Oceanic Administration, Federal Energy Regulatory Commission, etc.), given the need to promulgate joint regulations. Some urged the Service to

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

coordinate this Policy internally, particularly with policies promulgated under the Endangered Species Act and CERCLA, OPA, and the CWA during natural resource damage assessment. One commenter requested clarity where more than one statute applies, others suggested the Service provide training internally and externally to other agencies, and some recommended examples and templates be constructed.

Response: The Policy is consistent with the Presidential Memorandum on Mitigation. The guidance development referenced in the Presidential Memorandum on Mitigation is under consideration within the Department of Interior at the time this Policy is being finalized and the Service will continue to seek consistency in future guidance. We have made edits to Appendix A to clarify the relationship of this Policy with natural resource damage assessment and the Presidential Memorandum on Mitigation.

Comment (101): One commenter questioned the use of ''reasonably foreseeable,'' requesting clarification of what impacts would be considered such and what criteria would be applied to make that determination.

Response: The Service will implement use of the phrase ''reasonably foreseeable,'' similar to that used in NEPA. Under this scenario, actions that are likely to occur or are probable, rather than those that are merely possible, would be considered reasonably foreseeable. See CEQ guidance at 46 FR 18026 (March 23, 1981).

Comment (102): Several commenters were concerned that the Policy lacks clear mitigation protocol, resulting in moving targets for land users interested in developing and executing projects in good faith. Some commenters stated that the Policy will substantially increase uncertainty, without providing additional environmental benefits, especially given the broad range of regulatory protections already in place.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Thus, site differences could be considered during impact evaluation, for example, circumstances such as differences in productivity of habitat prior to the project, expected duration and severity of impact, or other local conditions. A less flexible policy could cause rigid adherence to a protocol, which may be more suitable in one region than another.

Comment (103): One commenter suggested the Service did not comply with procedural requirements to finalize the Policy, in particular the Administrative Procedure Act (APA) and the Regulatory Flexibility Act (RFA).

Response: The Service complied with all necessary regulatory requirements in publishing the final Policy. The Policy does not require compliance with the APA or the RFA because it is not regulatory. The Policy simply revises and replaces the 1981 Policy that guided the Service's mitigation recommendations for 35 years. This Policy is advisory in nature and outlines the Service's recommended approach to addressing accelerating loss of habitats, effects of climate change, and a strategic approach to conservation at appropriate landscape scales. It addresses all resources for which the Service has legal authorities to recommend mitigation for impacts to resources and provides an updated framework for mitigation measures that will maximize their effectiveness at multiple geographic scales.

Comment (104): Several commenters suggested we allow the public to comment on a complete portfolio of policies, handbooks, and guidance documents that implement the Policy at one time.

Response: Many of the Service's guidance products are completed, while others are either in development or have yet to be drafted, making it logistically impossible to complete such a filing. This Policy is intended to be an umbrella policy under which more detailed policies or guidance documents covering specific activities may be developed in the future.

Z. Editorial and Organizational Comments

Comment (105): Many commenters provided specific technical, editorial, and organizational suggestions or corrections, including suggestions for new or modified definitions.

Response: We have addressed technical, editorial, and organizational suggestions and corrections as appropriate throughout the document.

Comment (106): Many commenters questioned the specifics of multiple definitions, requested clarification or refinement, or mentioned the need for additional or narrowed definitions (*e.g.,* baseline, additionality, equivalent standards, preferences and credits, emerging mechanisms, conservation objective, net conservation gain, impacts or effects, landscape, ecologically relevant scales, broad ecological functions, ecologically functioning landscapes).

Response: With regard to refining the definitions, the Service is consistent with the Departmental Manual and Presidential Memorandum. As with many of the decisions made during analyses of impacts, definitions of many terms may take on the nuances of the project and/or authority under which the mitigation is being discussed. We have preserved the flexibility and look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency, including newly emerging mechanisms for analyses, mitigation, and monitoring.

Comment (107): One commenter was concerned the definition of ''compensatory mitigation'' insinuates there will always be ''remaining unavoidable impacts'' that must be compensated, and suggests revisions. The same commenter states that the definition of mitigation hierarchy should include where departure from the sequential approach may achieve a better conservation income.

Response: If there are no residual impacts after ''all appropriate and practicable avoidance and minimization measures have been applied,'' no compensatory mitigation would be required. Departure from the mitigation hierarchy is detailed in section 5.5, where we describe how relative emphasis will be given to mitigation types within the mitigation hierarchy depending on the landscape context and action-specific circumstances that influence the effectiveness of available mitigation. No change was made to these definitions.

AA. Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

Comment (108): Five commenters suggested or requested clarifications regarding Appendix C, which addresses the limited role that specific types of mitigation can play in financial assistance programs. Two commenters said they supported limiting the use of public conservation funds to meet regulatory mitigation requirements, as the use of such funding to also generate credits undermines the effectiveness of both conservation and mitigation programs. They said that funding from any public entity that is specifically dedicated to conservation should not be used to generate credits, and suggested those funds be used to achieve baseline conditions. They suggested the Policy clarify that public conservation funds can be used to meet baseline.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Response: The commenters propose that, if funds from a public entity are specifically dedicated to conservation, they could be used to achieve baseline conditions, which they define as ''the level of resource function above which mitigation credits may be sold.'' However, even if baseline were defined as recommended, the achievement of baseline would still be an essential part of the process leading to the generation of mitigation credits.

This Policy prohibits the use of the Federal share or the required minimum match of a financial assistance project to satisfy Federal mitigation requirements, except in exceptional situations described in the Policy. This prohibition is consistent with the basic principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. The regulations were published in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the EPA, resulting in regulations at 40 CFR part 230. Sections 332.3(j)(2) and 230.93(j)(2) state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, *cannot be used for the purpose of generating compensatory mitigation credits* for activities authorized by [Department of the Army] permits. *However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs* in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.*]

The preamble of the final rule for these regulations clarifies the intent of §§ 230.93(j)(2) and 332.3(j)(2) by stating that, for example, if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for Federal funding could be used as compensatory mitigation credits.

The Policy acknowledges these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation of the Policy for mitigation required by authorities other than the CWA. Restricting the role of financial assistance funds for mitigation purposes is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (109): Two commenters said limiting the use of funds counted as matching funds toward Federal grants as mitigation is inconsistent with several existing State and Federal policy statements. They noted that in 2008, seven agencies including the Service, other Federal agencies, and several Oregon State agencies issued joint recommendations limiting the use of public conservation dollars to generate credits for mitigation. The recommendations state, ''The agencies believe that funds from programs identified as Public Resource Protection and Restoration Programs should not be used to finance mitigation projects undertaken to satisfy regulatory requirements. To do so would be inconsistent with the mandated and/or intended purposes and limitations of these programs.'' The recommendations further state ''. . . multisource funded projects should include accounting that is detailed and transparent enough to accurately measure the relative habitat and conservation values derived through each funding source.'' They also stated that Metropolitan Regional Governments and other sources of public conservation funds have consistently limited the use of pubic conservation funds to support mitigation, but allow mitigation funds to be used as match.

Response: The Policy allows matching funds to be used to generate credits only if: (a) The match used for the credits is over and above the required minimum; (b) funding for the award has been statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects; or (c) the project funded by the Federal financial assistance award requires mitigation as a condition of a permit. These restrictions are based on the premise that neither Federal funds nor any required contribution for obtaining Federal funds should subsidize those who are legally obligated to compensate for the environmental impacts of the projects they propose. This was an underlying principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation.

The regulations on compensatory mitigation under the CWA were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. For excerpts from these regulations that are relevant to this comment, please see our response to comment #108 above.

Consistent with the DOD and EPA regulations, the Appendix C, section (C)(1)(a) of the Policy allows the match in a Federal financially assisted project to be used to generate mitigation credits if: The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the restoration or conservation project.

Comment (110): Five commenters said they want to encourage collective action to achieve conservation outcomes, and leveraging multiple funding sources will lead to bigger projects with greater environmental benefits. They said the Policy seems to support a scenario where the EPA could fund $1 million of a project, a city could fund $2 million, but the city could not take any mitigation credits if it claimed those funds as match for the Federal grant. The commenters said this scenario could limit opportunities to create greater conservation or environmental benefit at a landscape scale.

Response: Under the commenters' scenario, if a city provided match above the required minimum, the Policy would not present a barrier for this ''surplus'' match to generate mitigation credits as long as the program's establishing authority(ies) or regulations do not prohibit it. However, if a program requires a minimum match, that required minimum has effectively already been dedicated to conservation by the rules of the program. In those programs where a minimum match is required, the Federal funds and the minimum match are essential components of the financial assistance. The award would not be possible without that minimum match, so the Policy does not allow either of these

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

essential components to generate mitigation credits.

This was a basic principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation. The Service's revised Policy is based on the same principle. If we were to allow the match required as a prerequisite for an award to generate mitigation credits, it would effectively subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (111): Two commenters suggested the following text to reflect the importance of leveraging multiple funding sources in achieving landscape-scale outcomes: Public conservation funds cannot be used to meet regulatory compliance obligations. Where multiple sources of funding are used in conjunction with credit-generating activities, it is the permittee's responsibility to demonstrate compliance with this requirement. Public conservation funds can be used to meet baseline conditions.

Response: The Policy authorizes the use of specific funding sources that are, or could be interpreted as ''public conservation funds.'' The references to such funding in the Policy are:

(a) Federal funding statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects (Appendix C, section E(1)(b)).

(b) Federal funds needed to mitigate environmental damage caused by a federally funded project (Appendix C, section E(1)(c)).

(c) Revenue from a Natural Resource Damage Assessment and Restoration Fund settlement as long as the financial assistance program does not prohibit its use (Appendix C, section F).

The Policy also affirms that States, tribes, and local governments are free to use Federal financial assistance (*i.e.,* public conservation funds) to satisfy the mitigation requirements of State laws or regulations as long as that use is not contrary to any law, regulation, or policy of the State, tribal, or local government (Appendix C, section G(2)).

We did not accept the commenter's recommended language because it could lead to incorrect interpretations of the Policy.

The commenter also recommended ''public conservation funds'' be used to meet baseline conditions under the commenter's definition of ''baseline.'' We addressed this issue in a previous response.

Comment (112): One commenter said it is not workable to prohibit a site that has received Federal funds to generate credits. They suggested the Policy encourage the pooling of resources and the investment of mitigation dollars in the most valuable sites regardless of whether Federal funds have been invested on the site, especially for those uses not directly related to restoring greater sage-grouse habitat. The commenter said they believe thoughtful discussions and pertinent accounting will ensure Federal funds are not used to generate credits to offset the impacts of the private sector or create a conflict with the rules of additionality.

Response: The authority for most funds spent on mitigation is the CWA. The regulations that implement the CWA's compensatory mitigation requirements were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. Sections 332.3(a)(3) and 230.93(a)(3) indicate that compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, *over and above* those provided by public programs already in place. [*Emphasis added.*]

Sections 332.3(j)(2) and 230.93(j)(2) of 40 CFR part 230 state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by [Department of the Army] permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, *but supplemental to,* such programs in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.]*

The CWA may have a limited effect on the habitat of the greater sage-grouse, but the underlying principles of its regulations are reasonable and appropriate for applicability to other statutory authorities for mitigation. Limiting any credits from projects on public lands to those based on resource functions provided *over and above* those already in place, avoids a government subsidy to those already legally obligated to compensate for impacts of their projects. The Policy adopts the basic principles of the CWA's compensatory mitigation regulations as the foundation for all sources of compensatory mitigation.

Comment (113): One commenter noted Appendix C includes information on the use of Service funds relative to the need to obtain permits from the Corps' regulatory program. To avoid confusing these requirements with the Corps' Civil Works requirements, they suggested adding a statement that Appendix C does not affect policies on cost-sharing or non-Federal contributions for the Corps' Civil Works Program.

Response: The Policy directly affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications. It also affects real property or equipment either acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for that purpose. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect: (a) Restrictions in this Policy on the use of Service-administered financial assistance awards for generating compensatory mitigation credits, and (b) the Service's responsibilities as identified in Federal statutes or their implementing regulations. The Policy does not take precedence over the requirements of any Federal statute or regulation, whether that statute or regulation applies to a Service program or a program of another Federal agency. We added a new section I to Appendix C to clarify these issues.

Comment (114): One commenter said the Service's proposed revised Policy is inconsistent on in-lieu fee mitigation in the context of financial assistance programs. They sought further explanation of the rationale of allowing Federal funds to satisfy mitigation requirements of State, tribal, or local governments.

Response: The revised Policy prohibits the use of proceeds from the purchase of credits in an in-lieu fee program as match unless both of the following apply:

(a) The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

funds and the required minimum match to maximize the overall ecological benefits of the project.

(b) The statutory authority(ies) for the financial-assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

This prohibition is consistent with the underlying principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. Please see relevant excerpts from the regulations published jointly by The Department of Defense and the EPA within our response to comment #108 above.

The Service's revised Policy defers to these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation for mitigation required by authorities other than the CWA. Restricting the ability of financial assistance programs to generate compensatory mitigation credits is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

The rationale of allowing the use of Federal funds to satisfy mitigation requirements of State, tribal, or local governments is based on 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1), which have the force and effect of law only for the compensatory mitigation requirements of the CWA. However, the basic approach of these regulations is reasonable and appropriate for use as the foundation of a Service policy on mitigation in the context of financial assistance when the authority for mitigation is in a statute other than the CWA.

The regulations at 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1) read:

(j) *Relationship to other Federal, State, tribal, and local programs.* (1) Compensatory mitigation projects for DA [Department of the Army] permits may also be used to satisfy the environmental requirements of other programs, such as State, tribal, or local wetlands regulatory programs, other Federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations: (i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit. (ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.

The wording of Appendix C, section G may have led the commenter to incorrectly conclude that Service-administered financial assistance may be awarded explicitly for the purpose of satisfying the mitigation requirements of a State, tribal, or local government. We changed the wording of section G to avoid any misunderstanding on this issue.

Comment (115): One commenter asked what, if any, impacts might be considered for administration of the Service's Wildlife and Sport Fish Restoration Program (WSFR) and State fish and wildlife agency obligations related to that program. They requested potential programmatic impacts be noted in the Policy, and the existing Joint Federal/State Task Force on Federal Assistance Policy (JTF) be engaged. This commenter appreciated the Policy's emphasis on collaboration and coordination, but suggested we also cite 43 CFR part 24, *Department of the Interior Fish and Wildlife Policy: State-Federal Relationships.* They also said the Service should consult with the States and other affected governments before selecting plans to guide mitigation, and that great deference should be given to State-prepared plans.

Response: It is difficult to assess the impact of the Policy on WSFR because the Service has never had any comprehensive national policy on the role of mitigation in its financial assistance programs. The CWA is the authority for most funds spent on mitigation, and it is the only Federal statutory authority for mitigation that addresses mitigation in the context of financial assistance. The Policy does not (and cannot) change the CWA regulations on compensatory mitigation, which have been in effect since 2008. The Policy will give grants managers in the Service and in recipient agencies a better awareness and understanding of these regulations.

In addition to the 2008 CWA regulations, an element of continuity in this Policy is its treatment of the Natural Resource Damage Assessment and Restoration Fund. This Policy incorporates the findings of a 1999 Solicitor's Opinion determining that revenue from this fund was eligible as match.

As for the commenter's recommendation that we consult with the States and other affected governments before selecting plans to guide mitigation, on March 8, 2016, we published the proposed revised Policy in the **Federal Register**, and invited all interested parties to comment during a 60-day comment period. On May 12, 2016, we extended the comment period for an additional 30 days. We are pleased to have received the recommendations of the Association of Fish and Wildlife Agencies, which represents State fish and wildlife agencies.

As for the comment that we engage the Joint Federal/State Task Force on Federal Assistance Policy on the potential impacts to the WSFR program, we welcome any JTF engagement on the implementation of Appendix C. We are also open to future input that: (a) Clearly improves implementation of Appendix C; (b) fully complies with existing statutes and regulations; (c) carries out the general policy and principles stated in section 4 of the Policy, with special attention to the goal of a net conservation gain; (d) maintains a consistent approach in satisfying the requirements of all statutory authorities for mitigation to the extent possible; (e) ensures *additionality* (see section 6) for any proposed change in locating compensatory mitigation on public or private lands already designated for the conservation of natural resources; and (f) does not subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Section G of Appendix C of the revised Policy may be of special interest to the Association of Fish and Wildlife Agencies, as it affirms the rights of States, tribes, and local governments to structure the mitigation requirements of their own laws and regulations however they choose. The Service's revised Policy does not affect mitigation required by State, tribal, or local law.

We added the 43 CFR part 24 reference to Appendix A, section C per the comment.

To address the comment that we give great deference to State-prepared plans that guide mitigation, we will convert the existing section H in Appendix C to section I, and add the following to the new section H: When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

as long as the plans are consistent with Federal law, regulation, and this Policy.

Comment (116): One commenter noted that the way financial assistance programs addressed in Appendix A are described in section 3.5 may become outdated. The number of financial assistance programs recently increased to 61. Instead of using a number that will change frequently, they suggested revising the first sentence to read:

The Service has more than 60 financial assistance programs, which collectively disburse. . . .

Response: We made the suggested revision.

Comment (117): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C with section 4, General Policy and Principles. The commenter was concerned that the following concept in paragraph (g) would be applied inconsistently unless additional guidance was provided: ''The Service will recommend or require that compensatory mitigation be . . . additional to any *existing or foreseeably expected* conservation efforts planned for the future.'' The commenter said the following scenarios need clarification:

(1) A master plan for a land-management unit has an objective that calls for a specific conservation action to be accomplished in the next 15 years. If funding has not yet been appropriated or allocated to accomplish the conservation action, would the master-plan objective qualify as a ''foreseeably expected'' conservation effort planned for the future?

(2) The establishing statutory authority of a land-management agency makes that agency responsible for specific management actions, but the agency does not have enough funds to carry out these management actions? Would those management actions for which the agency is statutorily responsible qualify as an ''existing or foreseeably expected'' conservation effort?

(3) The partners in a grant-funded land-acquisition project have committed to use non-Federal and non-match funds to complete specific types of restoration or enhancement on the project area. These commitments contributed to the project being recommended for funding by the grant program's ranking panel. Would these commitments qualify as an ''existing or foreseeably expected'' conservation effort?

Response: The regulations implementing the compensatory mitigation requirements of the CWA at 33 CFR 332.7(a) and 40 CFR 230.97(a) state that:

Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as Federal, State, tribal, or local resource agencies, nonprofit conservation organizations, or private land manager; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through Federal facility management plans or integrated natural resources management plans.

These regulations regard facility-management plans and integrated natural-resources management plans as providing long-term protection. We used this as part of the basis for clarifying what would qualify as ''existing or foreseeably expected conservation efforts planned for the future.'' We addressed the issues and scenarios raised by the commenter in Appendix C, section H.

Comment (118): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C and provisions of section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. They asked for clarification on whether the following would be considered public land:

(a) Real property owned by ''instrumentalities'' of government, such as a regional water management district?

(b) An interest in real property that is less than full fee title, such as a conservation easement or a leasehold estate?

(c) Real property owned by tribal governments?

(d) Real property held by nongovernmental entities, but acquired with Federal financial assistance. In such cases, the Federal awarding agency does not have an ownership interest in the property, but it does have the following legal rights defined in regulation:

(1) Approving encumbrances to the title,

(2) Approving or giving instructions for disposition of real property no longer needed for its originally authorized purpose, and

(3) Receiving a share of the proceeds resulting from disposition of real property when the Federal awarding agency authorizes sale on the open market or transfer to the grant recipient.

Response: Examples (a), (b), and (c) would be public land for purposes of the Policy. However, if the government or public agency owns a fee with exceptions to title as in example (b), the Policy applies only to the interest owned by a government or public agency. It has no effect on interests not owned by a government or public agency. Example (d) would be considered public land only if the interest in real property is owned by the Federal Government; a State, tribal, or local government; or an agency or instrumentality of one of these governments. We have provided clarification in Appendix C, section H.

Comment (119): One commenter said terms in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, had implications for the material in Appendix C and were unclear. Specifically, they asked for an explanation of the difference between the proposed language of this Policy in section 5.7.2: ''measures the public agency is foreseeably expected to implement absent the mitigation'' and the language of the regulations jointly issued by the EPA at 40 CFR 230.93(a)(3) and the Corps at 33 CFR 332.3(a)(3): ''Credits for compensatory mitigation projects on *public* land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above *those provided by public programs already planned or in place.*''

Response: The language in section 5.7.2 and in the EPA/Corps regulation has different purposes, but both are applications of the principle of *additionality,* which this Policy defines as: A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

The measures described in section 5.7.2 are effectively those described in the regulatory language as: Those provided by public programs already planned.

Appendix C, section H explains how to determine what qualifies as ''baseline conditions . . . that a public land management agency is foreseeably expected to implement absent the mitigation.''

Comment (120): One commenter addressed Appendix C, section H, Can a mitigation proposal be located on land acquired under a Federal financial assistance award? They said despite this section title, section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, seems to apply to everything covered by the Policy, including financial assistance awards. They suggested that if section 5.7.2 applies to financial

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

assistance awards, we clarify that Appendix C, section H supplements section 5.7.2.

Response: Most lands acquired under Service-approved or administered financial assistance awards are dedicated to conservation, but not all are public land. We have revised section H to acknowledge the applicability of section 5.7.2 to land already designated for conservation.

Comment (121): One commenter said the Authorities and Direction for Service Mitigation Recommendations listed in Appendix A needed additional references related to the financial assistance programs described in Appendix C. They suggested the following authorities for the two Service grant programs that have an authorizing statute or regulation prohibiting the use mitigation in the program be added to Appendix A:

North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*

National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84.

Response: We added the North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.* to Appendix A, section B, Additional Legislative Authorities. We added the National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84 to Appendix A, section C, Implementing Regulations.

Comment (122): One commenter addressed the ineligibility of the use of mitigation in the National Coastal Wetlands Conservation program. They suggested that inserting the following as the ninth sentence in the introductory paragraph would avoid any potential misunderstandings: Consistent with the Service's Mitigation Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program.

Response: We added the sentence as recommended.

Comment (123): For further clarity, one commenter recommended editing in Appendix C, section B, Where do most mitigation issues occur in financial assistance? Specifically, they suggested the first sentence in the answer to Question B be replaced with: Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) the use as match of mitigation funds and in-kind contributions derived from mitigation funds.

Response: We replaced the first sentence as recommended by the commenter.

Comment (124): One commenter noted that in a recent mitigation project proposed for siting on land acquired with Federal financial assistance, the landowner asserted that the mitigation project should be acceptable to the Service because it was acceptable to the Corps. To address such implementation questions, the commenter suggested adding a new section that examines the responsibilities of the Corps and the Service for approving specific decisions related to the limited role of mitigation in financial assistance programs. They said, where appropriate, the new section would give the legal basis of their respective roles.

Response: The District Engineer of the Corps has the authority to impose conditions on a Department of the Army (DA) permit under the CWA, including conditions on the type and location of compensatory mitigation. However, no mitigation project, whether it is under the authority of the CWA or any other Federal statute, can interfere with the purposes of a financially assisted project. If the conditions in a DA permit will affect a financially assisted project for which the Service is responsible, those conditions must be acceptable to the Service before the permitted activity is initiated.

Even if a mitigation project under the CWA will not affect one of its financially assisted projects, the Service may be a member of the Interagency Review Team that reviews documentation for the establishment of mitigation banks and in-lieu fee programs. The respective roles of the Corps and the Service in carrying out the compensatory mitigation requirements of the CWA are described in more detail in 33 CFR parts 325 and 332, and 40 CFR part 230.

For mitigation projects that will affect a financially assisted project in a program where it approves or administers awards, the Service is responsible for the following decisions:

(a) Can real property and equipment acquired under a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.311(b) and 2 CFR 200.313(a–c), which addresses real property and equipment (respectively), with special reference to the Service's authority to approve encumbrances and its right to receive a share of proceeds from a disposition when property is no longer needed for the purposes of the original award. 50 CFR 80.132–135 also apply to real property acquired under the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs, and will guide mitigation in financial assistance programs.

(b) Can real property that includes a capital improvement funded by a Service-administered financial assistance award be used for purposes of compensatory mitigation during the useful life of the capital improvement?

The Service makes this decision based on 2 CFR 200.311(b). Regulations at 50 CFR 80.132–135 may also be applicable to a capital improvement funded by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs. ''Capital improvement'' means (a) a structure that costs at least $25,000 to build; or (b) the alteration, renovation, or repair of a structure that increases the structure's useful life by at least 10 years or its market value by at least $25,000. A financial assistance program may have its own definitions of capital improvement for purposes of compensatory mitigation as long as it includes all capital improvements as defined here.

(c) Can real property managed, maintained, or operated with funding from a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.300.311(a) and (b). Regulations at 50 CFR 80.134 also apply to real property managed, maintained, or operated by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs.

(d) Are funds or in-kind contributions that have been used or will be used to satisfy compensatory-mitigation requirements eligible as match in a Service-administered financial assistance program?

The Service makes this decision based on 2 CFR 200.300; 2 CFR 200.403(a); and 2 CFR 200.404(a), (b), and (d). For compensatory mitigation required by the CWA, the Service makes this decision in compliance with 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). The final rule for these regulations was published in the **Federal Register** on April 10, 2008 (73 FR 19594). Its preamble clarifies the intent of §§ 332.3(j)(2) and 230.93(j)(2) in the following example: . . . if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for federal funding could be used as compensatory mitigation credits.

National Environmental Policy Act (NEPA)

We have analyzed this Policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). Based on comments received, we determined that a categorical exclusion can apply to this Policy, but nevertheless, the Service chose to prepare an environmental assessment (EA) to inform decision makers and the public regarding the possible effects of the policy revisions. We announced our intent to prepare an EA pursuant to NEPA when we published the proposed revised policy. We requested comments on the scope of the NEPA review, information regarding important environmental issues that should be addressed, the alternatives to be analyzed, and issues that should be addressed at the programmatic stage in order to inform the site-specific stage during the comment period on the proposed revised policy. Comments from the public were considered in the drafting of the final EA. The final EA is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

Authority

The multiple authorities for this action include the: Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); Fish and Wildlife Coordination Act, as amended, (16 U.S.C. 661–667(e)); National Environmental Policy Act (42 U.S.C. 4371 *et seq.*); and others identified in section 2 and Appendix A of this Policy.

Mitigation Policy of the U.S. Fish and Wildlife Service

1. Purpose

This Policy applies to all actions for which the U.S. Fish and Wildlife Service (Service) has specific authority to either recommend or to require the mitigation of impacts to fish, wildlife, plants, and their habitats. Most applications of this Policy are advisory. The purpose of this Policy is to provide guidance to Service personnel in formulating and delivering recommendations and requirements to action agencies and project proponents so that they may avoid, minimize, and compensate for action-caused impacts to species and their habitats.

The guidance of this Policy:

- Provides a framework for formulating measures to maintain or improve the status of affected species through an application of the mitigation hierarchy informed by a valuation of their affected habitats;
- will help align Service-recommended mitigation with conservation objectives for affected resources and the strategies for achieving those objectives at ecologically relevant scales;
- will allow action agencies and proponents to anticipate Service recommendations and plan for mitigation measures early, thus avoiding delays and assuring equal consideration of fish and wildlife conservation with other action purposes; and
- allows for variations appropriate to action- and resource-specific circumstances.

This Policy supersedes the Fish and Wildlife Service Mitigation Policy (46 FR 7644–7663) published in the **Federal Register** on January 23, 1981. Definitions for terms used throughout this Policy are provided in section 6.

2. Authority

The Service has jurisdiction over a broad range of fish and wildlife resources. Service authorities are codified under multiple statutes that address management and conservation of natural resources from many perspectives, including, but not limited to, the effects of land, water, and energy development on fish, wildlife, plants, and their habitats. We list below the statutes that provide the Service, directly or indirectly through delegation from the Secretary of the Interior, specific authority for conservation of these resources and that give the Service a role in mitigation planning for actions affecting them. We further discuss the Service's mitigation planning role under each statute and list additional authorities in Appendix A.

- Bald and Golden Eagle Protection Act, 16 U.S.C. 668 *et seq.* (Eagle Act)
- Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.* (ESA)
- Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.* (FLPMA)
- Federal Power Act, 16 U.S.C. 791–828c (FPA)
- Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq.* (CWA)
- Fish and Wildlife Conservation Act, 16 U.S.C. 2901–2912
- Fish and Wildlife Coordination Act, as amended, 16 U.S.C 661–667(e) (FWCA)
- Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361 *et seq.* (MMPA)
- Migratory Bird Treaty Act, 16 U.S.C. 703–712 (MBTA)
- National Environmental Policy Act, 42 U.S.C. 4371 *et seq.* (NEPA)
- National Wildlife Refuge System Administration Act, 16 U.S.C. 668dd *et seq.*

While all of the statutes listed above give the Service an advisory role in fish and wildlife mitigation, not all of them give the Service authority to require others to implement the mitigation measures we identify. Circumstances under which the Service has specific authority to require, consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include:

- Actions that the Service carries out, *i.e.,* the Service is the action proponent;
- actions that the Service funds;
- actions to restore damages to fish and wildlife resources caused by spills of oil and other hazardous materials under the Oil Pollution Act and the Comprehensive Environmental Response, Compensation, and Liability Act;
- actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impact of the incidental taking on the species);
- actions of non-Federal entities that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);
- fishway prescriptions under section 18 of the FPA, which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;
- license conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;
- actions that require a ''Letter of Authorization'' or ''Incidental

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Harassment Authorization'' under the MMPA; and

- actions that require a permit for non-purposeful (incidental) take of eagles under the Eagle Act.

Our aim with this Policy is to provide a common framework for Service discretion across the full range of our authorities, including those listed above for which the Service may require mitigation, but the Policy does not alter or substitute for the regulations implementing any of these authorities.

3. Scope

3.1. Actions

This Policy applies to all Service activities related to evaluating the effects of proposed actions and subsequent recommendations or requirements to mitigate impacts to resources, defined in section 3.2. For purposes of this Policy, actions include: (a) Activities conducted, authorized, licensed, or funded by Federal agencies (including Service-proposed activities); (b) non-Federal activities to which one or more of the Service's statutory authorities apply to make mitigation recommendations or specify mitigation requirements; and (c) the Service's provision of technical assistance to partners in collaborative mitigation planning processes that occur outside of individual action review.

3.2. Resources

This Policy may apply to specific resources based on any Federal authority or combination of authorities, such as treaties, statutes, regulations, or Executive Orders, that empower the Federal Government to manage, control, or protect fish, wildlife, plants, and their habitats that are affected by proposed actions. Such Federal authority need not be exclusive, comprehensive, or primary, and in many cases, may overlap with that of States or tribes or both.

This Policy applies to those resources identified in statute or implementing regulations that provide the Service authority to make mitigation recommendations or specify mitigation requirements for the actions described in section 3.1. The scope of resources addressed by this Policy is inclusive of, but not limited to, the Federal trust fish and wildlife resources concept.

The Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Some authorities narrowly define or specifically identify covered taxa, such as threatened and endangered species, marine mammals, or the species protected by the Migratory Bird Treaty Act. This Policy applies to trust resources; however, Service Regions and field stations retain discretion to recommend mitigation for other resources under appropriate authorities.

The types of resources for which the Service is authorized to recommend mitigation also include those that contribute broadly to ecological functions that sustain species. The definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. Section 404 of the Clean Water Act (33 CFR 320.4) codifies the significance of wetlands and other waters of the United States as important public resources for their habitat value, among other functions.

The Endangered Species Act envisions a broad consideration when describing its purposes as providing a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and when directing Federal agencies at section 7(a)(1) to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

3.3. Exclusions

This Policy does not apply retroactively to completed actions or to actions specifically exempted under statute from Service review. It does not apply where the Service has already agreed to a mitigation plan for pending actions, except where: (a) New activities or changes in current activities would result in new impacts; (b) a law enforcement action occurs after the Service agrees to a mitigation plan; (c) an after-the-fact permit is issued; or (d) where new authorities or failure to implement agreed-upon recommendations, warrant new mitigation planning. Service personnel may elect to apply this Policy to actions that are under review as of the date of its final publication.

3.4. Applicability to Service Actions

This Policy applies to actions that the Service proposes, including those for which the Service is the lead or co-lead Federal agency for compliance with NEPA. However, it applies only to the mitigation of impacts to fish, wildlife, plants, and their habitats that are reasonably foreseeable from such proposed actions. When it is the Service that proposes an action, the Service acknowledges its responsibility, during early planning for design of the action, to consult with Tribes, and to consider the effects to, and mitigation for, impacts to resources besides fish, wildlife, plants, and their habitats (*e.g.,* cultural and historic resources, traditional practices, environmental justice, public health, recreation, other socio-economic resources, etc.). Consistent with NEPA (42 U.S.C. 4332(A)) (40 CFR 1500.2 and 1501.2) and the CEQ and the Advisory Council on Historic Preservation (ACHP), *NEPA NHPA Section 106 Handbook,* these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action. This Policy neither provides guidance nor supersedes existing guidance for mitigating impacts to resources besides those defined in section 3.2, Resources.

NEPA requires the action agency to evaluate the environmental effects of alternative proposals for agency action, including the environmental effects of proposed mitigation (*e.g.,* effects on historic properties resulting from habitat restoration). Considering impacts to resources besides fish and wildlife requires the Service to coordinate with entities having jurisdiction by law, special expertise, or other applicable authority. Appendix B further discusses the Service's consultation responsibilities with tribes related to fish and wildlife impact mitigation, *e.g.,* statutes that commonly compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources. It also supplements existing Service NEPA guidance by describing how this Policy integrates with the Service's decisionmaking process under NEPA.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

3.5. Financial Assistance Programs and Mitigation

The Service has more than 60 financial assistance programs, which collectively disburse more than $1 billion annually to non-Federal recipients through grants and cooperative agreements. Most programs leverage Federal funds by requiring or encouraging the commitment of matching cash or in-kind contributions. Recipients have acquired approximately 10 million acres in fee title, conservation easements, or leases through these programs. To foster consistent application of financial assistance programs with respect to mitigation processes, Appendix C addresses the limited role that specific types of mitigation can play in financial assistance programs.

4. General Policy and Principles

The mission of the Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. In furtherance of this mission, the Service has a responsibility to ensure that impacts to fish, wildlife, plants, and their habitats in the United States, its territories, and possessions are considered when actions are planned, and that such impacts are mitigated so that these resources may provide a continuing benefit to the American people. Consistent with Congressional direction through the statutes listed in the ''Authority'' section of this Policy, the Service will provide timely and effective recommendations to conserve, protect, and enhance fish, wildlife, plants, and their habitats when proposed actions may reduce the benefits thereof to the public.

Fish and wildlife and their habitats are resources that provide commercial, recreational, social, and ecological value to the Nation. For Tribal Nations, specific fish and wildlife resources and associated landscapes have traditional cultural and religious significance. Fish and wildlife are conserved and managed for the people by State, Federal, and tribal governments. If reasonably foreseeable impacts of proposed actions are likely to reduce or eliminate the public benefits that are provided by such resources, these governments have shared responsibility or interest in recommending means and measures to mitigate such losses. Accordingly, in the interest of serving the public, it is the policy of the U.S. Fish and Wildlife Service to seek to mitigate losses of fish, wildlife, plants, their habitats, and uses thereof resulting from proposed actions.

The following fundamental principles will guide Service-recommended mitigation, as defined in this Policy, across all Service programs.

a. *The goal is a net conservation gain.* The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority. As informed by established conservation objectives and strategies, Service mitigation recommendations will focus primarily on important, scarce, or sensitive resources, and will specify the means and measures that achieve the planning goal.

b. *Observe an appropriate mitigation sequence.* The Service recognizes it is generally preferable to take all appropriate and practicable measures to avoid and minimize adverse effects to resources, in that order, before compensating for remaining impacts. However, to achieve the best possible conservation outcomes, the Service recognizes that some limited circumstances may warrant a departure from this preferred sequence. The Service will prioritize the applicable mitigation types based on a valuation of the affected resources as described in this Policy in a landscape conservation context.

c. *Avoid high-value habitats.* The Service will seek avoidance of all impacts to high-value habitats. High-value habitats make an exceptional contribution to the conservation of species. Preventing impacts to these habitats is the most effective means of maintaining the current status of a species, which is the minimum goal of this Policy.

d. *A landscape approach will inform mitigation.* The Service will integrate mitigation into a broader ecological context with applicable landscape-level conservation plans, where available, when developing, approving, and implementing plans, and by steering mitigation efforts in a manner that will best contribute to achieving conservation objectives. The Service will consider climate change and other stressors that may affect ecosystem integrity and the resilience of fish and wildlife populations, which will inform the scale, nature, and location of mitigation measures necessary to achieve the best possible conservation outcome. The Service will foster partnerships with Federal and State partners, tribes, local governments, and other stakeholders to design mitigation strategies that will prevent fragmented landscapes and restore core areas and connectivity necessary to sustain species.

e. *Ensure consistency and transparency.* The Service will use timely and transparent processes that provide predictability and uniformity through the consistent application of standards and protocols as may be developed to achieve effective mitigation.

f. *Science-based mitigation.* The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.

g. *Durability.* The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service will recommend or require that action proponents provide assurances of durability, including financial assurances, to support the development, maintenance, and long-term effectiveness of the mitigation measures.

h. *Effective compensatory mitigation.* The Service will recommend implementing compensatory mitigation before the impacts of an action occur. The Service will recommend compensatory mitigation that provides benefits to the affected species that are additional to the benefits of existing conservation efforts or those planned for the reasonably foreseeable future. To ensure consistent implementation of compensatory mitigation, the Service will support the application of equivalent standards, regardless of the mechanism used to provide compensatory mitigation.

5. Mitigation Framework

This section of the Policy provides the conceptual framework and guidance for implementing the general policy and principles declared in section 4 in an action- and landscape-specific mitigation context. Implementation of the general policy and principles as well as the direction provided in 600 DM 6 occurs by integrating landscape scale decisionmaking within the Service's existing process for assessing effects of an action and formulating mitigation measures. The key terms used in describing this framework are defined in section 6, Definitions.

The Service recommends or requires mitigation under one or more Federal authorities (section 2) when necessary and appropriate to avoid, minimize, and/or compensate for impacts to resources (section 3.2) resulting from

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

proposed actions (section 3.1). Our goal for mitigation is to achieve a net conservation gain or, at minimum, no net loss of the affected resources (section 4). Sections 5.1 through 5.9, summarized below, provide an overview of the mitigation framework and describe how the Service will engage actions as part of its process of assessing the effects of an action and formulating mitigation measures that would achieve this goal. Variations appropriate to action-specific circumstances are permitted; however, the Service will provide action proponents with the reasons for such variations.

Synopsis of the Service Mitigation Framework

5.1. Integrating Mitigation Planning with Conservation Planning. The Service will utilize landscape-scale approaches and landscape conservation planning to inform mitigation, including identifying areas for mitigation that are most important for avoiding and minimizing impacts, improving habitat suitability, and compensating for unavoidable impacts to species. Proactive mitigation plans can achieve efficiencies for attaining conservation objectives while streamlining the planning and regulatory processes for specific landscapes and/or classes of actions within a landscape.

5.2. Collaboration and Coordination. At both the action and landscape scales, the Service will collaborate and coordinate with action proponents and with our State, Federal, and tribal conservation partners in mitigation.

5.3. Assessment. Assessing the effects of proposed actions and proposed mitigation measures is the basis for formulating a plan to meet the mitigation policy goal. This Policy does not endorse specific methodologies, but does describe several principles of effects assessment and general characteristics of methodologies that the Service will use in implementing this Policy.

5.4. Evaluation Species. The Service will identify the species evaluated for mitigation purposes. The Service should select the smallest set of evaluation species necessary, but include all species for which the Service is required to issue biological opinions, permits, or regulatory determinations. When actions would affect multiple resources of conservation interest, evaluation species should serve to best represent other affected species or aspects of the environment. This section describes characteristics of evaluation species that are useful in planning mitigation.

5.5. Habitat Valuation. The Service will assess the value of affected habitats to evaluation species based on their scarcity, suitability, and importance to achieving conservation objectives. This valuation will determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

5.6. Means and Measures. The means and measures that the Service recommends for achieving the mitigation policy goal are action- and resource-specific applications of the three general types of impact mitigation (avoid, minimize, and compensate). This section provides an expanded definition of each type, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations and requirements.

5.7. Recommendations. This section describes general standards for Service recommendations, and declares specific preferences for various characteristics of compensatory mitigation measures, *e.g.,* timing, location.

5.8. Documentation. Service involvement in planning and implementing mitigation requires documentation that is commensurate in scope and level of detail with the significance of the potential impacts to resources. This section provides an outline of documentation elements that are applicable at three different stages of the mitigation planning process: Early planning, effects assessment, and final recommendations.

5.9. Followup. Determining whether Service mitigation recommendations were adopted and effective requires monitoring, and when necessary, corrective action.

5.1. Integrating Mitigation With Conservation Planning

The Service's mitigation goal is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority (see section 4). This Policy provides a framework for formulating mitigation means and measures (see section 5.6) intended to efficiently achieve the mitigation planning goal based upon best available science. This framework seeks to integrate mitigation recommendations and requirements into conservation planning to better protect or enhance populations and those features on a landscape that are necessary for the long-term persistence of biodiversity and ecological functions. Functional ecosystems enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change, invasive species, and the continuing degradation and loss of habitat through human alteration of the landscape. Achieving the mitigation goal of this Policy involves:

- Avoiding and minimizing those impacts that most seriously compromise resource sustainability;
- rectifying and reducing over time those impacts where restoring or maintaining conditions in the affected area most efficiently contributes to resource sustainability; and
- strategically compensating for impacts so that actions result in an improvement in the affected resources, or at a minimum, result in a no net loss of those resources.

The Service recognizes that we will engage in mitigation planning for actions affecting resources in landscapes for which conservation objectives and strategies to achieve those objectives are not yet available, well developed, or formally adopted. The landscape-level approach to resource decisionmaking described in this Policy and in the Departmental Manual (600 DM 6.6D) applies in contexts with or without established conservation plans, but it will achieve its greatest effectiveness when integrated with such planning.

When appropriate, the Service will seek a net gain in the conservation outcome of actions we engage for purposes of this Policy. It is consistent with the Service's mission to identify and promote opportunities for resource enhancement during action planning, *i.e.,* to decrease the gap between the current and desired status of a resource. Mitigation planning often presents practicable opportunities to implement mitigation measures in a manner that outweighs impacts to affected resources. When resource enhancement is also consistent with the mission, authorities, and/or responsibilities of action proponents, the Service will encourage proponents to develop measures that result in a net gain toward achieving conservation objectives for the resources affected by their actions. Such proponents include, but are not limited to, Federal agencies when responsibilities such as the following apply to their actions:

- Carry out programs for the conservation of endangered and threatened species (Endangered Species Act, section 7(a)(1));
- consult with the Service regarding both mitigation and enhancement in water resources development (Fish and Wildlife Coordination Act, section 2);

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

• enhance the quality of renewable resources (National Environmental Policy Act, section 101(b)(6)); and/or

• restore and enhance bird habitat (Executive Order 13186, section 3(e)(2)).

To serve the public interest in fish and wildlife resources, the Service works under various authorities (see section 2) with partners to establish conservation objectives for species, and to develop and implement plans for achieving such objectives in various landscapes. We define a landscape as an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by common management concerns (see section 6, Definitions). Relative to this Policy, such management concerns relate to conserving species. The geographic scale of a landscape is variable, depending on the interacting elements that are meaningful to particular conservation objectives and may range in size from large regions to a single watershed or habitat type. When proposed actions may affect species in a landscape addressed in one or more established conservation plans, such plans will provide the basis for Service recommendations to avoid and minimize particular impacts, rectify and reduce over time others, and compensate for others. The criteria in this Policy for selecting evaluation species (section 5.4) and assessing the value of their affected habitats (section 5.5) are designed to place mitigation planning in a landscape conservation context by applying the various types of mitigation where they are most effective at achieving the mitigation policy goal.

The Service recognizes the inefficiency of automatically applying under all circumstances each mitigation type in the traditional mitigation sequence. As DM 6 also recognizes, in limited situations, specific circumstances may exist that warrant an alternative from this sequence, such as when seeking to achieve the maximum benefit to affected resources and their values, services, and functions. For example, the cost and effort involved in avoiding impacts to a habitat that is likely to become isolated or otherwise unsuitable for evaluation species in the foreseeable future may result in less conservation when compared to actions that achieve a greater conservation benefit if used to implement offsite compensatory mitigation in area(s) that are more important in the long term to achieving conservation objectives for the affected resource(s). Conversely, onsite avoidance is the priority where impacts would substantially impair progress toward achieving conservation objectives.

The Service will rely upon existing conservation plans that are based upon the best available scientific information, consider climate-change adaptation, and contain specific objectives aimed at the biological needs of the affected resources. Where existing conservation plans are not available that incorporate all of these elements or are not updated with the best available scientific information, Service personnel will otherwise incorporate the best available science into mitigation decisions and recommendations and continually seek better information in areas of greatest uncertainty. Service personnel will use a landscape approach based on analysis of information regarding resource needs, including priorities for impact avoidance and potential compensatory mitigation sites. Such information includes development trends and projected habitat loss or conversion, cumulative impacts of past development activities, the presence and needs of species, and restoration potential. Service personnel may access this information in existing mapping products, survey data, reports, studies, or other sources.

Proactive Mitigation Planning at Larger Scales

The Service supports the planning and implementation of proactive mitigation plans in a landscape conservation context, *i.e.,* mitigation developed before actions are proposed, particularly in areas where multiple similar actions are expected to adversely affect a similar suite of species. Proactive mitigation plans should complement or tier from existing conservation plans relevant to the affected resources (*e.g.,* recovery plans, habitat conservation plans, or nongovernmental plans). Effective and efficient proactive mitigation identifies high-priority resources and areas on a regional or landscape scale, prior to and without regard to specific proposed actions, in which to focus: (a) Resource protection for avoiding impacts; (b) resource enhancement or protection for compensating unavoidable impacts; and (c) measures to improve the resilience of resources in the face of climate change or otherwise increase the ability to adapt to climate and other landscape change factors. In many cases, the Service can take advantage of available Federal, State, tribal, local, or nongovernmental plans that identify such priorities.

Developing proactive mitigation should involve stakeholders in a transparent process for defining objectives and the means to achieving those objectives. Planning for proactive mitigation should establish standards for determining the appropriate scale, type, and location of mitigation for impacts to specific resources within a specified area. Adopted plans that incorporate these features are likely to substantially shorten the time needed for regulatory review and approval as actions are subsequently proposed. Proactive mitigation plans, not limited to those developed under a programmatic NEPA decisionmaking process or a Habitat Conservation Plan process, will provide efficiencies for project-level Federal actions and will also better address potential cumulative impacts.

Procedurally, proactive mitigation should draw upon existing land-use plans and databases associated with human infrastructure, including transportation, and water and energy development, as well as ecological data and conservation plans for floodplains, water quality, high-value habitats, and key species. Stakeholders and Service personnel process these inputs to design a conservation network that considers needed community infrastructure and clearly prioritizes the role of mitigation in conserving natural features that are necessary for long-term maintenance of ecological functions on the landscape. As development actions are proposed, an effective proactive regional mitigation plan will provide a transparent process for identifying appropriate mitigation opportunities within the regional framework and selecting the mitigation projects with the greatest aggregated conservation benefits.

5.2. Collaboration and Coordination

The Service shares responsibility for conserving fish and wildlife with State, local, and tribal governments and other Federal agencies and stakeholders. Our role in mitigation may involve Service biological opinions, permits, or other regulatory determinations as well as providing technical assistance. The Service must work in collaboration and coordination with other governments, agencies, organizations, and action proponents to implement this Policy. Whenever appropriate, the Service will:

a. Coordinate activities with the appropriate Federal, State, tribal, and local agencies and other stakeholders who have responsibilities for fish and wildlife resources when developing mitigation recommendations for resources of concern to those entities;

b. consider resources and plans made available by State, local, and tribal governments and other Federal agencies;

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

c. seek to apply compatible approaches and avoid duplication of efforts with those same entities;

d. collaborate with Federal and State agencies, tribes, local agencies and other stakeholders in the formulation of landscape-level mitigation plans; and

e. cooperate with partners to develop, maintain, and disseminate tools and conduct training in mitigation methodologies and technologies.

The Service should engage agencies and applicants during the early planning and design stage of actions. The Service is encouraged to engage in early coordination during the NEPA Federal decisionmaking process to resolve issues in a timely manner (516 DM 8.3). Coordination during early planning, including participation as a cooperating agency or on interdisciplinary teams, can lead to better conservation outcomes. For example, the Federal Highway Administration (FHWA) is most likely to adopt alternatives that avoid or minimize impacts when the Service provides early comments under section 4(f) of the Transportation Act of 1966 relative to impacts to refuges or other Service-supported properties. When we identify potential impacts to tribal interests, the Service, in coordination with affected tribes, may recommend mitigation measures to address those impacts. Recommendations will carry more weight when the Service and tribe have overlapping authority for the resources in question and when coordinated through government-to-government consultation.

Coordination and collaboration with stakeholders allows the Service to confirm that the persons conducting mitigation activities, including contractors and other non-Federal persons, have the appropriate experience and training in mitigation best practices, and where appropriate, include measures in employee performance appraisal plans or other personnel or contract documents, as necessary. Similarly, this allows for the development of rigorous, clear, and consistent guidance, suitable for field staff to implement mitigation or to deny authorizations when impacts to resources and their values, services, and functions are not acceptable. Collaboratively working across Department of the Interior bureaus and offices allows the Service to conduct periodic reviews of the execution of mitigation activities to confirm consistent implementation of the principles of this Policy.

When collaborating with stakeholders, Service staff should utilize the principles and recommendations set forth in the Council on Environmental Quality handbook, *Collaboration in NEPA—a Handbook for NEPA Practitioners* (2007).

5.3. Assessment

Effects are changes in environmental conditions caused by an action that are relevant to the resources (fish, wildlife, plants, and their habitats) covered by this Policy. This Policy addresses mitigation for impacts to these resources. We define impacts as adverse effects relative to the affected resources. Impacts may be direct, indirect, or cumulative. Indirect effects are often major drivers in ecological systems. Because indirect impacts from an action occur later in time or farther removed in distance, they may have landscape-scale implications. Mitigation is the general label for all measures implemented to avoid, minimize, and/or compensate for its predicted impacts.

The Service should design mitigation measures to achieve the mitigation goal, when appropriate, of net gain, or a minimum of no net loss for affected resources. This design should take into account the degree of risk and uncertainty associated with both predicted project effects and predicted outcomes of the mitigation measures. The following principles shall guide the Service's assessment of anticipated effects and the expected effectiveness of mitigation measures.

1. The Service will consider action effects and mitigation outcomes within planning horizons commensurate with the expected duration of the action's impacts. In predicting whether mitigation measures will achieve the mitigation policy goal for the affected resources during the planning horizon, the Service will recognize that predictions about the more-distant future are more uncertain and adjust the mitigation recommendations accordingly.

2. Action proponents should provide reasonable predictions about environmental conditions relevant to the affected area both with and without the action over the course of the planning horizon (*i.e.,* baseline condition). If such predictions are not provided, the Service will assess the effects of a proposed action over the planning horizon considering: (a) The full spatial and temporal extent of resource-relevant direct and indirect effects caused by the action, including resource losses that will occur during the period between implementation of the action and the mitigation measures; and (b) any cumulative effects to the affected resources resulting from existing concurrent or reasonably foreseeable future activities in the landscape context. When assessing the affected area without the action, the Service will also evaluate: (a) Expected natural species succession; (b) implementation of approved restoration/improvement plans; and (c) reasonably foreseeable conditions resulting directly or indirectly from any other factors that may affect the evaluation of the project including, but not limited to, climate change.

3. The Service will use the best available effect assessment methodologies that:

a. Display assessment results in a manner that allows decisionmakers, action proponents, and the public to compare present and predicted future conditions for affected resources;

b. measure adverse and beneficial effects using equivalent metrics to determine mitigation measures necessary to achieve the mitigation policy goal for the affected resources (*e.g.,* measure both adverse and beneficial effects to a species' food resources via changes to the density or spatial extent of the food resource);

c. predict effects over time, including changes to affected resources that would occur with and without the action, changes induced by climate change, and changes resulting from reasonably foreseeable actions;

d. are practical, cost-effective, and commensurate with the scope and scale of impacts to affected resources;

e. are sufficiently sensitive to estimate the type and relative magnitude of effects across the full spectrum of anticipated beneficial and adverse effects;

f. may integrate predicted effects with data from other disciplines such as cost or socioeconomic analysis; and

g. allow for incorporation of new data or knowledge as action planning progresses.

4. Where appropriate effects assessment methods or technologies useful in valuation of mitigation are not available, Service employees will apply best professional judgment supported by best available science to assess impacts and to develop mitigation recommendations.

5.4. Evaluation Species

Section 3.2 identifies the resources to which this Policy applies. Depending on the authorities under which the Service is engaging an action for mitigation purposes, these resources may include: Particular species; fish, wildlife, and plants more generally; and their habitats, including those contributing to ecological functions that sustain species. However, one or more species

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

of conservation interest to the Service is always necessary to initiate mitigation planning, and under this Policy, the Service will explicitly identify evaluation species for mitigation purposes. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for specific species, the Service will identify such species, at minimum, as evaluation species.

Selecting evaluation species in addition to those for which the Service must provide a regulatory determination varies according to action-specific circumstances. In practice, an initial examination of the habitats affected and review of typically associated species of conservation interest are usually the first steps in identifying evaluation species. The purpose of Service mitigation planning is to develop a set of recommendations that would improve or, at minimum, maintain the current status of the affected resources. When available, conservation planning objectives (*i.e.,* the desired status of the affected resources) will inform mitigation planning (see section 5.1). Therefore, following those species for which we must provide a regulatory determination, species for which action effects would cause the greatest increase in the gap between their current and desired status are the principal choices for selection as evaluation species.

An evaluation species must occur within the affected area for at least one stage of its life history, but as other authorities permit, the Service may consider evaluation species that are not currently present in the affected area if the species is:

a. Identified in approved State or Federal fish and wildlife conservation, restoration, or improvement plans that include the affected area; or

b. likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession.

Evaluation species may or may not occupy the affected area year-round or when direct effects of the action would occur.

The Service should select the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources and applicable authorities, including all species for which the Service is required to issue opinions, permits, or regulatory determinations. When an action affects multiple resources, evaluation species should represent other affected species or aspects of the environment so that the mitigation measures formulated for the evaluation species will mitigate impacts to other similarly affected resources to the greatest extent possible. Characteristics of evaluation species that are useful in mitigation planning may include, but are not limited to, the following:

a. Species that are addressed in conservation plans relevant to the affected area and for which habitat objectives are articulated;

b. species strongly associated with an affected habitat type;

c. species for which habitat limiting factors are well understood;

d. species that perform a key role in ecological processes (*e.g.,* nutrient cycling, pollination, seed dispersal, predator-prey relations), which may, therefore, serve as indicators of ecosystem health;

e. species that require large areas of contiguous habitat, connectivity between disjunct habitats, or a distribution of suitable habitats along migration/movement corridors, which may, therefore, serve as indicators of ecosystem functions;

f. species that belong to a group of species (a guild) that uses a common environmental resource;

g. species for which sensitivity to one or more anticipated effects of the proposed action is documented;

h. species with special status (*e.g.,* species of concern in E.O. 13186, Birds of Conservation Concern);

i. species of cultural or religious significance to tribes;

j. species that provide monetary and non-monetary benefits to people from consumptive and non-consumptive uses including, but not limited to, fishing, hunting, bird watching, and educational, aesthetic, scientific, or subsistence uses;

k. species with characteristics such as those above that are also easily monitored to evaluate the effectiveness of mitigation actions; and/or

l. species that would be subject to direct mortality as a result of an action (*e.g.,* wind turbine).

5.5. Habitat Valuation

Species conservation relies on functional ecosystems, and habitat conservation is generally the best means of achieving species population objectives. Section 5.4 provides the guidance for selecting evaluation species to represent these habitat resources. The value of specific habitats to evaluation species varies widely, such that the loss or degradation of higher value habitats has a greater impact on achieving conservation objectives than the loss or degradation of an equivalent area of lower value habitats. To maintain landscape capacity to support species, our mitigation policy goal (Section 4) applies to all affected habitats of evaluation species, regardless of their value in a conservation context. However, the Service will recognize variable habitat value in formulating appropriate means and measures to mitigate the impacts of proposed actions, as described in this section. The primary purpose of habitat valuation is to determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

The Service will assess the overall value of affected habitats by considering their: (a) Scarcity; (b) suitability for evaluation species; and (c) importance to the conservation of evaluation species.

- *Scarcity* is the relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.
- *Suitability* is the relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.
- *Importance* is the relative significance of the affected habitat, compared to other similar habitats in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

The Service has flexibility in applying appropriate methodologies and best available science when assessing the overall value of affected habitats, but also has a responsibility to communicate the rationale applied, as described in section 5.8 (Documentation Standards). These three parameters are the considerations that will inform Service determinations of the relative value of an affected habitat that will then be used to guide application of the mitigation hierarchy under this Policy.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

For all habitats, the Service will apply appropriate and practicable measures to avoid and minimize impacts over time, generally in that order, before applying compensation as mitigation for remaining impacts. For habitats we determine to be of high-value (*i.e.,* scarce and of high suitability and high importance) however, the Service will seek avoidance of all impacts. For habitats the Service determines to be of lower value, we will consider whether compensation is more effective than other components of the mitigation hierarchy to maintain the current status of evaluation species, and if so, may seek compensation for most or all such impacts.

The relative emphasis given to mitigation types within the mitigation hierarchy depends on the landscape context and action-specific circumstances that influence the efficacy and efficiency of available mitigation means and measures. For example, it is generally more effective and efficient to achieve the mitigation policy goal by maximizing avoidance and minimization of impacts to habitats that are either rare, of high suitability, or of high importance, than to rely on other measures, because these qualities are typically not easily repaired, enhanced through onsite management, or replaced through compensatory actions. Similarly, compensatory measures may receive greater emphasis when strategic application of such measures (*i.e.,* to further the objectives of relevant conservation plans) would more effectively and efficiently achieve the policy goal for mitigating impacts to habitats that are either abundant, of low suitability, or of low importance.

When more than one evaluation species uses an affected habitat, the highest valuation will govern the Service's mitigation recommendations or requirements. Regardless of the habitat valuation, Service mitigation recommendations or requirements will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum, maintains the current status of the affected resources.

5.6. Means and Measures

The means and measures that the Service recommends for achieving the goal of this Policy (see section 4) are action- and resource-specific applications of the five general types of impact mitigation: Avoid, minimize, rectify, reduce over time, and compensate. The third and fourth mitigation types, rectify and reduce over time, are combined under the minimization label (*e.g.,* in mitigation planning for permitting actions under the Clean Water Act, in the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, and in 600 DM 6.4), which we adopt for this Policy and for the structure of this section, while also providing specific examples for rectify and reduce. When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish, as needed, between minimizing, rectifying, and reducing or eliminating the impact over time, as described in Appendix B: Service Mitigation Policy and NEPA.

The emphasis that the Service gives to each mitigation type depends on the evaluation species selected (section 5.4) and the value of their affected habitats (section 5.5). Habitat valuation aligns mitigation with conservation planning for the evaluation species by identifying where it is critical to avoid habitat impacts altogether and where compensation measures may more effectively advance conservation objectives. All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

Nothing in this Policy supersedes the statutes and regulations governing prohibited ''take'' of wildlife (*e.g.,* ESA-listed species, migratory birds, eagles); however, the Policy applies to mitigating the impacts to habitats and ecological functions that support populations of evaluation species, including federally protected species. Attaining the goal of improving or, at a minimum, maintaining the current status of evaluation species will often involve applying a combination of mitigation types. For each of the mitigation types, the following subsections begin with a quote of the regulatory language at 40 CFR 1508.20, then provides an expanded definition, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations. Ensuring that Service-recommended mitigation measures are implemented and effective is addressed in sections 5.8, Documentation, and 5.9, Followup.

5.6.1. Avoid—Avoid the impact altogether by not taking a certain action or parts of an action.

Avoiding impacts is the first tier of the mitigation hierarchy. Avoidance ensures that an action or a portion of the action has no direct or indirect effects during the planning horizon on fish, wildlife, plants, and their habitats. Actions may avoid direct effects to a resource (*e.g.,* by shifting the location of the construction footprint), but unless the action also avoids indirect effects caused by the action (*e.g.,* loss of habitat suitability through isolation from other habitats, accelerated invasive species colonization, degraded water quality, etc.), the Service will not consider that impacts to a resource are fully avoided. In some cases, indirect effects may cumulatively result in population and habitat losses that negate any conservation benefit from avoiding direct effects. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is unavailable. The Service will recommend avoiding all impacts to high-value habitats. Generalized examples follow:

a. Design the timing, location, and/or operations of the action so that specific resource impacts would not occur.

b. Add structural features to the action, where such action is sustainable (*e.g.,* fish and wildlife passage structures, water treatment facilities, erosion control measures) that would eliminate specific losses to affected resources.

c. Adopt a non-structural alternative to the action that is sustainable and that would not cause resource losses (*e.g.,* stream channel restoration with appropriate grading and vegetation in lieu of rip-rap).

d. Adopt the no-action alternative.

5.6.2. Minimize (includes Rectify and Reduce Over Time)—Minimize the impact by limiting the degree or magnitude of the action and its implementation.

Minimizing impacts, together with rectifying and reducing over time, is the second tier of the mitigation hierarchy. Minimizing is reducing the intensity of the impact (*e.g.,* population loss, habitat loss, reduced habitat suitability, reduced habitat connectivity, etc.) to the maximum extent appropriate and practicable. Generalized examples of types of measures to minimize impacts follow:

a. Reduce the overall spatial extent and/or duration of the action.

b. Adjust the daily or seasonal timing of the action.

c. Retain key habitat features within the affected area that would continue to support life-history processes for the evaluation species.

d. Adjust the spatial configuration of the action to retain corridors for species movement between functional habitats.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

e. Apply best management practices to reduce water quality degradation.

f. Adjust the magnitude, timing, frequency, duration, and/or rate-of-change of water flow diversions and flow releases to minimize the alteration of flow regime features that support life-history processes of evaluation species.

g. Install screens and other measures necessary to reduce aquatic life entrainment/impingement at water intake structures.

h. Install fences, signs, markers, and other measures necessary to protect resources from impacts (*e.g.,* fencing riparian areas to exclude livestock, marking a heavy-equipment exclusion zone around burrows, nest trees, and other sensitive areas).

Rectify — This subset of the second tier of the mitigation hierarchy involves ''repairing, rehabilitating, or restoring the affected environment.''

Rectifying impacts may possibly improve, relative to no-action conditions, a loss in habitat availability and/or suitability for evaluation species within the affected area and contribute to a net conservation gain. Rectifying impacts may also involve directly restoring a loss in populations through stocking. Generalized examples follow:

a. Repair physical alterations of the affected areas to restore pre-action conditions or improve habitat suitability for the evaluation species (*e.g.,* re-grade staging areas to appropriate contours, loosen compacted soils, restore altered stream channels to stable dimensions).

b. Plant and ensure the survival of appropriate vegetation where necessary in the affected areas to restore or improve habitat conditions (quantity and suitability) for the evaluation species and to stabilize soils and stream channels.

c. Provide for fish and wildlife passage through or around action-imposed barriers to movement.

d. Consistent with all applicable laws, regulations, policies, and conservation plans, stock species that experienced losses in affected areas when habitat conditions are able to support them in affected areas.

Reduce Over Time—This subset of the second tier of the mitigation hierarchy is to ''reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.''

Reducing impacts over time is preserving, enhancing, and maintaining the populations, habitats, and ecological functions that remain in an affected area following the impacts of the action, including areas that are successfully restored or improved through rectifying mitigation measures. Preservation, enhancement, and maintenance operations may improve upon conditions that would occur without the action and contribute to a net conservation gain (*e.g.,* when such operations would prevent habitat degradation expected through lack of management needed for an evaluation species). Reducing impacts over time is an appropriate means to achieving the mitigation goal after applying all appropriate and practicable avoidance, minimization, and rectification measures. Generalized examples follow:

a. Control land uses and limit disturbances to portions of the affected area that may continue to support the evaluation species.

b. Control invasive species in the affected areas.

c. Manage fire-adapted habitats in the affected areas with an appropriate timing and frequency of prescribed fire, consistent with applicable laws, regulations, policies, and conservation plans.

d. Maintain or replace equipment and structures in affected areas to prevent losses of fish and wildlife resources due to equipment failure (*e.g.,* cleaning and replacing trash racks and water intake screens, maintaining fences that limit access to environmentally sensitive areas).

e. Ensure proper training of personnel in operations necessary to preserve existing or restored fish and wildlife resources in the affected area.

5.6.3. Compensate—Compensate for the impact by replacing or providing substitute resources or environments.

Compensating for impacts is the third and final tier of the mitigation hierarchy. Compensation is protecting, maintaining, enhancing, and/or restoring habitats and ecological functions for an evaluation species, generally in an area outside the action's affected area. Mitigating some percentage of unavoidable impacts through measures that minimize, rectify, and reduce losses over time is often appropriate and practicable, but the costs or difficulties of mitigation may rise rapidly thereafter to achieve the mitigation planning goal entirely within the action's affected area. In such cases, a lesser or equivalent effort applied in another area may achieve greater benefits for the evaluation species. Likewise, the effort necessary to mitigate the impacts to a habitat of low suitability and low importance of a type that is relatively abundant in the landscape context (low-value habitat) will more likely achieve sustainable benefits for an evaluation species if invested in enhancing a habitat of moderate suitability and high importance. This Policy is designed to apply the various types of mitigation where they may achieve the greatest efficiency toward accomplishing the mitigation planning goal.

Onsite restoration of an affected resource meets the definition of rectify and is not considered compensation under this Policy. Although compensation is usually accomplished outside the affected area, onsite compensation under the definitions of this Policy involves provision of a habitat resource within the affected area that was not adversely affected by the action, but that would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but in dry years, water availability is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status than some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. In this example, measures to restore food resources are rectification, and measures to increase water availability are onsite compensation.

Multiple mechanisms may accomplish compensatory mitigation, including habitat credit exchanges and other emerging mechanisms. Proponent-responsible mitigation, mitigation/conservation banks, and in-lieu fee funds are the three most common mechanisms. Descriptions of their general characteristics follow:

a. *Proponent-Responsible Mitigation.* A proponent-responsible mitigation site provides ecological functions and services in accordance with Service-defined or approved standards to offset the habitat impacts of a proposed action on particular species. As its name implies, the action proponent is solely responsible for ensuring that the compensatory mitigation activities are completed and successful. Proponent-responsible mitigation may occur onsite or offsite relative to action impacts. Like all compensatory mitigation measures, proponent-responsible mitigation should: (a) Maximize the benefit to impacted resources and their values, services, and functions; (b) implement and earn credits in advance of project impacts; and (c) reduce risk to achieving effectiveness.

b. *Mitigation/Conservation Banks.* A conservation bank is a site or suite of sites that provides ecological functions and services expressed as credits that are conserved and managed in

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

perpetuity for particular species and are used expressly to offset impacts occurring elsewhere to the same species. A mitigation bank is established to offset impacts to wetland habitats under section 404 of the Clean Water Act. Some mitigation banks may also serve the species-specific purposes of a conservation bank. Mitigation and conservation banks are typically for-profit enterprises that apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on their banking properties. The establishment, operation, and use of a conservation bank requires a conservation bank agreement between the Service and the bank sponsor, and aquatic resource mitigation banks require a banking instrument approved by the U.S. Army Corps of Engineers. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the bank sponsor at the time of the sale/transfer of credits. Mitigation and conservation banks generally provide mitigation in advance of impacts.

c. *In-Lieu Fee.* An in-lieu fee site provides ecological functions and services expressed as credits that are conserved and managed for particular species or habitats, and are used expressly to offset impacts occurring elsewhere to the same species or habitats. In-lieu fee programs are sponsored by governmental or nonprofit entities that collect funds used to establish in-lieu fee sites. In-lieu fee program operators apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on in-lieu fee sites. The establishment, operation, and use of an in-lieu fee program may require an agreement between regulatory agencies of applicable authority, including the Service, and the in-lieu fee program operator. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the in-lieu fee program operator at the time of sale/transfer of credits. Unlike mitigation or conservation banks, in-lieu fee programs generally provide compensatory mitigation after impacts have occurred. See section 5.7.1 for discussion of the Service's preference for compensatory mitigation that occurs prior to impacts.

The Service's preference is that proponents offset unavoidable resource losses in advance of their actions. Further, the Service considers the banking of habitat value for the express purpose of compensating for future unavoidable losses to be a legitimate form of mitigation, provided that withdrawals from a mitigation/conservation bank are commensurate with losses of habitat value (considering suitability and importance) for the evaluation species and not based solely upon the affected habitat acreage or the cost of land purchase and management. Resource losses compensated through purchase of conservation or mitigation bank credits may include, but are not limited to, habitat impacts to species covered by one or more Service authorities.

5.6.3.1 Equivalent Standards

The mechanisms for delivering compensatory mitigation differ according to: (1) Who is ultimately responsible for the success of the mitigation (the action proponent or a third party); (2) whether the mitigation site is within or adjacent to the impact site (onsite) or at another location that provides either equivalent or additional resource value (offsite); and (3) when resource benefits are secured (before or after resource impacts occur).

Regardless of the delivery mechanism, species conservation strategies and other landscape-level conservation plans that are based on the best scientific information available are expected to provide the basis for establishing and operating compensatory mitigation sites and programs. Such strategies and plans should also inform the assessment of species-specific impacts and benefits within a defined geography.

Service recommendations or requirements will apply equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms. Departmental guidance at DM 6.6 C declares a preference for compensatory mitigation measures that will maximize the benefit to affected resources, reduce risk to achieving effectiveness, and use transparent methodologies. Mitigation that the Service recommends or approves through any compensatory mitigation mechanism should incorporate, address, or identify the following that are intended to ensure successful implementation and durability:

a. Type of resource(s) and/or its value(s), service(s), and function(s), and amount(s) of such resources to be provided (usually expressed in acres or some other physical measure), the method of compensation (restoration, establishment, preservation, etc.), and the manner in which a landscape-scale approach has been considered;

b. factors considered during the site selection process;

c. site protection instruments to ensure the durability of the measure;

d. baseline information;

e. the mitigation value of such resources (usually expressed as a number of credits or other units of value), including a rationale for such a determination;

f. a mitigation work plan including the geographic boundaries of the measure, construction methods, timing, and other considerations;

g. a maintenance plan;

h. performance standards to determine whether the measure has achieved its intended outcome;

i. monitoring requirements;

j. long-term management commitments;

k. adaptive management commitments; and

l. financial assurance provisions that are sufficient to ensure, with a high degree of confidence, that the measure will achieve and maintain its intended outcome, in accordance with the measure's performance standards.

Third parties may assume the responsibilities for implementing proponent-responsible compensation. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations for ensuring their success and durability.

5.6.3.2 Research and Education

Research and education, although important to the conservation of many resources, are not typically considered compensatory mitigation, because they do not directly offset adverse effects to species or their habitats. In rare circumstances, research or education that is directly linked to reducing threats, or that provides a quantifiable benefit to the species, may be included as part of a mitigation package. These circumstances may exist when: (a) The major threat to a resource is something other than habitat loss; (b) the Service can reasonably expect the outcome of research or education to more than offset the impacts; (c) the proponent commits to using the results/recommendations of the research to mitigate action impacts; or (d) no other reasonable options for mitigation are available.

5.7. Recommendations

Consistent with applicable authorities, the Policy's fundamental principles, and the mitigation planning principles described herein, the Service will provide recommendations to mitigate the impacts of proposed actions at the earliest practicable stage of planning to ensure maximum

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

consideration. The Service will develop mitigation recommendations in cooperation with the action proponent and/or the applicable authorizing agency, considering the cost estimates and other information that the proponent/agency provides about the action and its effects, and relying on the best scientific information available. Service recommendations will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum maintains, the current status of the affected resources. The Service will provide mitigation recommendations under an explicit expectation that the action proponent or the applicable authorizing agency is fully responsible for implementing or enforcing the recommendations.

The Service will strive to provide mitigation recommendations, including reasonable alternatives to the proposed action, which, if fully and properly implemented, would achieve the best possible outcome for affected resources while also achieving the stated purpose of the proposed action. However, on a case-by-case basis, the Service may recommend the ''no action'' alternative. For example, when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative.

5.7.1. Preferences for Compensatory Mitigation

Unless action-specific circumstances warrant otherwise, the Service will observe the following preferences in providing compensatory mitigation recommendations:

Advance compensatory mitigation. When compensatory mitigation is necessary, the Service prefers compensatory mitigation measures that are implemented and earn credits in advance of project impacts. Even though compensatory mitigation may be initiated in advance of project impacts, there may still be temporal losses that need to be addressed. The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Compensatory mitigation in relation to landscape strategies and plans. The preferred location for Service-recommended or required compensatory mitigation measures is within the boundaries of an existing strategically planned, interconnected conservation network that serves the conservation objectives for the affected resources in the relevant landscape context. Compensatory measures should enhance habitat connectivity or contiguity, or strategically improve targeted ecological functions important to the affected resources (*e.g.,* enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change).

Similarly, Service-recommended or required mitigation should emphasize avoiding impacts to habitats located within a planned conservation network, consistent with the Habitat Valuation guidance (section 5.5).

Where existing conservation networks or landscape conservation plans are not available for the affected resources, Service personnel should develop mitigation recommendations based on best available scientific information and professional judgment that would maximize the effectiveness of the mitigation measures for the affected resources, consistent with this Policy's guidance on Integrating Mitigation Planning with Conservation Planning (section 5.1).

5.7.2. Recommendations for Locating Compensatory Mitigation on Public or Private Lands

When appropriate as specified in this Policy, the Service may recommend establishing compensatory mitigation at locations on private, public, or tribal lands that provide the maximum conservation benefit for the affected resources. The Service will generally, but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred, *e.g.,* impacts to evaluation species on private lands are generally mitigated on private lands and impacts to evaluation species on public lands are generally mitigated on public lands. However, most private lands are not permanently dedicated to conservation purposes, and are generally the most vulnerable to impacts resulting from land and water resources development actions; therefore, mitigating impacts to any type of land ownership on private lands is usually acceptable as long as they are durable. Locating compensatory mitigation on public lands for impacts to evaluation species on private lands is also possible, and in some circumstances may best serve the conservation objectives for evaluation species. Such compensatory mitigation options require careful consideration and justification relative to the Service's mitigation planning goal, as described below.

The Service generally only supports locating compensatory mitigation on (public or private) lands that are already designated for the conservation of natural resources if additionality (see section 6, Definitions) is clearly demonstrated and is legally attainable. In particular, the Service usually does not support offsetting impacts to private lands by locating compensatory mitigation on public lands designated for conservation purposes because this practice risks a long-term net loss in landscape capacity to sustain species by relying increasingly on public lands to serve conservation purposes. However, the Service acknowledges that public ownership does not automatically confer long-term protection and/or management for evaluation species in all cases, which may justify locating compensatory mitigation measures on public lands, including compensation for impacts to evaluation species on public or private lands. The Service may recommend compensating for private-land impacts to evaluation species on public lands (whether designated for conservation of natural resources or not) when:

a. Compensation is an appropriate means of achieving the mitigation planning goal, as specified in this Policy;

b. the compensatory mitigation would provide additional conservation benefits above and beyond measures the public agency is foreseeably expected to implement absent the mitigation (only such additional benefits are counted towards achieving the mitigation planning goal);

c. the additional conservation benefits are durable, *i.e.,* lasting as long as the impacts that prompted the compensatory mitigation;

d. consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies; and

e. the public land location would provide the best possible conservation outcome, such as when private lands suitable for compensatory mitigation are unavailable or are available but do not provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the evaluation species.

Ensuring the durability of compensatory mitigation on public lands may require multiple tools beyond land use plan designations, including right-of-way grants, withdrawals, disposal or lease of land for conservation, conservation easements, cooperative agreements, and agreements with third parties. Mechanisms to ensure durability of land protection for compensatory mitigation on public and private lands vary among agencies, but should preclude conflicting uses and ensure that protection and management

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

of the mitigation land is commensurate with the magnitude and duration of impacts.

When the public lands under consideration for use as compensatory mitigation for impacts on private lands are National Wildlife Refuge System (NWRS) lands, additional considerations covered in the Service's Final Policy on the NWRS and Compensatory Mitigation Under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999) may apply. Under that policy, the Regional Director will recommend the mitigation plan proposing to site compensatory mitigation on NWRS lands to the Director for approval.

5.7.3. Recommendations Related to Recreation

Mitigation for impacts to recreational uses of wildlife and habitat. The Service will generally not recommend measures intended to increase recreational value as mitigation for habitat losses. The Service may address impacts to recreational uses that are not otherwise addressed through habitat mitigation, but will do so with separate and distinct recreational use mitigation recommendations.

Recreational use of mitigation lands. Consistent with applicable statutes, the Service supports those recreational uses on mitigation lands that are compatible with the conservation goals of those mitigation lands. If certain uses are incompatible with the conservation goals for the mitigation lands, for example, off-road vehicle use in an area conserved for wildlife intolerant to disturbance, the Service will recommend against such uses.

5.8. Documentation

The Service should advise action proponents and decisionmaking agencies at timely stages of the planning process. To ensure effective consideration of Service recommendations, it is generally possible to communicate key concerns that will inform our recommendations early in the mitigation planning process, communicate additional components during and following an initial assessment of effects, and provide final written recommendations toward the end of the process, but in advance of a final decision for the action. The following outline lists the components applicable to these three planning stages. Because actions vary substantially in scope and complexity, these stages may extend over a period of years or occur almost simultaneously, which may necessitate consolidating some of the components listed below. For all actions, the level of the Service's analysis and documentation should be commensurate with the scope and severity of the potential impacts to resources. Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.

A. Early Planning

1. Inform the proponent of the Service's goal to improve or, at minimum, maintain the status of affected resources, and that the Service will identify opportunities for a net conservation gain if appropriate.

2. Coordinate key data collection and planning decisions with the proponent, relevant tribes, and Federal and State resource agencies; including, but not limited to:

a. Delineate the affected area;

b. define the planning horizon;

c. identify species that may occur in the affected area that the Service is likely to consider as evaluation species for mitigation planning;

d. identify landscape-scale strategies and conservation plans and objectives that pertain to these species and the affected area;

e. define surveys, studies, and preferred methods necessary to inform effects analyses; and

f. as necessary, identify reasonable alternatives to the proposed action that may achieve the proponent's purpose and the Service's no-net-loss goal for resources.

3. As early as possible, inform the proponent of the presence of probable high-value habitats in the affected area (see section 5.5), and advise the proponent of Service policy to avoid all impacts to such habitats.

B. Effects Assessment

1. Coordinate selection of evaluation species with relevant tribes, Federal and State resource agencies, and action proponents.

2. Communicate the Service's assessment of the value of affected habitats to evaluation species.

3. If high-value habitats are affected, advise the proponent of the Service's policy to avoid all impacts to such habitats.

4. Assess action effects to evaluation species and their habitats.

5. Formulate mitigation options that would achieve the mitigation policy goal (an appropriate net conservation gain or, at minimum, no net loss) in coordination with the proponent and relevant tribes, and Federal and State resource agencies.

C. Final Recommendations

The Service's final mitigation recommendations should communicate in writing the following:

1. The authorities under which the Service is providing the mitigation recommendations consistent with this Policy.

2. A description of all mitigation measures that are reasonable and appropriate to ensure that the proposed action improves or, at minimum, maintains the current status of affected fish, wildlife, plants, and their habitats.

3. The following elements should be specified within a mitigation plan or equivalent by either the Service, action proponents, or in collaboration:

a. Measurable objectives;

b. implementation assurances, including financial, as applicable;

c. effectiveness monitoring;

d. additional adaptive management actions as may be indicated by monitoring results; and

e. reporting requirements.

4. An explanation of the basis for the Service recommendations, including, but not limited to:

a. Evaluation species used for mitigation planning;

b. the assessed value of affected habitats to evaluation species;

c. predicted adverse and beneficial effects of the proposed action;

d. predicted adverse and beneficial effects of the recommended mitigation measures; and

e. the rationale for our determination that the proposed action, if implemented with Service recommendations, would achieve the mitigation policy goal.

5. The Service's expectations of the proponent's responsibility to implement the recommendations.

5.9. Followup

The Service encourages, supports, and will initiate, whenever practicable and within our authority, post-action monitoring studies and evaluations to determine the effectiveness of recommendations in achieving the mitigation planning goal. In those instances where Service personnel determine that action proponents have not carried out those agreed-upon mitigation means and measures, the Service will request that the parties responsible for regulating the action initiate corrective measures, or will initiate access to available assurance measures. These provisions also apply when the Service is the action proponent.

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

6. Definitions

Definitions in this section apply to the implementation of this Policy and were developed to provide clarity and consistency within the policy itself, and to ensure broad, general applicability to all mitigation processes in which the Service engages. Some Service authorities define some of the terms in this section differently or more specifically, and the definitions herein do not substitute for statutory or regulatory definitions in the exercise of those authorities.

Action. An activity or program implemented, authorized, or funded by Federal agencies; or a non-Federal activity or program for which one or more of the Service's authorities apply to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning.

Additionality. A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

Affected area. The spatial extent of all effects, direct and indirect, of a proposed action to fish, wildlife, plants, and their habitats.

Affected resources. Those resources, as defined by this Policy, that are subject to the adverse effects of an action.

Baseline. Current and future environmental conditions (relevant to the resources covered by this Policy) that are expected without implementation of the proposed action under review. Predictions about future environmental conditions without the action should account for natural species succession, implementation of approved land and resource management plans, and any other reasonably foreseeable factors that influence these conditions.

Compensatory mitigation. Compensatory mitigation means to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20.) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions. Impacts are authorized pursuant to a regulatory or resource management program that issues permits, licenses, or otherwise approves activities. In this Policy, ''mitigation'' is a deliberate expression of the full mitigation hierarchy, and ''compensatory mitigation'' describes only the last phase of that sequence.

Conservation. In the context of this Policy, the noun ''conservation'' is a general label for the collective practices, plans, policies, and science that are used to protect and manage species and their habitats to achieve desired outcomes.

Conservation objective. A measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

Conservation planning. The identification of strategies for achieving conservation objectives. Conservation plans include, but are not limited to, recovery plans, habitat conservation plans, watershed plans, green infrastructure plans, and others developed by Federal, State, tribal or local government agencies or non-governmental organizations. This Policy emphasizes the use of landscape-scale approaches to conservation planning.

Durability. A mitigation measure is durable when the effectiveness of the measure is sustained for the duration of the associated impacts of the action, including direct and indirect impacts.

Effects. Changes in environmental conditions that are relevant to the resources covered by this Policy.

Direct effects are caused by the action and occur at the same time and place.

Indirect effects are caused by the action, but occur at a later time and/or another place.

Cumulative effects are caused by other actions and processes, but may refer also to the collective effects on a resource, including direct and indirect effects of the action. The causal agents and spatial/temporal extent for considering cumulative effects varies according to the authority(ies) under which the Service is engaged in mitigation planning (*e.g.,* refer to the definitions of cumulative effects and cumulative impacts in ESA regulations and NEPA, respectively), and the Service will apply statute-specific definitions in the application of this Policy.

Evaluation species. Fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning.

Habitat. An area with spatially identifiable physical, chemical, and biological attributes that supports one or more life-history processes for evaluation species. Mitigation planning should delineate habitat types in the affected area using a classification system that is applicable to both the region(s) of the affected area and the selected evaluation species in order to facilitate determinations of habitat scarcity, suitability, and importance.

Habitat Credit Exchange. An environmental market that operates as a clearinghouse in which an exchange administrator, operating as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and project permittees. This is in contrast to the direct transactions between compensatory mitigation providers and permittees that generally occur through conservation banking and in-lieu fee programs. Exchanges provide ecological functions and services expressed as credits that are permanently conserved and managed for specified species and are used to compensate for adverse impacts occurring elsewhere to the same species.

Habitat value. An assessment of an affected habitat with respect to an evaluation species based on three attributes—scarcity, suitability, and importance—which define its conservation value to the evaluation species in the context of this Policy. The three parameters are assessed independently but are sometimes correlated. For example, rare or unique habitat types of high suitability for evaluation species are also very likely of high importance in achieving conservation objectives.

Impacts. In the context of this Policy, impacts are adverse effects relative to the affected resources.

Importance. The relative significance of the affected habitat, compared to other examples of a similar habitat type in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

Landscape. An area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The most relevant concerns to the Service and this Policy are those associated with the conservation of species and their habitats. The landscape is not defined by the size of the area, but rather the interacting elements that are meaningful to the conservation objectives for the resources under consideration.

Landscape-scale approach. For the purposes of this Policy, the landscape-scale approach applies the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however narrow or broad, necessary to sustain, or otherwise achieve, established goals for those resources and their values, services, and functions. A landscape-scale approach should be used when developing and approving strategies or plans, reviewing projects, or issuing permits. The approach identifies the needs and baseline conditions of targeted resources and their values, services, and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources and their values, services, and functions, with full consideration of the conditions of additionality and durability.

Landscape-scale strategies and plans. For the purposes of this Policy, landscape-scale strategies and plans identify clear management objectives for targeted resources and their values, services, and functions at landscape-scales, as necessary, including across administrative boundaries, and employ the landscape-scale approach to identify, evaluate, and communicate how mitigation can best achieve those management objectives. Strategies serve to assist project applicants, stakeholders, and land managers in pre-planning as well as to inform NEPA analysis and decisionmaking, including decisions to develop and approve plans, review projects, and issue permits. Land use planning processes provide opportunities for identifying, evaluating, and communicating mitigation in advance of anticipated land use activities. Consistent with their statutory authorities, land management agencies may develop landscape-scale strategies through the land use planning process, or incorporate relevant aspects of applicable and existing landscape-scale strategies into land use plans through the land use planning process.

Mitigation. In the context of this Policy, the noun ''mitigation'' is a label for all types of measures (see Mitigation Types) that a proponent would implement toward achieving the Service's mitigation goal.

Mitigation hierarchy. The elements of mitigation, summarized as avoidance, minimization, and compensation, provide a sequenced approach to addressing the foreseeable impacts to resources and their values, services, and functions. First, impacts should be avoided by altering project design and/or location or declining to authorize the project; then minimized through project modifications and permit conditions; and, generally, only then compensated for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

Mitigation planning. The process of assessing the effects of an action and formulating mitigation measures that would achieve the mitigation planning goal.

Mitigation goal. The Service's goal for mitigation is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority.

Mitigation types. General classes of methods for mitigating the impacts of an action (Council on Environmental Quality, 40 CFR 1508.20(a–e)), including:

(a) Avoid the impact altogether by not taking the action or parts of the action;

(b) minimize the impact by limiting the degree or magnitude of the action and its implementation;

(c) rectify the impact by repairing, rehabilitating, or restoring the affected environment;

(d) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; and

(e) compensate for the impact by replacing or providing substitute resources or environments.

These five mitigation types, as enumerated by CEQ, are compatible with this Policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensation for remaining unavoidable (also known as residual) impacts. Section 5.6 (Mitigation Means and Measures) of this Policy provides expanded definitions and examples for each of the mitigation types.

Practicable. Available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale.

Proponent. The agency(ies) proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action.

Resources. Fish, wildlife, plants, and their habitats for which the Service has authority to recommend or require the mitigation of impacts resulting from proposed actions.

Scarcity. The relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.

Suitability. The relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.

Unavoidable. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is not available.

Appendix A. Authorities and Direction for Service Mitigation Recommendations

A. Relationship of Service Mitigation Policy to Other Policies, Regulations

This section is intended to describe the interaction of existing policies and regulations with this Policy in agency processes. Descriptions regarding the application of mitigation concepts generally, and elements of this Policy specifically, for each of the listed authorities follow:

1. The Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d) (Eagle Act)

The Eagle Act prohibits take of bald eagles and golden eagles except pursuant to Federal regulations. The Eagle Act regulations at title 50, part 22 of the Code of Federal Regulations (CFR), define the ''take'' of an eagle to include the following actions: ''pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb'' (§ 22.3).

Except for protecting eagle nests, the Eagle Act does not directly protect eagle habitat. However, because disturbing eagles is a violation of the Act, some activities within

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

eagle habitat, including some habitat modification, can result in illegal take in the form of disturbance. ''Disturb'' is defined as ''to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.''

The Eagle Act allows the Secretary of the Interior to authorize certain otherwise prohibited activities through regulations. The Service is authorized to prescribe regulations permitting the taking, possession, and transportation of bald and golden eagles provided such permits are ''compatible with the preservation of the bald eagle or the golden eagle'' (16 U.S.C. 668a). Permits are issued for scientific and exhibition purposes; religious purposes of Native American tribes; falconry (golden eagles only); depredation; protection of health and safety; golden eagle nest take for resource development and recovery; nonpurposeful (incidental) take; and removal or destruction of eagle nests.

The Eagle Act provides for mitigation in the form of avoidance and minimization by restricting permitted take to circumstances where take is ''necessary.'' While not expressly addressed, compensatory mitigation can also be used as a tool for ensuring that authorized take is consistent with the preservation standard of the Eagle Act. The regulations for eagle nest take permits and eagle non-purposeful incidental take permits explicitly provide for compensatory mitigation. Although eagle habitat (beyond nest structures) is not directly protected by the Eagle Act, the statute and implementing regulations do not preclude the use of habitat restoration, enhancement, and protection as compensatory mitigation.

At the time of development of this Appendix A, the threshold for authorized take of golden eagles is set at zero throughout the United States because golden eagle populations appear to be stable and potentially declining, and may not be able to absorb additional take while still maintaining current numbers of breeding pairs over time. Accordingly, all permits for golden eagle take must incorporate compensatory mitigation. Because golden eagle populations are currently primarily constrained by a high level of unauthorized human-caused mortality, rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction of a source of mortality; however, habitat restoration and enhancement could potentially offset permitted take in some situations, once reliable standards and metrics are developed to support the application of habitat-based mitigation to offset permitted take.

2. Clean Water Act (33 U.S.C. 1251 *et seq.*)

Several locations within the statute under section 404 describe the responsibilities and roles of the Service. The authority at section 404(m) is most directly relevant to the Service's engagement of Clean Water Act permitting processes to recommend mitigation for impacts to aquatic resources nationwide and is routinely used by Ecological Services Field Offices. At section 404(m), the Secretary of the Army is required to notify the Secretary of the Interior, through the Service Director, that an individual permit application has been received or that the Secretary proposes to issue a general permit. The Service will submit any comments in writing to the Secretary of the Army (Corps of Engineers) within 90 days. The Service has the opportunity to engage several thousand Corps permit actions affecting aquatic habitats and wildlife annually and to assist the Corps of Engineers in developing permit terms that avoid, minimize, or compensate for permitted impacts. The Department of the Army has also entered into a Memorandum of Agreement with the Department of the Interior under section 404(q) of the Clean Water Act. The current Memorandum of Agreement, signed in 1992, provides procedures for elevating national or regional issues relating to resources, policy, procedures, or regulation interpretation.

3. Endangered Species Act of 1973, as Amended (16 U.S.C. 1531 *et seq.*)

A primary purpose of the Endangered Species Act (ESA) of 1973 as amended (16 U.S.C. 1531 *et seq.*) is to conserve the ecosystems upon which species listed as endangered and threatened depend. Conserving listed species involves the use of all methods and procedures that are necessary for their recovery, which includes mitigating the impacts of actions to listed species and their habitats. All actions must comply with the applicable prohibitions against taking endangered animal species under ESA section 9 and taking threatened animal species under regulations promulgated through ESA section 4(d). Under ESA section 7(a)(2), Federal agencies must consult with the Service(s) to ensure that any actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. Federal agencies, and any permit or license applicants, may be exempted from the prohibitions against incidental taking for actions that are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat, if the terms and conditions of the incidental take statement are implemented.

The Service may permit incidental taking resulting from a non-Federal action under ESA section 10(a)(1)(B) after approving the proponent's habitat conservation plan (HCP) under section 10(a)(2)(A). The HCP must specify the steps the permit applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps. The basis for issuing a section 10 permit includes a finding that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of incidental taking, and a finding that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

This Policy applies to all actions that may affect ESA-protected resources except for conservation/recovery permits under section 10(a)(1)(A). The Service will recommend mitigation for impacts to listed species, designated critical habitat, and other species for which the Service has authorized mitigation responsibilities consistent with the guidance of this Policy, which proponents may adopt as conservation measures to be added to the project descriptions of proposed actions. Such adoption may ensure that actions are not likely to jeopardize species or adversely modify designated critical habitat; however, such adoption alone does not constitute compliance with the ESA. Federal agencies must complete consultation per the requirements of section 7 to receive Service concurrence with ''may affect, not likely to adversely affect'' determinations, biological opinions for ''likely to adversely affect'' determinations, and incidental take statement terms and conditions. Proponents of actions that do not require Federal authorization or funding must complete the requirements under section 10(a)(2) to receive an incidental take permit. Mitigation planning under this Policy applies to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA implementing regulations.

All forms of mitigation are potential conservation measures of a proposed Federal action in the context of section 7 consultation and are factored into Service analyses of the effects of the action, including any voluntary mitigation measures proposed by a project proponent that are above and beyond those required by an action agency. Service regulations at 50 CFR 402.14(g)(8) affirm the need to consider ''any beneficial actions'' in formulating a biological opinion, including those ''taken prior to the initiation of consultation.'' Because jeopardy and adverse modification analyses weigh effects in the action area relative to the status of the species throughout its listed range and to the status of all designated critical habitat units, respectively, ''beneficial actions'' may also include proposed conservation measures for the affected species within its range but outside of the area of adverse effects (*e.g.,* compensation).

Mitigation measures included in proposed actions that avoid and minimize the likelihood of adverse effects and incidental take are also relevant to the Service's concurrence with ''may affect, not likely to adversely affect'' determinations through informal consultation. All mitigation measures included in proposed actions that benefit listed species and/or designated critical habitat, including compensatory measures, are relevant to jeopardy and adverse modification conclusions in Service biological opinions.

Likewise, the Service may apply all forms of mitigation, consistent with the guidance of this Policy, in formulating a reasonable and prudent alternative that would avoid jeopardy/adverse modification, provided that it is also consistent with the regulatory

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

definition of a reasonable and prudent alternative at 50 CFR 402.02. It is preferable to avoid or minimize impacts to listed species or critical habitat before rectifying, reducing over time, or compensating for such impacts. Under some limited circumstances, however, the latter forms of mitigation may provide all or part of the means to achieving the best possible conservation outcome for listed species consistent with the purpose, authority, and feasibility requirements of a reasonable and prudent alternative.

For Federal actions that are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of habitat, the Service may provide a statement specifying those reasonable and prudent measures that are necessary or appropriate to minimize the impacts of taking incidental to such actions on the affected listed species. That incidental take statement must comply with all applicable regulations. No proposed mitigation measures relieve an action proponent of the obligation to obtain incidental take exemption through an incidental take statement (Federal actions) or authorization through an incidental take permit (non-Federal actions), as appropriate, for unavoidable incidental take that may result from a proposed action.

4. Executive Order 13186 (E.O. 13186), Responsibilities of Federal Agencies To Protect Migratory Birds

E.O. 13186 directs Federal departments and agencies to avoid or minimize adverse impacts on ''migratory bird resources,'' defined as ''migratory birds and the habitats upon which they depend.'' These acts of avian protection and conservation are implemented under the auspices of the MBTA, the Eagle Act, the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the ESA, the National Environmental Policy Act, and ''other established environmental review process'' (section 3(e)(6)). Additionally, E.O. 13186 directs Federal agencies whose activities will likely result in measurable negative effects on migratory bird populations to collaboratively develop and implement an MOU with the Service that promotes the conservation of migratory bird populations. These MOUs can clarify how an agency can mitigate the effects of impacts and monitor implemented conservation measures. MOUs can also define how appropriate corrective measures can be implemented when needed, as well as what proactive conservation actions or partnerships can be formed to advance bird conservation, given the agency's existing mission and mandate.

The Service policy regarding its responsibility to E.O. 13186 (720 FW 2) states ''all Service employees should: A. Implement their mission-related activities and responsibilities in a way that furthers the conservation of migratory birds and minimizes and avoids the potential adverse effects of migratory bird take, with the goal of eliminating take'' (2.2 A). The policy also stipulates that the Service will support the conservation intent of the migratory bird conventions by integrating migratory bird conservation measures into our activities, including measures to avoid or minimize adverse impacts on migratory bird resources; restoring and enhancing the habitat of migratory birds; and preventing or abating the pollution or detrimental alteration of the environment for the benefit of migratory birds.

5. Executive Order 13653 (E.O. 13653), Preparing the United States for the Impacts of Climate Change

E.O. 13653 directs Federal agencies to improve the Nation's preparedness and resilience to climate change impacts. The agencies are to promote: (1) Engaged and strong partnerships and information sharing at all levels of government; (2) risk-informed decisionmaking and the tools to facilitate it; (3) adaptive learning, in which experiences serve as opportunities to inform and adjust future actions; and (4) preparedness planning.

Among the provisions under section 3, *Managing Lands and Waters for Climate Preparedness and Resilience,* is this: ''agencies shall, where possible, focus on program and policy adjustments that promote the dual goals of greater climate resilience and carbon sequestration, or other reductions to the sources of climate change . . . [a]gencies shall build on efforts already completed or underway . . . as well as recent interagency climate adaptation strategies.'' Section 5 specifies that agencies shall develop or continue to develop, implement, and update comprehensive plans that integrate consideration of climate change into agency operations and overall mission objectives.

The *Priority Agenda: Enhancing The Climate Resilience of America's Natural Resources* (October 2014), called for in E.O. 13653, includes provisions to develop and provide decision support tools for ''climate-smart natural resource management'' that will improve the ability of agencies and landowners to manage for resilience to climate change impacts.

The Service policy on climate change adaptation (056 FW 1) states that the Service will ''effectively and efficiently incorporate and implement climate change adaptation measures into the Service's mission, programs, and operations.'' This includes using the best available science to coordinate an appropriate adaptive response to impacts on fish, wildlife, plants, and their habitats. The policy also specifically calls for delivering landscape conservation actions that build resilience or support the ability of fish, wildlife, and plants to adapt to climate change.

6. Federal Power Act (16 U.S.C. 791–828c) (FPA)

The Federal Energy Regulatory Commission (FERC) authorizes non-Federal hydropower projects pursuant to the FPA. The Service's roles in hydropower project review are primarily defined by the FPA, as amended in 1986 by the Electric Consumers Protection Act, which explicitly ascribes those roles to the Service. The Service has mandatory conditioning authority for projects on National Wildlife Refuge System lands under section 4(e) and to prescribe fish passage to enhance and protect native fish runs under section 18. Under section 10(j), FERC is required to include license conditions that are based on recommendations made pursuant to the Fish and Wildlife Coordination Act by States, NOAA, and the Service for the adequate and equitable protection, mitigation, and enhancement of fish, wildlife, and their habitats.

7. Fish and Wildlife Conservation Act (16 U.S.C. 2901–2912)

Specifically, Federal Conservation of Migratory Nongame Birds (16 U.S.C. 2912) requires the Service to ''identify the effects of environmental changes and human activities on species, subspecies, and populations of all migratory nongame birds'' (section 2912(2)); ''identify conservation actions to assure that species, subspecies, and populations of migratory nongame birds . . . do not reach the point at which the measures provided pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543), become necessary'' (section 2912(4)); and ''identify lands and waters in the United States and other nations in the Western Hemisphere whose protection, management, or acquisition will foster the conservation of species, subspecies, and populations of migratory nongame birds. . . .'' (section 2912(5)).

8. Fish and Wildlife Coordination Act (16 U.S.C. 661–667e) (FWCA)

The FWCA requires Federal agencies developing water-related projects to consult with the Service, NOAA, and the States regarding fish and wildlife impacts. The FWCA establishes fish and wildlife conservation as a coequal objective of all federally funded, permitted, or licensed water-related development projects. Federal action agencies are to include justifiable means and measures for fish and wildlife, and the Service's mitigation and enhancement recommendations are to be given full and equal consideration with other project purposes. The Service's mitigation recommendations may include measures addressing a broad set of habitats beyond the aquatic impacts triggering the FWCA and taxa beyond those covered by other resource laws. Action agencies are not bound by the FWCA to implement Service conservation recommendations in their entirety.

9. Marine Mammal Protection Act of 1972, as Amended (16 U.S.C. 1361 *et seq.*) (MMPA)

The MMPA prohibits the take (*i.e.,* hunting, killing, capture, and/or harassment) of marine mammals and enacts a moratorium on the import, export, and sale of marine mammal parts and products. There are exemptions and exceptions to the prohibitions. For example, under section 101(b), Alaskan Natives may hunt marine mammals for subsistence purposes and may possess, transport, and sell marine mammal parts and products. However, this section focuses on incidental take authorizations for non-commercial fishing activities.

Section 101(a)(5) allows for the authorization of incidental, but not intentional, take of small numbers of marine mammals by U.S. citizens while engaged in a specified activity (other than commercial fishing) within a specified geographical

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

region, provided certain findings are made. Specifically, the Service must make a finding that the total of such taking will have a negligible impact on the marine mammal species and will not have an unmitigable adverse impact on the availability of these species for subsistence uses. Negligible impact is defined at 50 CFR 18.27(c) as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' Unmitigable adverse impact, which is also defined at 50 CFR 18.27(c), means ''an impact resulting from the specified activity that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.''

Section 101(a)(5)(A) of the MMPA provides for the promulgation of Incidental Take Regulations (ITRs), which can be issued for a period of up to 5 years. The ITRs set forth permissible methods of taking pursuant to the activity and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses. In addition, ITRs include requirements pertaining to the monitoring and reporting of such takings.

Under the ITRs, a U.S. citizen may request a Letter of Authorization (LOA) for activities proposed in accordance with the ITRs. The Service evaluates each LOA request based on the specific activity and geographic location, and determines whether the level of taking is consistent with the findings made for the total taking allowable under the applicable ITRs. If so, the Service may issue an LOA for the project and will specify the period of validity and any additional terms and conditions appropriate to the request, including mitigation measures designed to minimize interactions with, and impacts to, marine mammals. The LOA will also specify monitoring and reporting requirements to evaluate the level and impact of any taking. Depending on the nature, location, and timing of a proposed activity, the Service may require applicants to consult with potentially affected subsistence communities in Alaska and develop additional mitigation measures to address potential impacts to subsistence users. Regulations specific to LOAs are codified at 50 CFR 18.27(f).

Section 101(a)(5)(D) established an expedited process to request authorization for the incidental, but not intentional, take of small numbers of marine mammals for a period of not more than one year if the taking will be limited to harassment, *i.e.,* Incidental Harassment Authorizations (IHAs). Harassment is defined in section 3 of the MMPA (16 U.S.C. 1362). For activities other than military readiness activities or scientific research conducted by or on behalf of the Federal Government, harassment means ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild'' (the MMPA calls this Level A harassment) ''or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to migration, breathing, nursing, breeding, feeding, or sheltering'' (the MMPA calls this Level B harassment). There is a separate definition of harassment applied in the case of a military readiness activity or a scientific research activity conducted by or on behalf of the Federal Government. In addition, ''small numbers'' and ''specified geographical region'' requirements do not apply to military readiness activities.

The IHA prescribes permissible methods of taking by harassment and includes other means of effecting the least practicable impact on marine mammal species or stocks and their habitats, paying particular attention to rookeries, mating grounds, and areas of similar significance. In addition, as appropriate, the IHA will include measures that are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for subsistence purposes in Alaska. IHAs also specify monitoring and reporting requirements pertaining to the taking by harassment.

ITRs and IHAs can provide considerable conservation and management benefits to covered marine mammals. The Service shall recommend mitigation for impacts to species covered by the MMPA that are under its jurisdiction consistent with the guidance of this Policy and to the extent compatible with the authorities of the MMPA. Proponents may adopt these recommendations as components of proposed actions. However, such adoption itself does not constitute compliance with the MMPA. In addition, IHAs or LOAs issued under ITRs specify the permissible methods of taking and other means of effecting the least practicable adverse impact on the species or stock and its habitat, and on the availability for subsistence purposes. Those authorizations also outline required monitoring and reporting of takes.

10. Migratory Bird Treaty Act (16 U.S.C. 703–712) (MBTA)

The MBTA does not allow the take of migratory birds without a permit or other regulatory authorization (*e.g.,* rule, depredation order). The Service has express authority to issue permits for purposeful take and currently issues several types of permits for purposeful take of individuals (*e.g.,* hunting, depredation, scientific collection). Hunting permits do not require the mitigation hierarchy be enacted; rather, the Service sets annual regulations that limit harvest to ensure levels harvested do not diminish waterfowl breeding populations. For purposeful take permits that are not covered in these annual regulations (*e.g.,* depredation, scientific collection), there is an expectation that take be avoided and minimized to the maximum extent practicable as a condition of the take authorization process. Compensation and offsets are not required under these purposeful take permits, but can be accepted.

The Service has implied authority to permit incidental take of migratory birds, though incidental take has only been authorized in limited situations (*e.g.,* Department of Defense Readiness Rule and the NOAA Fisheries Special Purpose Permit). In all situations, permitted or unpermitted, there is an expectation that take be avoided and minimized to the maximum extent practicable, and voluntary offsets can be employed to this end. However, the Service cannot legally require or accept compensatory mitigation for unpermitted, and thus illegal, take of individuals. While action proponents are expected to reduce impacts to migratory bird habitat, such impacts are not regulated under the MBTA. As a result, action proponents are allowed to use the full mitigation hierarchy to manage impacts to their habitats, regardless of whether or not a permit for take of individuals is in place. Assessments of action effects should examine direct, indirect, and cumulative impacts to migratory bird habitats, as habitat losses have been identified as a critical factor in the decline of many migratory bird species.

11. National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) (NEPA)

NEPA requires Federal agencies to integrate environmental values into decisionmaking processes by considering impacts of their proposed actions and reasonable alternatives. Agencies disclose findings through an environmental assessment or a detailed environmental impact statement and are required to identify and include all relevant and reasonable mitigation measures that could improve the action. The Council on Environmental Quality's implementing regulations under NEPA define mitigation as a sequence, where mitigation begins with avoidance of impacts; followed by minimization of the degree or magnitude of impacts; rectification of impacts through repair, restoration, or rehabilitation; reducing impacts over time during the life of the action; and lastly, compensation for impacts by providing replacement resources. Effective mitigation through this ordered approach starts at the beginning of the NEPA process, not at the end. Implementing regulations require that the Service be notified of all major Federal actions affecting fish and wildlife and our recommendations solicited. Engaging this process allows the Service to provide comments and recommendations for mitigation of fish and wildlife impacts.

12. National Wildlife Refuge Mitigation Policy (64 FR 49229–49234, September 10, 1999) (Refuge Mitigation Policy)

The Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the section 10/404 Program establishes guidelines for the use of Refuge lands for siting compensatory mitigation for impacts permitted through section 404 of the Clean Water Act (CWA) and section 10 of the Rivers and Harbors Act (RHA). The Refuge Mitigation Policy clarifies that siting mitigation for off-Refuge impacts on Refuge lands is appropriate only in limited and

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

exceptional circumstances. Mitigation banks may not be sited on Refuge lands, but the Service may add closed banks to the Refuge system if specific criteria are met. The Refuge Mitigation Policy, which explicitly addresses only compensatory mitigation under the CWA and RHA, remains in effect and is unaltered by this Policy. However, the Service will evaluate all proposals for using Refuge lands as sites for other compensatory mitigation purposes using the criteria and procedures established for aquatic resources in the Refuge Mitigation Policy (*e.g.,* to locate compensatory mitigation on Refuge property for off-Refuge impacts to endangered or threatened species).

13. Natural Resource Damage Assessment and Restoration (NRDAR)

Under the Oil Pollution Act (33 U.S.C. 2701 *et seq.*) (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601) (CERCLA), as amended by Public Law 99–499, when a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, and Federal agencies, these governments quantify injuries to determine appropriate restoration necessary to compensate the public for losses of those resources or their services. Nothing in this Policy supersedes the statutes and regulations governing the natural resource damage provisions of CERCLA, OPA, and the CWA.

The Service is often a participating bureau, supporting the Department of the Interior, during NRDAR. A restoration settlement, in the form of damages provided through a settlement document, is usually determined by quantifying the type and amount of restoration necessary to offset the injury caused by the spill or release. The type of restoration conducted depends on the resources injured by the release (*e.g.,* marine habitats, ground water, or biological resources (fish, birds)).

In the *Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (November 3, 2015), DOI is charged with developing guidance describing considerations for evaluating whether, where, and when tools and techniques used in mitigation—including restoration banking or advance restoration projects—would be appropriate as components of a restoration plan resolving natural resource damage claims. Pending promulgation of that guidance, the tools provided in section 5 maintain the flexibility to implement the appropriate restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals.

B. Additional Legislative Authorities

1. Clean Air Act; 42 U.S.C. 7401 *et seq.,* as amended (See *http://www.fws.gov/refuges/airquality/permits.html*)
2. Marine Protection, Research, and Sanctuaries Act; 16 U.S.C. 1431 *et seq.* and 33 U.S.C. 1401 *et seq.*
3. Resource Conservation and Recovery Act; 42 U.S.C. 6901 *et seq.*
4. Shore Protection Act; 33 U.S.C. 2601 *et seq.*
5. Coastal Zone Management Act; 16 U.S.C. 1451 *et seq.*
6. Coastal Barrier Resources Act; 16 U.S.C. 3501
7. Surface Mining Control and Reclamation Act; 30 U.S.C. 1201 *et seq.*
8. National Wildlife Refuge System Administration Act; 16 U.S.C. 668dd, as amended
9. National Historic Preservation Act; 16 U.S.C. 470f
10. North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*
11. Pittman-Roberts Wildlife Restoration Act; 16. U.S.C. 669–669k
12. Dingell-Johnson Sport Fish Restoration Act; 16 U.S.C. 777–777n, except 777e–1 and g–1
13. Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.*

C. Implementing Regulations

1. National Environmental Policy Act (NEPA), 40 CFR part 1508, 42 U.S.C. 55
2. Marine Mammal Protection Act (MMPA), 50 CFR part 18, 16 U.S.C. 1361 *et seq.*
3. Migratory Bird Treaty Act (MBTA), 50 CFR part 21, 16 U.S.C. 703 *et seq.*
4. Bald and Golden Eagle Protection Act (Eagle Act), 50 CFR part 22, 16 U.S.C. 668 *et seq.*
5. Guidelines for Wetlands Protection, 33 CFR parts 320 and 332, 40 CFR part 230
6. Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344
7. National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84
8. Natural Resource Damage Assessments (OPA), 15 CFR part 990, 33 U.S.C. 2701 *et seq.*
9. Natural Resource Damage Assessments (CERCLA), 43 CFR part 11, 42 U.S.C. 9601
10. Endangered Species Act of 1973, as amended; 50 CFR parts 13, 17 (specifically §§ 17.22, 17.32, 17.50), part 402; 16 U.S.C. 1531 *et seq.*
11. Powers of the Secretary (43 U.S.C. 1201), 43 CFR part 24

D. Executive Orders

1. Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, January 10, 2001
2. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, January 4, 1979
3. Executive Order 11988, Floodplain Management, May 24, 1977
4. Executive Order 11990, Protection of Wetlands, May 24, 1977
5. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority and Low-Income Populations, February 11, 1994
6. Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, October 5, 2009
7. Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, March 22, 2012

E. Council on Environmental Quality (CEQ) Policy and Guidance

1. Guidance Regarding NEPA Regulations (48 FR 34236, July 28, 1983)
2. Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (40 CFR 1508.5, July 28, 1999)
3. Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 30, 2002)
4. Collaboration in NEPA, a Handbook for NEPA Practitioners (October 2007)
5. Memorandum, ''Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact'' (January 14, 2011)
6. ''Memorandum on Environmental Collaboration and Conflict Resolution'' (September 6, 2012)
7. NEPA and NHPA, a Handbook for Integrating NEPA and Section 106 (March 2013)
8. Memorandum for Heads of Federal Departments and Agencies, ''Effective Use of Programmatic NEPA Reviews'' (December 18, 2014)
9. Memorandum: ''Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews'' (August 1, 2016)

F. Department of the Interior Policy and Guidance

1. Department of the Interior National Environmental Policy Act Procedures, 516 DM 1–7
2. Secretarial Order 3330, Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013)
3. Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997)
4. Department of the Interior Climate Change Adaptation Policy, 523 DM 1

G. U.S. Fish and Wildlife Service (USFWS) Policy and Guidance:

1. Service Responsibilities to Protect Migratory Birds, 720 FW 2
2. Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program, 64 FR 49229–49234, September 10, 1999
3. Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 61 FR 63854, 1996
4. USFWS National Environmental Policy Act Reference Handbook, 505 FW 1.7 and 550 FW 1
5. Endangered Species Act Habitat Conservation Planning Handbook (with NMFS), 1996
6. Endangered Species Act Consultation Handbook (with NMFS), 1998
7. Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act, 2002
8. Guidance for the Establishment, Use, and Operation of Conservation Banking, 2003
9. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 2008
10. USFWS Tribal Consultation Handbook, 2011
11. Service Climate Change Adaptation Policy, 056 FW 1
12. USFWS Native American Policy, 510 FW 1

H. Other Agency Policy, Guidance, and Actions Relevant to Service Activities

1. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 1990
2. Federal Highway Administration, Consideration of Wetlands in the Planning of Federal Aid Highways, 1990
3. Clean Water Act Section 404(q) Memorandum of Agreement Between the Department of the Interior and the Department of the Army, 1992
4. Interagency Agreement between the National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Federal Aviation Administration Regarding Low-Level Flying Aircraft Over Natural Resource Areas, 1993
5. USFWS Memorandum from Acting Director to Regional Directors, Regarding ''Partners for Fish and Wildlife Program and NEPA Compliance,'' 2002
6. Agreement between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers for Conducting Fish and Wildlife Coordination Act Activities, 2003
7. Memorandum of Agreement Between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, 2003
8. Partnership Agreement between the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service for Water Resources and Fish and Wildlife, 2003
9. Memoranda of understanding with nine Federal agencies, under E.O. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds (*http://www.fws.gov/migratorybirds/PartnershipsAndIniatives.html*)

Appendix B. Service Mitigation Policy and NEPA

This appendix addresses Service responsibilities for applying this Policy when we are formulating our own proposed actions under the NEPA decision making process. Service personnel may also use this appendix as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA. However, comments that we provide are advisory to other Federal agencies in the NEPA context as an agency with special expertise regarding mitigating impacts to fish and wildlife resources. Consistent with their authorities, action agencies choose whether to adopt, in whole or in part, mitigation recommendations received from other agencies and the public, including the Service. Any requirements of other Federal agencies to mitigate impacts to fish and wildlife resources are governed by applicable statutes and regulations.

A. Mitigation in Environmental Review Processes

NEPA was enacted to promote efforts to prevent or eliminate damage to the environment and biosphere (42 U.S.C. 4321). The NEPA process is intended to help officials make decisions based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment (40 CFR part 1501). At the earliest stage possible in the planning process, and prior to making any detailed environmental review, the Service will ''consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.'' (42 U.S.C. 4332(C)) Early coordination avoids delays, reduces potential conflicts, and helps ensure compliance with other statutes and regulations. When scoping the issues for the review, the Service will ''invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds).'' (40 CFR 1501.7(a)(1))

NEPA requires consideration of the impacts from connected, cumulative, and similar actions, and their relationship to the maintenance and enhancement of long-term productivity (42 U.S.C. 4332). Mitigation measures should be developed that effectively and efficiently address the predicted and actual impacts, relative to the ability to maintain and enhance long-term productivity. The consideration of mitigation (type, timing, degree, etc.) should be consistent with and based upon the evaluation of direct, indirect, and cumulative impacts. The Service should also consider and encourage public involvement in development of mitigation planning, including components such as compliance and effectiveness monitoring, and adaptive management processes.

Consistent with the January 14, 2011, CEQ Memorandum: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impacts, Service-proposed actions should incorporate measures to avoid, minimize, rectify, reduce, and compensate for impacts into initial proposal designs and described as part of the action. Measures to achieve net gain or no-net-loss outcomes have the greatest potential to achieve environmentally preferred outcomes that are encouraged by the memorandum, and measures to achieve net gain outcomes have the greatest potential to enhance long-term productivity. We should analyze mitigation measures considered, but not incorporated into the proposed action, as one or more alternatives. For illustrative purposes, our NEPA documents may address mitigation alternatives or consider mitigation measures that the Service does not have legal authority to implement. However, the Service should not commit to mitigation alternatives or measures considered or analyzed without sufficient legal authorities or sufficient resources to perform or ensure the effectiveness of the mitigation (CEQ 2011). The Service should monitor the compliance and effectiveness of our mitigation commitments. For applicant-driven actions, some or most of the responsibility for mitigation monitoring may lie with the applicant; however, the Service retains the ultimate responsibility to ensure that monitoring is occurring when needed and that the results of monitoring are properly considered in an adaptive management framework.

When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish between:

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment; and
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

Minimizing impacts under NEPA is commonly applied at the planning design stage, prior to the action (and impacts) occurring. Rectification and reduction over time are measures applied after the action is implemented (even though they may be included in the plan). Therefore, under NEPA, there are often very different temporal scopes between minimization measures and those for rectification and reduction over time. These temporal differences can be important for developing and evaluating alternatives, analyzing indirect and cumulative impacts, and for designing and implementing effectiveness and compliance monitoring. Therefore, the Service will retain the ability to distinguish between these three mitigation types when doing so will improve the ability to take the requisite NEPA ''hard look'' at potential environmental impacts and reasonable alternatives to proposed actions.

Other statutes besides NEPA that compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources commonly include the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. 1251–1376), Fish and Wildlife Coordination Act (16 U.S.C 661–667(e)), as amended (FWCA), and the Clean Air Act (42 U.S.C. 7401–7661). Service mitigation decisions should also comply with all applicable Executive Orders, including E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance (October 5, 2009); E.O. 13653, Preparing the United States for the Impacts of Climate Change (November 1, 2013); and E.O. 12898, Federal Actions To Address Environmental Justice in Minority

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Populations and Low-Income Populations. DOI Environmental Compliance Memorandum (ECM) 95–3 provides additional direction regarding responsibilities for addressing environmental justice under NEPA, including the equity of benefits and risks distribution.

B. Efficient Mitigation Planning

The CEQ Regulations Implementing NEPA include provisions to reduce paperwork (§ 1500.4), delay (§ 1505.5), and duplication with State and local procedures (§ 1506.2) and combine documents in compliance with NEPA. A key component of the provisions to reduce paperwork directs Federal agencies to use environmental impact statements for programs, policies, or plans, and to tier from statements of broad scope to those of narrower scope, in order to eliminate repetitive discussions of the same issues (§§ 1501.1(i), 1502.4, and 1502.20). To the fullest extent possible, the Service should coordinate with State, tribal, local, and other Federal entities to conduct joint mitigation planning, research, and environmental review processes. Mitigation planning can also provide efficiencies when it is used to reduce the impacts of a proposed project to the degree it eliminates significant impacts and avoids the need for an environmental impact statement. When using this approach, employing a mitigated Finding of No Significant Impact (FONSI), the Service should ensure consistency with the aforementioned January 14, 2011, CEQ memorandum.

Use of this Policy will help focus our NEPA discussion on issues for fish, wildlife, plants, and their habitats, and will avoid unnecessarily lengthy background information. When appropriate, the Service should use the process for establishing evaluation species and resource categories to concentrate our environmental analyses on relevant and significant issues.

Programmatic NEPA reviews can establish standards for consideration and implementation of mitigation, and can more effectively address cumulative impacts. The programmatic NEPA reviews can facilitate decisions on agency actions that precede site- or project-specific decisions and actions, such as mitigation alternatives or commitments for subsequent actions, or narrowing of future alternatives. To ensure that landscape-scale mitigation planning is effectively implemented and meets conservation goals, as appropriate, the Service should seek and consider collaborative opportunities to conduct programmatic NEPA decisionmaking processes on Service actions that are similar in timing, impacts, alternatives, resources, and mitigation. The Service should consider developing standard mitigation protocols or objectives in a programmatic NEPA review in order to provide a framework and scope for the subsequent tiered analysis of environmental impacts. Existing landscape-scale conservation and mitigation plans that have already undergone a NEPA process will provide efficiencies for Federal actions taken on a project-specific basis and will also better address potential cumulative impacts. However, the Service may incorporate plans or components of plans by reference (40 CFR 1502.21), while addressing impacts from plans or components within the NEPA process on the Service action. When considering programmatic NEPA reviews, the Service should adopt approaches consistent with the December 18, 2014, CEQ Memorandum: Effective Use of Programmatic NEPA Reviews.

Appropriate treatment of climate change in NEPA reviews is essential to development of meaningful mitigation. The Service approach should be consistent with the August 1, 2016, CEQ Memorandum: Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, which guides the consideration of reasonable alternatives and recommends agencies consider the short- and long-term effects and benefits in the alternatives and mitigation analysis.

C. Collaboration

Collaboration is an important component of mitigation planning, especially at the landscape or programmatic level. A collaborative NEPA process can offer the Service many benefits regarding development and implementation of mitigation, including, but not limited to: Better information regarding mitigation options by accessing relevant scientific and technical expertise and knowledge relating to local resources; a fairer process by involving most or all interests involved in determining mitigation; conflict prevention by dealing with issues related to mitigation as they arise; and easier implementation because all the stakeholders feel vested in the implementation of mitigation. Therefore, when considering and engaging in collaboration, the Service should, to the extent applicable, utilize the principles and recommendations set forth in the Office of Management and Budget and CEQ Memorandum on Environmental Collaboration and Conflict Resolution (2012) and the CEQ handbook, *Collaboration in NEPA–a Handbook for NEPA Practitioners* (2007).

D. NEPA and Tribal Trust Responsibilities

NEPA also provides a process through which all Tribal Trust responsibilities can be addressed simultaneous to consultation, but care should be taken to ensure that culturally sensitive information is not disclosed. Resources that may be impacted by Service actions or mitigation measures include culturally significant or sacred landscapes, species associated with those landscapes, or species that are separately considered culturally significant or sacred. The Service should coordinate or consult with affected tribes to develop methods for evaluating impacts, significance criteria, and meaningful mitigation to sacred or culturally significant species and their locales. Because climate change has been identified as an Environmental Justice (EJ) issue for tribes, adverse climate change-related effects to culturally significant or sacred landscapes or species may be cumulatively greater, and may indicate the need for a separate EJ analysis. Affected tribes can be those for which the locale of the action or landscape mitigation planning lies within traditional homelands and can include traditional migration areas. The final determination of whether a tribe is affected is made by the tribe, and should be ascertained during consultation or a coordination process. When government-to-government consultation takes place, the consultation process will be guided by the Service Tribal Consultation Handbook.

The Service has overarching Tribal Trust Doctrine responsibilities under the Eagle Act, the National Historic Preservation Act (NHPA), the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996), Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. 2000bb *et seq.*), Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, the Endangered Species Act (June 5, 1997), Executive Order 13007, Indian Sacred Sites (61 FR 26771, May 29, 1996), and the USFWS Native American Policy. Government-wide statutes with requirements to consult with tribes include the Archeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470aa–mm), the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 *et. seq.*), and AIRFA. Regulations with requirements to consult include NAGPRA, NHPA, and NEPA. As required, the Service will initiate Section 106 consultation with Indian tribes during early planning for FWS proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation.

E. Integrating the Mitigation Policy Into the NEPA Process

When the Service is the lead or co-lead Federal agency for NEPA compliance, this Policy may inform several components of the NEPA process and make it more effective and more efficient in conserving the affected Federal trust resources. This section discusses the role of this Policy in Service decisionmaking under NEPA.

Scoping

The Service should use internal and external scoping to help identify appropriate evaluation species, obtain information about the relative scarcity, suitability, and importance of affected habitats for resource category assignments, identify issues associated with these species and habitats, and identify issues associated with other affected resources. Climate change vulnerability assessments can be a valuable tool for identifying or screening new evaluation species. The Service should coordinate external scoping with agencies having special expertise or jurisdiction by law for the affected resources.

Purpose and Need

The purpose and need statement of the NEPA document should incorporate relevant conservation objectives for evaluation species and their habitats, and the need to ensure either a net gain or no-net-loss. Because the statement of purpose and need frames the development of the proposed action and

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

alternatives, including conservation objectives from the beginning, it steers action proposals away from impacts that may otherwise necessitate mitigation. Addressing conservation objectives in the purpose statement initiates a planning process in which the proposed action and all reasonable alternatives evaluated necessarily include appropriate conservation measures, differing in type or degree, and avoids presenting decisionmakers with a choice between a ''conservation alternative'' and a ''no conservation alternative.''

Alternatives

The alternatives should include, as appropriate, an alternative that includes design components or mitigation measures to achieve a net benefit for affected resources and an alternative that includes design components or mitigation measures to achieve no-net-loss of affected resources. Alternatives that include provisions for mitigation based upon different climate change projections will help guide the development of appropriate responses, and will facilitate the ability to change mitigation responses more quickly to ones already analyzed but not previously adopted.

Affected Environment

The affected environment discussion should focus on significant environmental issues associated with evaluation species and their habitats and highlight resource vulnerabilities that may require mitigation features in the project design. This section should document the relative scarcity, suitability, and importance of affected habitats, along with the sensitivity and status of the species and habitats. It should identify relevant temporal and spatial scales for each resource and the appropriate indicators of effects and units of measurement for evaluating mitigation features. This section should also identify habitats for evaluation species that are currently degraded but have a moderate to high potential for restoration or improvement.

Significance Criteria

Explicit significance criteria provide the benchmarks or standards for evaluating effects under NEPA. Potentially significant impacts to resources require decisionmaking supported by an environmental impact statement. Determining significance considers both the context and intensity of effects. For resources covered by this Policy, the sensitivity and status of affected species, and the relative scarcity, suitability, and importance of affected habitats, provide the context component of significance criteria. Measures of the severity of effects (degree, duration, spatial extent, etc.) provide the intensity component of significance criteria. Significance criteria may help identify appropriate levels and types of mitigation; however, the Service should consider mitigation for impacts that do not exceed thresholds for significance as well as those that do.

Analysis of Environmental Consequences

The analysis of environmental consequences should address the relationship of effects to the maintenance and enhancement of long-term productivity (40 CFR 1502.16), and include the timing and duration of direct, indirect, and cumulative effects to resources, short-term versus long-term effects (adverse and beneficial), and how the timing and duration of mitigation would influence net effects over time. The Service's net gain goal for fish and wildlife resources under this Policy applies to the full planning horizon of a proposed action. Guidance under section V.B.3 (Assessment Principles) of this Policy supplements existing Service, Department, and government-wide guidance for the Service's environmental consequences analyses for affected fish and wildlife resources under NEPA.

Cumulative Effects Analyses

The long-term benefits of mitigation measures, whether onsite or offsite relative to the proposed action, often depend on their placement in the landscape relative to other environmental resources and stressors. Therefore, cumulative effects analyses, including the effects of climate change, are especially important to consider in designing mitigation measures for fish and wildlife resources. Cumulative effects analyses should include consideration of direct and indirect effects of climate change and should incorporate mitigation measures to address altered conditions. Cumulative effects are doubly important in actions affecting species in decline, such as ESA-listed or candidate species, marine mammals, and Birds of Conservation Concern, for which the Service should design mitigation that will improve upon existing conditions and offset as much as practicable reasonably foreseeable adverse cumulative effects. Also, to the extent practicable, cumulative effects analyses should address the synergistic effects of multiple foreseeable resource stressors. For example, in parts of some western States, the combination of climate change, invasive grasses, and nitrogen deposition may substantially increase fire frequency and intensity, adversely affecting some resources to a greater degree than the sum of these stressors considered independently.

Analysis of Climate Change

The analyses of climate change effects should address effects to and changes for the evaluation species, resource categories, mitigation measures, and the potential for changes in the effects of mitigation measures. Anticipated changes may result in the need to choose different or additional evaluation species and habitat, at different points in time.

Decision Documents

Mitigation measures should be included as commitments within a Record of Decision (ROD) for an EIS, and within a mitigated FONSI. The decision documents should clearly identify: (a) Measures to achieve outcomes of no net loss or net gain; (b) the types of mitigation measures adopted for each evaluation species or suite of species; (c) the spatial and temporal application and duration of the measures; (d) compliance and effectiveness monitoring; (e) criteria for remedial action; and (f) unmitigable residual effects.

Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

The basic authority for Federal financial assistance is in the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 *et seq.*). It distinguishes financial assistance from procurement, and explains when to use a grant or a cooperative agreement as an instrument of financial assistance. Regulations at 2 CFR part 200 provide Government-wide rules for managing financial assistance awards. Each of the Service's financial assistance programs has at least one statutory authority, which are listed in the Catalog of Federal Domestic Assistance at *http://www.cfda.gov/*. These statutory authorities and their program-specific regulations may supplement or create exceptions to the Government-wide regulations. The authorities and regulations for the vast majority of financial assistance programs do not address mitigation, but there are at least two exceptions. The statutory authority for the North American Wetlands Conservation Fund program (16 U.S.C. 4401 *et seq.*) prohibits the use of program funds for specific types of mitigation. Regulations implementing the National Coastal Wetlands Conservation Grant program (50 CFR part 84) include among the activities ineligible for funding the acquisition, restoration, enhancement, or management of lands to mitigate recent or pending habitat losses. Consistent with this Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program. To foster consistent application of financial assistance programs with respect to mitigation processes, the following provisions describe appropriate circumstances as well as prohibitions for use of financial assistance in developing compensatory mitigation.

A. What is Federal financial assistance?

Federal financial assistance is the transfer of cash or anything of value from a Federal agency to a non-Federal entity to carry out a public purpose authorized by a U.S. law. If the Federal Government will be substantially involved in carrying out the project, the instrument for transfer must be a cooperative agreement. Otherwise, it must be a grant agreement. We use the term *award* interchangeably for a grant or cooperative agreement. This Policy applies only to awards approved or administered by the Service in one of its financial assistance programs. If the Service shares responsibility for approving or administering an award with another entity, this Policy applies only to those decisions that the Service has the authority to make under the terms of the shared responsibility.

B. Where do most mitigation issues occur in financial assistance?

Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) using either mitigation funds or in-kind

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

contributions derived from mitigation, as match. Match is the share of project costs not paid by Federal funds, unless otherwise authorized by Federal statute. Most Service-approved or -administered financial assistance programs require or encourage applicants to provide match to leverage the Federal funds.

C. Can the Federal or matching share in a financially assisted project be used to generate mitigation credits for activities authorized by Department of the Army (DA) permits?

1. Neither the Federal nor matching share in financially assisted aquatic-resource-restoration projects or aquatic resource conservation projects can be used to generate mitigation credits for DA-authorized activities except as authorized by 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). These exceptional situations are any of the following:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the restoration or conservation project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for the purpose of mitigation.

c. The work funded by the financial assistance award is subject to a DA permit that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to generate mitigation credits under the exceptional situations described in section C(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for compensatory mitigation.

D. Can the Service approve a proposal to use the proceeds from the purchase of credits in an in-lieu-fee program or a mitigation bank as match?

1. In-lieu-fee programs and mitigation banks are mechanisms authorized in 33 CFR part 332 and 40 CFR part 230 to provide mitigation for activities authorized by a DA permit. The Service must not approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match unless both of the following apply:

a. The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the project.

b. The statutory authority for the financial assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

2. The reasons that the Service cannot approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match except as described in section D(1)(a–b) are:

a. Proceeds from the purchase of credits are legally required compensation for resources or resource functions impacted elsewhere. The sponsor of the in-lieu-fee program or mitigation bank uses these proceeds for the restoration, establishment, enhancement, and/or preservation of the resources impacted. The purchase price of the credits is based on the full cost of providing the compensatory mitigation.

b. When credits are purchased from an in-lieu-fee program sponsor or a mitigation bank to compensate for impacts authorized by a DA permit, the responsibility for providing the compensatory mitigation transfers to the sponsor of the in-lieu-fee program or mitigation bank. The process is not complete until the sponsor provides the compensatory mitigation according to the terms of the in-lieu-fee program instrument or mitigation-banking instrument approved by the District Engineer of the U.S. Army Corps of Engineers.

E. Can the Federal share or matching share in a financially assisted project be used to satisfy a mitigation requirement of a permit or legal authority other than a DA permit?

The limitations on the use of mitigation in a Federal financially assisted project are generally the same regardless of the source of the mitigation requirement, but only the limitations regarding mitigation required by a DA permit are currently established in regulation. Limitations for a permit or authority other than a DA permit are established in this Policy. They are:

1. Neither the Federal nor matching share in a financially assisted project can be used to satisfy Federal mitigation requirements except in any of the following situations:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects.

c. The project funded by the Federal financial assistance award is subject to a permit or authority that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to satisfy Federal mitigation requirements under the exceptional situations described in section E(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for mitigation.

3. If any regulations govern the specific type of mitigation, and if these regulations address the role of mitigation in a Federal financially assisted project, the regulations will prevail in any conflict between those regulations and section E of Appendix C.

F. Can the Service approve a proposal to use revenue from a Natural Resource Damage Assessment and Restoration (NRDAR) Fund settlement as match in a financial assistance award?

1. The Service can approve such a proposal as long as the financial assistance program does not prohibit the use of match or program funds for compensatory mitigation. In certain cases, this revenue qualifies as match because:

a. Federal and non-Federal entities jointly recover the fees, fines, and/or penalties and deposit the fees, fines, and/or penalties as joint and indivisible recoveries into a fiduciary fund for this purpose.

b. The governing body of the NRDAR Fund may include Federal and non-Federal trustees, who must unanimously approve the transfer to a non-Federal trustee for use as non-Federal match.

c. The project is consistent with a negotiated settlement agreement and will carry out the provisions of the Comprehensive Environmental Response Compensation and Liability Act, as amended, Federal Water Pollution Control Act of 1972, and the Oil Pollution Act of 1990 for damage assessment activities.

d. The use of the funds by the non-Federal trustee is subject to binding controls.

G. Can the Service approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments?

1. The Service may approve an award that satisfies a compensatory mitigation requirement of a State, tribal, or local government, if satisfying the mitigation requirement is incidental to a project purpose consistent with the purposes(s) of the program. It is solely the responsibility of the State, tribal, or local government to determine that its mitigation requirement has been satisfied and to submit any required certifications to that effect.

2. Satisfying a State, tribal, or local government mitigation requirement with Federal financial assistance or contributing match originating from such a requirement to a Federal award must not be contrary to any law, regulation, or policy of the State, tribal, or local government, as applicable.

H. Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?

1. A project on public, private, or federally recognized tribal lands already designated for conservation of natural resources can generate credits for compensatory mitigation if it meets the requirements of section 5.7.2. One of these requirements is that the benefits of the mitigation measures must be additional. If the authority for the compensatory mitigation is the Clean Water Act and if public land is proposed as the site of the project, it must also comply with 33 CFR 332.3(a)(3) and 40 CFR 230.93(a)(3), both of which read:

. . . Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. . . .

17-01174_016953;17-01174_016953;17-01174_016954;17-01174_016955;17-01174_016956;17-01174_016957;1...

Public land includes only those real property interests owned or held by Federal, State, and local governments, and instrumentalities of any of these governments.

To be either ''additional'' or ''over and above,'' the benefits must improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure. Baseline conditions are: (a) Those that exist, and (b) those that a public land-management agency is foreseeably expected to implement absent the mitigation.

2. Examples of baseline conditions that a land-management agency or organization is foreseeably expected to implement are:

a. Management outcomes or environmental benefits required for a land-management unit by a statute, regulation, covenant in a deed, facility-management plan, or an integrated natural resources management plan, *e.g.,* (a) huntable populations of big game, (b) Class A wild trout populations at Class A densities, and (c) habitat diversity. When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal as long as the plans are consistent with Federal law and regulation and this Policy.

b. Management responsibilities assigned to an agency by statute, regulation, facility management plan, or integrated natural resources management plan, *e.g.,* (a) resource protection, (b) habitat management, and (c) fire management.

c. Commitments made under a financial-assistance award by the recipient, a subrecipient, or a partner to achieve certain management outcomes or environmental benefits for a land-management unit. The source of the funding to carry out these commitments may be the awarding agency, a match provider, and/or other contributors.

3. Projects that are not part of annual operations and maintenance are not baseline conditions if they are unfunded and have little prospect of funding, even if these projects are authorized in a statute or called for in a plan. Examples of projects that may be authorized in a statute or called for in a plan, but may have little prospect for funding are: (a) Construction of a high-volume pump station, (b) demolition of a dam, (c) reforestation of 1,000 acres of former agricultural land, and (d) acquisition of real property.

4. If it is unclear whether the proposed mitigation would provide additional conservation benefits after considering the above guidance, financial assistance managers must use judgment in making a decision. The overarching principles in making this decision should be: (a) Consistency with regulations, and (b) avoidance of an unauthorized subsidy to anyone who has a legal obligation to compensate for the environmental impacts of a project.

5. Service staff must be involved in the decision to locate mitigation on real property acquired under a Service-approved or administered financial assistance award for one or both of the following reasons:

a. The Service has a responsibility to ensure that real property acquired under one of its financial assistance awards is used for its authorized purpose as long as it is needed for that purpose.

b. If the proposed legal arrangements or the site-protection instrument to use the land for mitigation would encumber the title, the recipient of the award that funded the acquisition of the real property must obtain the Service's approval. If the proposed legal arrangements would dispose of any real-property rights, the recipient must request disposition instructions from the Service.

I. Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?

1. This Policy affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications for financial assistance or changes in the terms and conditions of an award. It also affects real property or equipment acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for those purposes.

2. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect:

a. Restrictions in the Policy on the use of Service-approved or administered financial assistance awards for generating compensatory mitigation credits, and

b. the Service's responsibilities as identified in Federal statutes or their implementing regulations.

3. This Policy does not take precedence over the requirements of any Federal statute or regulation whether that statute or regulation applies to a Service program or a program of another Federal agency.

Dated: November 9, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–27751 Filed 11–18–16; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2015–0165; FXES11140900000–178nmdash;FF09E33000]

Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of final policy.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), announce the final Endangered Species Act (ESA) Compensatory Mitigation Policy. The new policy steps down and implements recent Executive Office, Department of the Interior, and Service mitigation policies that reflect a shift from project-by-project to landscape-scale approaches to planning and implementing compensatory mitigation. The new policy is established to improve consistency and effectiveness in the use of compensatory mitigation as recommended or required under the ESA. The ESA Compensatory Mitigation Policy covers permittee-responsible mitigation, conservation banking, in-lieu fee programs, and other third-party mitigation mechanisms, and stresses the need to hold all compensatory mitigation mechanisms to equivalent and effective standards.

DATES: This policy is effective on December 27, 2016.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this policy, including an environmental assessment, are available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0165.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2442. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

The mission of the U.S. Fish and Wildlife Service (Service or USFWS) is working with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. As part of our mission, we continually seek opportunities to engage both the public and private sectors to work with us to conserve species and the ecosystems on which they depend. This collaborative effort includes conservation of endangered and threatened (listed) species and their designated critical habitat protected under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and other species proposed for listing or at-risk of being listed. The purposes of the ESA are to provide a means whereby the ecosystems upon which listed species depend may be conserved, and to provide a program for the conservation of such species. The Service and National Oceanic and Atmospheric Administration's National Marine Fisheries Service share responsibilities for administering the ESA. However, this policy only applies to the Service and species under our jurisdiction.

This policy is the first comprehensive treatment of compensatory mitigation under authority of the ESA to be issued by the Service. Both the 1995 interagency policy on the establishment and operation of wetland mitigation banks (60 FR 58605, November 28, 1995) and the 2000 interagency policy on the use of in-lieu fee arrangements (65 FR 66914, November 7, 2000) are specific to wetland mitigation, but provide guidance that is generally applicable to conservation banking and in-lieu fee programs for species associated with wetlands or uplands. These interagency policies were superseded by the Environmental Protection Agency—U.S. Army Corps of Engineers 2008 Compensatory Mitigation Rule for Losses of Aquatic Resources (73 FR 19594, April 10, 2008). In 2003, the Service issued guidance on the establishment, use, and operation of conservation banks (68 FR 24753, May 8, 2003). In 2008, we issued recovery crediting guidance (73 FR 44761, July 31, 2008). This ESA Compensatory Mitigation Policy clarifies Service expectations regarding all compensatory mitigation mechanisms recommended or supported by the Service when implementing the ESA, including, but not limited to, conservation banks, in-lieu fee programs, habitat credit exchanges, and permittee-responsible mitigation.

Purpose and Importance of the Policy

The primary intent of the policy is to provide Service personnel with direction and guidance in the planning and implementation of compensatory mitigation, primarily through encouraging strategic planning at the landscape level and setting standards that mitigation programs and projects must meet to achieve conservation that is effective and sustainable. Compensatory mitigation is defined in this policy as compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (part 600, chapter 6 of the Departmental Manual (600 DM 6.4C)). While this policy addresses only the role of compensatory mitigation under the ESA, avoidance and minimization of impacts retain their central role in both the section 7 and section 10 processes. Guidance on the application of the mitigation hierarchy is provided in our Mitigation Policy (81 FR 83440, November 21, 2016), regulations implementing the ESA, and other policies and guidance documents specific to various sections of the ESA.

Alignment of the Policy With Existing Directives

By memorandum (80 FR 68743, November 6, 2015), the President directed all Federal agencies that manage natural resources, ''to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities.'' This policy is consistent with the Presidential memorandum (''Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment'') issued November 3, 2015; the Department of the Interior (Department) Secretarial Order 3330 entitled, ''Improving Mitigation Policies and Practices of the Department of the Interior,'' issued October 31, 2013; the new Interior Departmental Manual Chapter on Landscape-Scale Mitigation Policy, 600 DM 6 (October 23, 2015); and is intended to institute the policies and procedures reflected in the guiding principles on mitigation established by the Department through the report to the Secretary entitled, ''A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior,'' issued in April 2014 (Clement et al. 2014). These directives emphasize a comprehensive landscape-scale approach to planning and implementing mitigation programs, and they also include a mitigation goal to improve

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

(*i.e.,* ''net gain'') or, at a minimum, to maintain (*i.e.,* ''no net loss'') the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate.

The mitigation principles set forth in the above directives, including the landscape scale approach and the goal of ''net gain,'' have been adopted in both the Service's Mitigation Policy (81 FR 83440, November 21, 2016), and in this policy. The landscape-scale approach to mitigation is not a new concept. For example, in 2013, the Service issued mitigation guidance for two listed songbirds in central Texas based on recovery goals for these species. The songbird mitigation guidance sets minimum standards that must be met by mitigation providers and encourages the use of consolidated compensatory mitigation in the form of permanent protection and management of large, contiguous patches of the species' habitat. Proactive approaches, such as this example, provide greater regulatory certainty for project proponents and encourage the establishment of conservation banks and other mitigation opportunities by mitigation sponsors for use by project proponents.

The mitigation goal (*i.e.,* ''net gain'' or, at a minimum, ''no net loss'') is not necessarily based on habitat area, but on numbers of individuals, size and distribution of populations, the quality and carrying capacity of habitat, or the capacity of the landscape to support stable or increasing populations of the affected species after the action (including all proposed conservation measures) is implemented. In other words, it is based on those factors that determine the ability of the species to be conserved.

Benefits of the Policy

This policy sets forth standards for compensatory mitigation that implement the tenets in the directives cited above and reflect the many lessons learned by the Service during our more than 40-year history implementing the ESA, particularly sections 7 and 10 of the ESA. The standards apply to all compensatory mitigation mechanisms (*i.e.,* permittee-responsible mitigation, conservation banks, in-lieu fee programs, habitat exchanges, and other third-party mitigation arrangements), which are instrumental to achieving effective compensatory mitigation on the landscape and encouraging private investment in compensatory mitigation.

Adherence to the mitigation principles and compensatory mitigation standards identified in this policy will achieve greater consistency, predictability, and transparency in implementation of the ESA. Service offices are encouraged to work with Federal agencies and other partners to establish compensatory mitigation programs based on landscape-scale conservation plans, such as more efficient, better coordinated, and expedited regulatory processes, which can provide project applicants with incentives to mitigate their actions. Compensatory mitigation programs and projects designed and implemented in accordance with the standards set forth in this policy are expected to achieve the best conservation outcomes for listed, proposed, and at-risk species through effective management of the risks associated with compensatory mitigation.

This policy encourages the use of market-based compensatory mitigation programs such as conservation banking in conjunction with programmatic approaches to ESA section 7 consultations and habitat conservation plans (HCPs) that can be designed to achieve a ''no net loss'' or a ''net gain'' mitigation goal. Consultations and HCPs that establish a ''program'' to address multiple, similar actions and/or impacts to one or more species operate on a larger landscape scale and expedite regulatory processes. Market-based mitigation programs improve regulatory predictability, provide efficiencies of scale, and incentivize private investment in species conservation (Fox and Nino-Murcia 2005). The benefits provided by these mitigation programs generally encourage Federal agencies and incentivize applicants to develop proposed actions that fully compensate for adverse impacts to affected species anticipated as a result of their actions.

Discussion

''In enacting the ESA, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the [ESA] focus on species that are formally listed as endangered or threatened, the purposes and policies of the [ESA] are far broader than simply providing for the conservation of individual species or individual members of listed species'' (Conference Report No. 97–835 House of Representatives, September 17, 1982). This comment, made over 30 years ago during reauthorization of the ESA, is a reminder of the challenges still before us.

Incorporating a landscape-scale approach to development and conservation planning, including mitigation, that ensures a ''net gain'' or, at a minimum, ''no net loss'' in the status of affected resources, as directed by the Presidential memorandum (80 FR 68743, November 6, 2015), helps address the additive impacts that lead to significant deterioration of resources over time and has the potential to foster recovery of listed species and avoid listing of additional species.

As discussed later in this document, the Service's authority to require compensatory mitigation under the ESA is limited and differs under sections 7 and 10. However, we can more broadly recommend the use of compensatory mitigation to offset the adverse impacts of actions under certain provisions of the ESA and under other authorities, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*) and the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). This policy encourages Service offices to work with Federal agencies and applicants, and to recommend or require, if appropriate, the inclusion of compensatory mitigation for all unavoidable adverse impacts to listed, proposed, and at-risk species and their habitat anticipated as a result of any proposed action. While this practice currently exists for some species, it is not used broadly throughout the Service. Recommending, where applicable, that Federal agencies use their authorities to fully mitigate the adverse effects of their actions (*i.e.,* ensure ''no net loss'' in the status of affected resources) is consistent with the Presidential memorandum (80 FR 68743, November 6, 2015), the Department's and the Service's mitigation planning goals, and the purposes of the ESA. Effective mitigation that fully offsets the impacts of an action prevents that action from causing a decline in the status of affected species (*i.e.,* achieves ''no net loss'').

Compensatory Mitigation Under Sections 7 and 10 of the ESA

The additive effects of impacts adversely affecting listed and at-risk species as a result of many past and current human-caused actions are significant. The number of listed species has increased from slightly more than 300 in 1982 (when the ESA was reauthorized) to more than 1,500 by the end of 2016. While some listed species have been reclassified from endangered to threatened (*i.e.,* ''downlisted'') or

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

removed from either the Federal List of Endangered and Threatened Wildlife or List of Endangered and Threatened Plants (*i.e.,* ''delisted'') within the last 40 years, the projected increase in human population growth, increasing demand on our natural resources associated with this projected population growth, accelerated climate change, continued introductions of invasive species, and other stressors are putting even more species at risk and compromising the essential functions of ecosystems necessary to improve the status and recover these species. We cannot expect to change the status trajectories of these species without a commitment to responsible and implementable standards for accomplishing effective, sustainable compensatory mitigation that fully offsets the adverse impacts of actions to species and other resources of concern.

Compensatory mitigation is a conservation measure that can be used within an appropriate context under section 7 of the ESA to address proposed actions that may result in adverse impacts to listed species that cannot be avoided. For example, under section 7(a)(1) of the ESA, all Federal agencies are required to use their authorities to carry out conservation programs for listed species. Federal agencies may choose to develop and implement section 7(a)(1) conservation programs for listed species in conjunction with section 7(a)(2) consultation through a coordinated program. The Service supports these efforts, and we encourage Federal agencies to coordinate with us on development of such programs.

Compensatory mitigation can be used under section 10(a)(1)(B) of the ESA through HCPs developed to address adverse impacts of non-Federal actions on listed and other covered species that cannot be avoided. Landscape-scale HCPs developed for use by multiple applicants to conserve multiple resources are generally the most efficient and effective approaches. The Service supports these efforts and encourages applicants, particularly local and State agencies and organizations, to coordinate with us on the development of such plans.

Landscape-Level Approaches to Compensatory Mitigation

Taking a landscape-level approach to mitigation will assist the Service to modernize our compensatory mitigation procedures and practices and better meet the challenges posed by the growing human population's demands on our natural resources and changing conditions such as those resulting from climate change. Conservation banking is a market-based compensatory mitigation mechanism based on a landscape approach to mitigation that achieves compensation for listed and other resources of concern in advance of project impacts. In-lieu fee programs also establish compensatory mitigation sites but generally not in advance of impacts and often not through a market-based approach. Habitat credit exchanges are a relatively new market-based compensatory mitigation mechanism based on a clearinghouse model that may or may not accomplish mitigation in advance of project impacts. All three of these mitigation mechanisms use a landscape-level approach to consolidate and locate compensatory mitigation in areas identified as conservation priorities. These programs have designated service areas within which proposed actions that meet certain criteria may be mitigated with Service approval. The functions and services provided for listed, proposed, and at-risk species by these compensatory mitigation programs are represented by credits. Credits are used to offset impacts (often referred to as debits). Most credit transactions involve a permittee purchasing the amount of credits needed to offset the anticipated adverse effects of an action from the mitigation project sponsor. The Service must approve credit transactions as to their conservation value and appropriate application for use related to any authorization or permit issued under the ESA.

The conservation banking model is generally perceived as successful at achieving effective conservation outcomes and, when used in conjunction with section 7 consultations and section 10 HCPs, has achieved notable regulatory efficiencies. Results include ecological performance that usually achieves ''no net loss,'' and often a net benefit, in species conservation; increased regulatory predictability for Federal agencies and applicants; and more efficient and better coordinated permitting processes, especially when multiple agencies with overlapping regulatory jurisdictions are involved.

Permittee-responsible mitigation for many small to moderate impacts often cannot provide adequate compensation because it is often difficult to achieve effective conservation on a small scale. Small mitigation sites are often not ecologically defensible, and it is often difficult to ensure long-term stewardship of these sites. Most individual actions result in small or moderate impacts to species and habitat, yet the additive effects of these actions (often referred to as ''death by a thousand cuts''), when not compensated for, can have substantial adverse effects on these resources by degrading the environmental baseline and impairing the potential for future actions. In general, conservation banking, in-lieu fee programs, and similar mitigation mechanisms that consolidate compensatory mitigation on larger landscapes are designed to serve project proponents with small to moderate impact actions, are ecologically more effective, and provide more economical options to achieve compensation than permittee-responsible mitigation.

Furthermore, larger landscape-scale conservation programs with market-based compensatory mitigation opportunities create an economic incentive for private landowners, investors, and mitigation project sponsors to participate in these programs. The most robust programs generate competition among mitigation sponsors and may provide cost-effective means for complying with natural resource laws such as the ESA. To be successful, these market-based and other compensatory mitigation programs must operate transparently and be held to high standards that are uniformly applied across all compensatory mitigation mechanisms. Equally important is transparency in the implementation of the ESA and the development of mitigation programs for use by regulated communities.

Mitigation Defined

Because endangered and threatened species are by definition in danger of extinction or likely to become so in the foreseeable future, avoiding, minimizing, and compensating for impacts to their populations are all forms of mitigation that the Service may consider when administering the ESA. The Council on Environmental Quality (CEQ) NEPA regulations (40 CFR 1508.20) state that mitigation includes:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- Compensating for the impact by replacing or providing substitute resources or environments.

In 600 DM 6, the Department of the Interior states that mitigation, as

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

enumerated by CEQ, is compatible with Departmental policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts. Historically, those administering the ESA have often used a condensed mitigation sequence—avoid, minimize, and compensate; or avoid, minimize, and mitigate. This policy adopts the Department's definition of compensatory mitigation: Compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C). Throughout this policy, ''compensatory mitigation'' or ''compensation'' is used in this broad sense to include any measure that would rectify, reduce, or compensate for an impact to an affected resource. We also use the term ''minimize'' in the broad sense throughout this policy to include any conservation measure, including compensation, which would lessen the impact of the action on the species or other affected resource. We recognize there is some overlap in the use of these terms but, as a practical matter, this use in practice is consistent with the intent of the ESA. Information regarding avoidance and observance of the mitigation sequence can be found at our Mitigation Policy (81 FR 83440, November 21, 2016). This ESA Compensatory Mitigation Policy covers permittee-responsible mitigation, conservation banking, in-lieu fee programs, and all other compensatory mitigation mechanisms.

Implementation

The Service will issue interim guidance containing specific operational steps to assist Service staff in implementing this policy. This interim guidance will be issued in the form of a Director's memorandum, which will be used to develop a Service Manual chapter at a later date. Throughout this policy, the term ''implementation guidance'' will be used when referencing the interim guidance and future Service Manual chapter.

Changes From the Draft Policy

This final policy differs from the draft policy in a few substantive respects, which we list below, and contains editorial changes in response to comments we received that requested greater clarity of expression regarding various aspects of the policy's purpose, authorities, scope, general principles, framework for formulating mitigation measures, and definitions. The most common editorial change to the final policy addresses the concern that the Service lacks authority to apply compensatory mitigation to the ESA. Reasons cited by the commenters for not applying compensatory mitigation to the ESA included: (a) The ESA does not provide authority to require mitigation; and (b) policy concepts such as ''net conservation gain'' and a ''landscape approach'' to conservation are inconsistent with ESA statutory authority and regulatory requirements. This final policy adds new text to 2. Authorities and Coordination that identifies those circumstances under which we have specific authority to require, consistent with other applicable laws and regulations, one or more forms of compensatory mitigation for impacts to federally listed species, proposed species, and candidates as defined in the ESA. This policy provides a common framework for the Service when identifying and implementing compensatory mitigation measures pursuant to the ESA. The policy, however, cannot and does not alter or substitute for the regulations implementing the ESA. We summarize below the few substantive changes from the draft policy, listed by section.

Section 5 in the draft policy, Application of Compensatory Mitigation Under the ESA, was moved in its entirety to replace section 4, as we felt it more appropriate to discuss the policy's application under the ESA after section 2. Authorities and Coordination, and section 3. Scope. Section 4 in the draft policy, Compensatory Mitigation Standards, is now section 5 in this final policy.

In section 5.1, *Siting Sustainable Compensatory Mitigation,* this final policy focuses on overarching considerations and leaves specific factors or examples to be explained in the implementation guidance.

In section 6.1.3, ''Preference for Consolidated Compensatory Mitigation,'' we removed habitat credit exchanges as a specifically identified preference for compensatory mitigation because we do not yet have the record of success with this mechanism that we have with other mechanisms such as conservation banks.

The bulk of sections 6.2.3, ''Ensuring Durability on Public Lands,'', and 6.2.4, ''Transfer of Private Mitigation Lands to Public Agencies,'' was removed from the policy and will be discussed in the implementation guidance, as well as the prescriptive operational detail from section 6.6, *Managing Risk and Uncertainty.*

In section 7.1.4 ''Habitat Credit Exchange,'' we added text indicating that habitat credit exchanges are a relatively new mitigation mechanism, and warrant additional care and consideration when implementing them. We also removed section 7.1.5, ''Other Third-party Compensatory Mitigation,'' as this is a purely hypothetical mechanism which seems to differ little from proponent-responsible mitigation, and it was redundant with section 7.3, *Other Compensatory Mitigation Programs or Projects.*

In Table 1. ''Comparison of Habitat-based Compensatory Mitigation Sites Established Under Different Mechanisms,'' we removed the column ''Instrument Required'' because all discussion of instruments will be in the implementation guidance, and we removed the final row of the table: ''Other Third-party Mitigation Site.''

We removed the draft policy's section 8, Establishment and Operation of Compensatory Mitigation Programs and Projects; it will form the basis of the implementation guidance.

Section 9 of the draft policy, Criteria for Use of Third-party Mitigation, has been re-numbered in this policy, and is now section 8.

The majority of section 10, Compliance and Tracking, has been removed from the policy, and will be discussed in the implementation guidance; accordingly, the remaining paragraph has been renumbered in this policy as section 9.

Regarding appendix B, Glossary of Terms Related to Compensatory Mitigation, we removed several terms that are more appropriate for the implementation guidance document as well as items that could be confused with terms used in the ESA's implementing regulations.

Finally, we have removed appendix C, Requirement of the Marine Mammal Protection Act, to avoid confusion with the policy's focus on implementing the ESA.

Summary of Comments and Responses

The September 2, 2016, notice announcing our draft Endangered Species Act Compensatory Mitigation Policy (draft policy) (81 FR 61032) requested written comments, information, and recommendations from governmental agencies, tribes, the scientific community, industry groups, environmental interest groups, and any other interested members of the public.

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

That notice established a 45-day comment period, ending October 17, 2016, on the draft policy. Several commenters (1) requested an extension of time to provide their comments; (2) asked the Service to revise and recirculate the draft policy for comment; or (3) asked the Service to withdraw the draft policy to allow interested parties additional time to comment. The November 3, 2015, Presidential Memorandum on Mitigation states, ''Within 1 year of the date of this memorandum, the Department of the Interior, through the U.S. Fish and Wildlife Service, shall finalize a revised mitigation policy that applies to all of the U. S. Fish and Wildlife Service's authorities and trust responsibilities. The U.S. Fish and Wildlife Service shall also finalize an additional policy that applies to compensatory mitigation associated with its responsibilities under the Endangered Species Act of 1973.'' In order to finalize the policy as close as possible to the date outlined in the Presidential Memorandum on Mitigation, we were unable to publish an extension or reopen the comment period.

During the comment period, we received approximately 150 public comment letters, including comments from Federal, State, and local government entities; industry; trade associations; conservation organizations; nongovernmental organizations; private citizens; and others. The range of comments varied from those that provided general statements of support or opposition to the draft policy, to those that provided extensive comments and information supporting or opposing the draft policy in its entirety or specific aspects of the draft policy. The majority of comments submitted included detailed suggestions for revisions addressing major concepts, as well as editorial suggestions for specific wording or line edits.

All comments submitted during the comment period have been fully considered in preparing this final policy. All substantive information provided has been incorporated, where appropriate, directly into this final policy or is addressed below. The comments we received were grouped into general issues specifically relating to the draft policy, and are presented below along with the Service's responses to these substantive comments.

We received several comments requesting clarification on various aspects of the draft policy, including: Reporting; monitoring; financial instruments; coordination with States, tribes, and local groups; the compensatory mitigation mechanisms; and other implementation elements. We recognize the value of these comments and are giving them due consideration. We have removed these elements from this policy and will address them in the implementation guidance.

A. Definitions

Comment (1): One commenter suggested a more precise definition of compensatory mitigation. The commenter stated the draft policy's definition suggests any remaining impacts must be ''unavoidable'' and not simply ''un-avoided.'' The commenter suggests the draft policy's definition is confusing and inconsistent with the ESA language that uses ''minimize'' and ''mitigate.''

Response: The definition of ''compensatory mitigation'' in this policy derives from the Department of the Interior's Department Manual (600 DM 6.4C). This definition gives more flexibility in the use of avoidance and minimization measures for listed species than the recommendation provided in the comment. The use of the terms ''appropriate and practicable'' in this policy's definition give deference to project proponents and Federal agencies.

Comment (2): Comments included a statement that the definition of landscape-scale approach is unclear.

Response: Our definition of landscape-scale approach is informed by the definition used in 600 DM 6 and our Service's mitigation policy. The landscape approach to conservation considers the functional context of the species or habitat under consideration. For example, activities involving fairy shrimp might be evaluated at a vernal pool complex or regional scale. Issues affecting sturgeon may require strategies that consider an entire river system, thousands of miles long. Fundamental to this approach is an understanding of what is important to ensure the ecological function of the species or habitat in question, at the appropriate scale. Examples include the North American Waterfowl Management Plan, many fisheries management plans, recovery plans for federally listed species, watershed restoration plans, and State wildlife plans.

B. Policy Is Based on Existing Authority

i. ESA Sections 7 and 10

Comment (3): Several commenters stated that the mitigation sequence that uses ''avoidance'' cannot be required under sections 7 and 10 of the ESA, unless it alleviates a jeopardy situation. One of the commenters noted that ''avoidance'' is voluntary on the part of an action agency or applicant.

Response: The use of ''avoidance'' in the mitigation sequence is not a requirement in the sense that all impacts to listed species or critical habitat must be avoided. Through the policy, we are neither requiring nor mandating avoidance. One of the stated purposes of the ESA at section 2(b) is to ''provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.'' Developing options to avoid impacts to listed resources under sections 7 and 10 is important to furthering this purpose and effectively implementing the ESA.

The policy is consistent with the Presidential memorandum (''Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment'') issued November 3, 2015 (see 80 FR 68743, November 6, 2015), in which the President directed all Federal agencies that manage natural resources ''to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities.'' The Service agrees that some impacts to listed species or critical habitat may be unavoidable and that the ESA provides a mechanism for both Federal agencies (section 7) and non-Federal entities (section 10) to receive take coverage in the case of any unavoidable impacts. There are multiple sections of our implementing regulations in title 50 of the Code of Federal Regulations (CFR) at 50 CFR part 402 (§§ 402.10, 402.13) that direct the Service to suggest modifications or make advisory recommendations to Federal action agencies and applicants to avoid the likelihood of adverse effects to listed species or critical habitat. Additionally, if the Service is required to provide a reasonable and prudent alternative under section 7 consultation, the regulations state that such an alternative must be one ''that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat'' (50 CFR 402.02). Use of the full mitigation sequence including avoidance and minimization of impacts to listed species is consistent with the purposes and mandates set forth in the ESA.

Comment (4): Several commenters suggested compensatory mitigation cannot be required under section 7 of

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

the ESA, and that there is no authority to include such mitigation in reasonable and prudent measures (RPMs) and the accompanying mandatory terms and conditions that the Service includes in incidental take statements. Some stated that compensation is limited to voluntary actions on behalf of the action agency and recommendations on the part of the Service. One comment stated compensation was not appropriate in both RPMs and reasonable and prudent alternatives (RPAs). Another suggested that compensation under section 7 consultation was appropriate but not under section 7(a)(4) conference. Commenters cited the ESA, its implementing regulations, and the Service's 1998 Consultation Handbook.

Response: As discussed in sections 4.1.2 and 4.1.3 of this policy, compensatory mitigation can play an important role in section 7(a)(2) consultations and 7(a)(4) conferences. Compensatory mitigation can appropriately be included as part of an action subject to consultation, or in reasonable and prudent alternatives to avoid the likelihood of jeopardy, in order to reduce the net adverse effect of an action on proposed or listed species or designated critical habitat. This policy clarifies those circumstances where it may be appropriate to incorporate mitigation into reasonable and prudent measures and terms and conditions as part of a section 7(a)(2) consultation. For example, throughout this policy, ''compensatory mitigation'' or ''compensation'' is used to include any measure that would rectify, reduce, or compensate for an impact to an affected resource. Rectifying the impact means ''repairing, rehabilitating, or restoring the affected environment'' (40 CFR 1508.20). Restoring impacted habitat is a commonly used reasonable and prudent measure that meets the definition of compensatory mitigation in this policy, minimizes the amount or extent of incidental take, and can be accomplished consistent with the ESA and its implementing regulations at 50 CFR part 402.

Comment (5): Commenters said the policy's emphasis on the role of conservation in the section 7 consultation process is misdirected. Section 7(a)(2) does not include a conservation requirement for Federal agencies.

Response: The Service respectfully disagrees. Section 7(a)(2) requires that Federal agencies ensure their actions do not jeopardize the continued existence of endangered and threatened species or result in the destruction or adverse modification of critical habitat. This requirement is accomplished through the consultation process, which concludes with the Service's biological opinion. In the event a section 7 consultation concludes with a jeopardy or adverse modification determination, the Service will include reasonable and prudent alternatives (RPAs), when possible, that the action agency can implement to avoid violation of section 7(a)(2) of the ESA. Options for RPAs can include compensatory mitigation in order to avoid a jeopardy or adverse modification situation, as long as they are consistent with the definitions at 50 CFR 402.02. When the Service's biological opinion concludes that the agency action would not result in jeopardy or adverse modification, the Service will include reasonable and prudent measures (RPMs) to minimize any incidental take associated with the action. As described in the policy, minimization of impacts of the taking on the species may include compensation as consistent with the ESA implementing regulations. The Service provides technical assistance during the section 7(a)(2) consultation process to help reduce the need for RPMs and RPAs. These measures fall within the ESA's definition of ''conserve,'' which means ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.''

Comment (6): Several commenters expressed concern that the policy would complicate the process for sections 7 and 10, and cause project delays. The commenters stated that such delays could create increased project costs.

Response: The Service respectfully disagrees. Mitigation provided in advance of impacts, such as through a conservation banking program, can expedite project reviews by the Service, because the mitigation is already established and has already gone through the due diligence process. Clear guidance on application of compensatory mitigation mechanisms as provided in this policy, should assist Service staff and project proponents implement their ESA responsibilities in a timely fashion. Furthermore, conducting compensatory mitigation may assist in the compliance with other required laws, which may expedite the project process. For example, compensatory mitigation may lower the level of analysis required by NEPA (allowing a mitigated environmental assessment/finding of no significant impact instead of an environmental impact statement).

Comment (7): One commenter objected to the phrase ''recovery measure'' when discussing section 7(a)(1) of the ESA. The commenter provided substantial information, including a section of the preamble from the Service's 1986 interagency cooperation rulemaking (51 FR 19926, June 3, 1986), noting the ESA does not mandate specific actions under section 7(a)(1), nor does it authorize the Service to mandate how or when Federal agencies should implement their section 7(a)(1) responsibilities. Specifically, the commenter said that section 7(a)(1) is not a recovery measure, and the policy failed to properly state the basis for such a characterization.

Response: We agree that the directive under section 7(a)(1) of the ESA does not give the Service authority over other Federal agencies, nor does it specifically authorize actions to be implemented. It does, however, direct other Federal agencies to consult with the Service when developing conservation programs under section 7(a)(1). To this end, the policy provides guidance and recommendations on how Federal agencies may achieve the greatest effectiveness when implementing their section 7(a)(1) obligations.

The policy clearly describes the basis for the use of the term ''recovery measure'' when describing section 7(a)(1), which comes from the definition of the terms ''conserve,'' ''conserving,'' and ''conservation'' in section 3 of the ESA. Although the word ''recovery'' is not used in the definition, it clearly describes recovery as ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.'' Additionally, section 7(a)(1) directs all Federal agencies to ''utilize their authorities in furtherance of the purposes of [the ESA]''. One of the stated purposes of the ESA is to ''provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.'' The intent is that all Federal agencies have a responsibility, using their existing authorities, to help recover listed species.

Comment (8): One commenter stated the policy should focus only on implementation of voluntary mitigation actions under the ESA. The commenter noted that mitigation guidance for sections 7 and 10 under the ESA are provided in the habitat conservation planning and consultation handbooks.

Response: This policy provides greater clarity and detail with regard to mitigation implementation than the

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

section 7 and habitat conservation planning handbooks. As stated earlier, this policy reflects the many lessons learned by the Service during our more than 40-year history implementing the ESA, particularly sections 7 and 10. We agree that the use of voluntary mitigation programs and actions that further the purposes of the ESA should be encouraged. The development and implementation of voluntary mitigation programs should also be effective and consistent with other forms of mitigation. The policy will guide such voluntary efforts to promote consistency in the same way it will guide mitigation efforts in regulatory processes.

Comment (9): One commenter recommended we add ''and applicants'' following ''Federal agencies'' in two sentences in section 4.1.2.

Response: Applicants are not typically involved in the establishment of mitigation programs such as conservation banks and in-lieu fee programs; moreover, the responsibility for ensuring a Federal action does not violate section 7(a)(2) of the ESA ultimately lies with the Federal agency proposing the action. We did not make the suggested change.

Comment (10): One commenter thought the Service should recognize the importance of the Habitat Conservation Plan (HCP) Assurances (''No Surprises'') Rule (63 FR 8859, February 23, 1998) and explicitly state that remediation and alternative mitigation will not erode protections afforded by the No Surprises Rule.

Response: The Service does recognize the importance of the No Surprises Rule in the section 10 process, and agrees that remediation and alternative mitigation should not erode protections afforded by the No Surprises Rule. The Service works with applicants to develop HCPs that include contingencies for mitigation that does not function as expected, including remediation or alternative mitigation. The No Surprises Rule is not eroded in this case, because these contingencies are included in the HCPs and agreed upon ahead of time.

Comment (11): One commenter requested clarification of how the draft policy would apply to reinitiation of consultations under section 7(a)(2) of the ESA. Specifically, what would be different, especially with regard to the concepts of ''net gain'' and ''no net loss?''

Response: During the reinitiation process under section 7(a)(2), the concepts under this policy and their application to any consultation do not change. The ESA's directive to agencies to ensure any action is not likely to jeopardize the continued existence of any endangered or threatened species or adversely modify its critical habitat guides that process. The Service will recommend actions consistent with this policy, including consideration of the goal of a ''net gain'' or, at a minimum, ''no net loss.'' Considering the variety of actions under consultation, the reasons for reinitiation, and the multitude of species covered, it is not possible for the policy to provide specific details regarding the application of such concepts during the consultation process.

Comment (12): One commenter was concerned about section 4.7 (*Effective Conservation Outcomes and Accountability Through Monitoring, Adaptive Management, and Compliance*) of the draft policy, which states that: ''A process for achieving remediation or alternative mitigation for compensatory mitigation failures beyond the control of the responsible party (*e.g.,* unforeseen circumstances) must be clearly described in the mitigation instrument, biological and/or conference opinion, or permit.'' The commenter asked the Service to the clarify the statement to say that biological opinions issued in connection with section 7 consultations with Federal agencies, other than the Service itself, are not required to provide for unforeseen circumstances, saying that such a requirement is associated with ESA section 10(a) HCPs, but is not required in the context of section 7 consultations by the section 7 handbook, or existing law or regulations. They were concerned the current language of the draft policy could be misinterpreted to mean that section 7 biological opinions must include alternative mitigation for compensatory mitigation failures ''beyond the control of the responsible party,'' and this policy should not change the section 7 requirements for avoiding jeopardy to the species and adverse modification of critical habitat.

Response: The development and implementation of mitigation programs should be effective and consistent among all forms of mitigation offered in sections 7 and 10 of the ESA, regardless of whether the mitigation is voluntary or required. Planning for unforeseen circumstances is part of effective mitigation. The policy will guide efforts to promote consistency, and Service staff will work with applicants and Federal agencies to explain how all mitigation standards can be incorporated into their mitigation plans. Nevertheless, the ESA and its implementing regulations ultimately determine how the Service makes decisions regarding listed species. We do not include the statement in question in this final policy; we will address this topic in implementation guidance.

Comment (13): One commenter stated the Service has no statutory authority to require section 7 consultation on candidate or at-risk species or to include such species in HCPs. If the policy pursues a conservation goal in excess of the Service's actual regulatory and statutory authorities, separate guidance should be issued to draw this clear distinction, in order to provide complete transparency and direction to both Service staff and others in actual implementation.

Response: The commenter is correct that the Service cannot require section 7 consultation for candidate or at-risk species. ESA section 7 regulations provide for a conference between a Federal action agency and the Service for actions that are likely to jeopardize the continued existence of a proposed species or likely to result in destruction or adverse modification of proposed critical habitat (50 CFR 402.10). Including candidate or other at-risk species in conferences would be voluntary on the part of the Federal agency; however, it is encouraged by the Service and through this policy, and other Federal agencies may voluntarily conference to expedite possible future re-consultations. This is consistent with ESA goals of recovering listed species and, ideally, avoiding the need to list species because threats to them have been addressed. Further, intra-Service consultations and conferences will consider effects of the Service's actions on listed, proposed, and candidate species. Candidate species are treated as if they are proposed for listing for purposes of conducting internal Service conferencing.

Additionally, under section 10 of the ESA, HCPs are voluntary and developed by the applicant, in consultation with the Service. It is the applicant who decides which candidate or non-listed at-risk species they wish to include. The Service has found that many applicants elect to include at-risk species to receive ''no surprises'' assurances and preclude the need to amend the associated incidental take permit, should the species become listed in the future. The voluntary inclusion of at-risk species in both the conference and HCP processes are proactive approaches to reduce the need for future listing of the species.

Comment (14): One commenter said the Service mixes the concepts of voluntary conservation recommendations that can be provided under ESA section 7(a)(1) with requirements under ESA section 7(a)(2).

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

They also commented that neither standard under ESA section 10 imposes a ''no net loss'' requirement.

Response: Federal agencies are directed to consult with the Service under ESA section 7(a)(1) to assist their development of programs to conserve listed species. Technical assistance to agencies with actions that require compliance with section 7(a)(2) is a logical nexus for the Service to advise Federal agencies about section 7(a)(1) conservation opportunities associated with these actions. Similarly, technical assistance to non-Federal applicants for incidental take permits under section 10(a)(1)(B) is a logical nexus to advise them about conservation opportunities associated with these actions. This policy provides a framework for such recommendations, and does not otherwise alter or substitute for standards under the ESA or the regulations implementing ESA sections 7(a)(2) and 10(a)(1)(B). Though not required, striving for ''no net loss'' in the status of the species' conservation is an appropriate mitigation goal, and may be to the benefit of the other agency or private landowner in greater future regulatory certainty or expedited future compliance (*e.g.,* including ''at-risk'' species).

ii. Authorities—Other

Comment (15): One commenter requested that we revise section 5.3 of the draft policy to provide more detail about how compensatory mitigation would work in relation to section 4(d) rules for threatened species.

Response: This policy is intended to be general in nature. More detailed guidance documents covering specific activities may be developed in the future, such as for rules promulgated under section 4(d) of the ESA.

Comment (16): One commenter said that it was unclear how the policy would ''replace'' rules promulgated by other Federal agencies for guiding implementation of Federal laws such as the Clean Water Act (33 U.S.C. 1251 *et seq.*) and natural resources such as ''waters of the United States.'' They requested clarification of how the April 10, 2008, joint rulemaking of the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA) (73 FR 19594) applies to ESA actions and what the impact of the policy would be.

Response: The Service has added clarification to this final policy that it does not replace or alter the referenced April 10, 2008, rule (73 FR 19594). Processes established by applicable statutes and regulations remain in effect and are not superseded by this policy. This policy applies to compensatory mitigation for all species and habitat protected under the ESA and for which the Service has jurisdiction. The April 10, 2008, rule (73 FR 19594) applies to impacts to aquatic resources permitted by section 404 of the Clean Water Act.

Comment (17): One commenter said that issuance of this policy violates the Administrative Procedure Act (APA; 5 U.S.C. subchapter II) or the Regulatory Freedom Act (RFA).

Response: The Service complied with all necessary requirements in publishing the final policy. We are unaware of the Regulatory Freedom Act but for the purposes of this response, will assume the commenter is referring to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The policy does not require compliance with the APA or the RFA because it is not a regulatory document.

Comment (18): One commenter was concerned that voluntary mitigation could be abused if an agency were to unreasonably withhold action for the purpose of applying undue pressure to force an applicant to volunteer mitigation measures. They said the policy should acknowledge and protect against this possibility.

Response: We agree with the commenter that such an approach by Service or other agency staff would be unacceptable. It would also be contrary to this policy and existing authority. Processes established by applicable statutes and regulations remain in effect and are not superseded by this policy.

Comment (19): One commenter stated that the policy goes beyond the authorities granted the Service in both sections 7 and 10 of the ESA. The other authorities relied on by the Service in adopting this policy, including the Presidential directives and memoranda, cannot legally form the basis for the promulgation of the policy.

Response: This policy is designed to improve and clarify implementation of the ESA. Towards that end, it seeks to provide a framework for effecting mitigation that reflects a permissible reading of the law, while fulfilling the conservation purposes of the ESA. Federal agencies are directed to consult with the Service under ESA section 7(a)(1) to assist their development of programs to conserve listed species. A mitigation framework may provide valuable expertise for an agency considering their section 7(a)(1) responsibilities. Additionally, a framework may assist agencies with actions that require compliance with section 7(a)(2) of the ESA. Similarly, technical assistance to non-Federal applicants for incidental take permits under section 10(a)(1)(B) of the ESA is a logical nexus to advise them about conservation opportunities associated with these actions. The policy provides a framework for such recommendations and does not otherwise alter or substitute for the regulations implementing ESA sections 7(a)(2) and 10(a)(1)(B). Authority to make recommendations to mitigate impacts to resources covered by the ESA is provided by that statute. Promulgation of this policy is consistent with not only the ESA, but also the Office of Management and Budget's guidelines on interpretive policies. Those guidelines state that public policies, such as this one, guide administrative processes while increasing an agency's predictability to external parties.

Comment (20): One commenter noted the ESA imposes different standards and prohibitions with respect to pre-listing versus post-listing activities for candidate conservation agreements with assurances (CCAAs) and safe harbor agreements (SHAs). By incorporating the net conservation benefit standard used for SHAs, the Service fails to account for these differences and conflates its treatment of pre-listing and post-listing activities.

Response: The Service does not intend to change the requirements for CCAAs and SHAs. The intent of the policy is to describe the requirements for converting either of these agreements to a mitigation agreement should a landowner desire to make their conservation more permanent and use it for mitigation.

iii. NEPA

Comment (21): One commenter said that the policy should recommend that the Service comment on NEPA documents apart from, or in addition to, section 7 consultation.

Response: We agree that application of the Service's authority to make advisory comments and recommendations under NEPA provides a powerful capability for influencing conservation of a broad array of natural resources while helping agencies and proponents identify appropriate project alternatives. The Service will continue to comment on NEPA documents in addition to conducting section 7 consultations whenever warranted. Our application of NEPA in a mitigation context is covered in the Service mitigation policy (81 FR 83440, November 21, 2016).

Comment (22): One commenter said the policy would increase the time and resources required by Federal agencies to comply with section 7 of the ESA and by proponents of any projects that may

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

adversely affect an at-risk species. The commenter said that the policy meets the definition of a major Federal action defined at 40 CFR 1508.18 and should be analyzed in an environmental impact statement to comply with NEPA.

Response: As explained in more detail below, neither of the two alternatives evaluated in the NEPA assessment would be expected to result in significant effects to the human environment within the meaning of NEPA and the CEQ regulations. Although we describe potential actions and consequences that could flow from each of the alternatives, the nature and scope of environmental consequences that are likely to result from any of the alternatives would depend on a variety of intervening circumstances that are impossible to identify in this analysis. However, we find there is no basis to infer that any such effects, even viewed generously, would be significant.

In addition, because of the programmatic nature of the draft policy and the breadth of activities under consideration, the analyses of environmental effects must be very general, addressing the consequences from each alternative at a programmatic scale. Regardless of the alternative, we anticipate that the majority of the specific actions covered under the policy would receive additional project-specific NEPA review, either by other Federal agencies during their project review or by the Service during review of an ESA section 10(a)(1)(B) application. Those project-specific reviews would include development of appropriately detailed alternatives based on information necessary to complete informed and meaningful effects analyses. That information (*e.g.,* location, timing, duration, and affected resources, etc.) is currently not available. More detailed information is contained in the environmental assessment, which is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0165.

C. Net Conservation Gain/No Net Loss

Comment (23): One commenter stated the policy should more consistently emphasize throughout that ''conservation'' is the goal for protected species and their habitat, using our full suite of authorities including the ESA. While ''no net loss'' is appropriate under certain statutes like the Clean Water Act (as acknowledged in the April 10, 2008, joint rulemaking of USACE and EPA (73 FR 19594), for example), ''no net loss'' is a lower standard than what they have sought in conservation banking and in-lieu fee programs.

Response: The Service's mitigation policy (81 FR 83440, November 21, 2016) sets a mitigation planning goal of ''net conservation gain,'' which seeks to improve the status of affected resources, and, at a minimum, maintain the status of those resources (*i.e.,* ''no net loss''). Adhering to the standards discussed in section 5 of this policy (Compensatory Mitigation Standards) is the best way to attain this goal, although we recognize that achieving a net conservation gain will not be possible in every circumstance, and in those cases will strive for ''no net loss.''

Comment (24): One commenter strongly opposed the goal of a ''net gain'' in the policy, stating the Service lacks the underlying statutory authority to require it under the ESA and it will likely result in an uncompensated taking in violation of the U.S. Constitution. The commenter stated that the obligations under the policy, with the use of mandatory language such as ''must'' and ''shall,'' constitute a rulemaking.

Response: This policy adopts mitigation principles established by the Service's mitigation policy (81 FR 83440, November 21, 2016) and establishes compensatory mitigation standards to guide the use of compensatory mitigation under the ESA. The mitigation goal of ''net gain'' or, at a minimum, ''no net loss,'' is to assist the Service and its partners in developing mitigation programs and projects to further the purposes of the ESA. One of the stated purposes under section 2 of the ESA is to ''provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.'' Section 3 of the ESA defines ''conserved'' as ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' This conservation purpose of the ESA is served by the policy's goal of a ''net gain'' when developing compensatory mitigation.

In this context, the policy is not a legally binding rulemaking; the ESA and its implementing regulations determine the Service's decisions for listed species. The policy will not effectively compel a property owner to suffer a physical invasion of property and will not deny all economically beneficial or productive use of the land or aquatic resources. This policy provides consistent standards for the Service, and its partners, to apply when developing compensatory mitigation programs or projects, as appropriate under the authority of the ESA. The use of the terms ''must'' and ''shall'' in the policy are directed toward the Service's authority in implementing the ESA.

The policy is broadly framed to encompass all species covered under the ESA, but does not result in any particular actions concerning specific properties. Additionally, this policy substantially advances a legitimate government interest (conservation of species and their habitats) and does not present a barrier to all reasonable and expected beneficial use of private property.

Comment (25): One commenter stated that the Service does not explain how it will determine or impose mitigation measures to meet a mitigation target that is somewhere between maintaining and improving the status of affected resources.

Response: The Service, being national in scope of operations, wrote this policy to allow for further clarification on a regional and local scale. This will allow the Service to work with Federal agencies and applicants to develop mitigation measures that meet objectives based on local conditions and tailored to the specific species that are impacted. A less flexible policy could cause rigid adherence to a protocol, which may be more suitable in one region, or for one species, versus another.

Comment (26): Commenters stated that the ESA requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the no net loss or net gain goal articulated in the draft policy, and the Service has no authority under the ESA to require measures that will result in a ''net gain'' or ''no net loss.'' In addition, one commenter said a ''net gain'' or ''no net loss'' goal is incompatible with well-established standards for administering sections 7 and 10 of the ESA.

Response: Action agencies or proponents may adopt Service recommendations provided under this policy as part of their proposed actions, but electing to do so does not change the applicable standards under the ESA or otherwise alter the processes prescribed under the ESA and its regulations.

The Service does not view a ''net gain'' or ''no net loss'' goal as incompatible with well-established standards for administering sections 7 and 10 of the ESA. Instead, it is complementary to the ESA requirements to avoid jeopardizing the continued existence of any listed species, or destroying or adversely modifying any designated critical habitat. To achieve

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

this goal, an action agency or applicant need not abandon the actions they have taken to avoid jeopardizing the continued existence of any listed species, or destroying or adversely modifying any designated critical habitat. Instead, they may complement these actions by including additional measures that allow their action to reach the ''net gain'' or ''no net loss'' goal.

Comment (27): One commenter said by encouraging Service staff to work with applicants to implement ''no net loss'' or ''net conservation gain,'' the judgment of applications will no longer be standardized. They said the policy does not state how conservation gain will be measured, whether on a numerical basis or under what circumstances the Service will make a qualitative judgment regarding the level of mitigation that achieves this standard.

Response: This policy is national in scope, and it is beyond the scope of the policy to provide specific quantifiable measures to achieve a ''net conservation gain'' or specify the methodology for assessing or measuring the ''net conservation gain.'' The Service's mitigation goal is to achieve a ''net conservation gain'' or, at a minimum, ''no net loss'' of the affected resources. The policy provides the framework for formulating compensatory mitigation measures to achieve this goal. The geographical and ecological breadth of this policy's coverage combined with the variation in project and impact types affecting species and habitats nationwide make the detailed specifications for calculating ''no net loss'' or ''net gain'' impossible to include. Such determinations will either be made on a case-by-case basis or will be addressed through additional guidance or planning processes.

Comment (28): Commenters said the policy should be revised to help Service staff avoid crossing the line between ''encouraging'' Federal agencies and applicants to achieve ''a net gain or, at a minimum, no net loss in the conservation of listed species'' and incorrectly representing to Federal agencies and applicants that they are somehow ''required'' to achieve a ''net gain'' or, at a minimum, ''no net loss'' in the conservation of listed species. Commenters added that Service staff should be instructed by the policy to clearly disclose to Federal agencies and applicants at all times that section 7 of the ESA does not require such a ''no net loss in the conservation of listed species'' or a ''net gain'' in relation to the ''no jeopardy'' and ''no adverse modification'' standards.

Response: This policy clearly states that the mitigation planning goal is a goal, not a requirement. We expect further clarification on a regional and local scale to reiterate this distinction.

Comment (29): One commenter stated the goal of ''no net loss'' is admirable and adequate with respect to the Presidential Memorandum (80 FR 68743, November 6, 2015); however, the commenter is concerned this new language may unfairly prohibit or require mitigation for agricultural actions without due process of assessment.

Response: The Service will consider the facts specific to the actions that we review under our authorities. This policy does not provide for the Service to categorically deny development or agricultural activities. Instead, our decisions and opinions on those activities will be guided by relevant statutes and regulations.

Comment (30): One commenter said the sentence, ''Losses of habitat that require many years to restore may be best offset by . . . preservation of existing habitat . . .,'' is counter to the ''no net loss policy.''

Response: The entire sentence reads, ''Losses of habitat that require many years to restore may best be offset by a combination of restored habitat, preservation of existing high-quality habitat, and improved management of existing habitat.'' It is the combination and ratios of these three habitat mitigation types that can create a ''no net loss'' scenario. Improved management can create an immediate conservation benefit and habitat restoration creates a long-term conservation benefit, while preservation of high quality habitat protects existing habitat from being lost. Long-term land management is included in the durability standard.

D. Applicability

Comment (31): Several commenters had concerns about the applicability of the policy to existing mitigation programs, HCPs and associated incidental take permits, and ongoing section 7 consultations that were initiated between the Federal agency and the Service prior to the effective date of the final policy. The comments requested clarity that the policy does not apply to existing projects or projects currently under development, including the associated real estate and financial assurances.

Response: The policy states that it applies to Federal and non-Federal actions permitted or otherwise authorized or approved prior to issuance of the policy only under circumstances where the action may require additional compliance review under the ESA. In addition, the policy states that it does not apply where the Service has already agreed in writing to mitigation measures for pending actions, except where new activities or changes in current activities associated with those actions would result in new impacts, or where new authorities or failure to implement agreed-upon recommendations warrant new consideration regarding mitigation. Service offices may elect to apply this policy to actions that are under review as of its effective date (see DATES, above).

Comment (32): The draft policy does not include any de minimus size consideration. While consultation considers the extent of potential impacts to ESA-listed species, the draft policy does not. It talks in general terms about credit valuation and ratios, but at some point, there should be a consideration of a de minimus project size to which this draft policy would not apply.

Response: The policy is intended to guide compensatory mitigation projects for listed and at-risk species regardless of the scope, magnitude, or size of the project. As such, it would not be reasonable to attempt to define ''de minimis'' limits for the application of the policy that would cover all species and mitigation projects across the country. However, step-down guidance derived from this policy for particular species would be more specific for the biological needs of the species and therefore likely consider factors related to the scope of compensatory mitigation projects.

E. Scope of the Policy

Comment (33): One commenter said that the Service should identify activities and projects that are exempt from the policy.

Response: We agree that the scope of coverage should be clearly described and have listed those circumstances when the policy does not apply in section 3, Scope.

Comment (34): One commenter said that it is important for the policy to address species protected under additional Federal laws, including the Bald and Golden Eagle Protection Act (BGEPA; 16 U.S.C. 668–668d) and the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712).

Response: We agree that conservation of the resources under BGEPA and MBTA is important. However, those resources, and processes specified by those Acts and any implementing regulations or guidance, are beyond the scope of this policy. We discuss these

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

authorities in the Service mitigation policy (81 FR 83440, November 21, 2016).

Comment (35): One commenter said that the policy should be limited to listed threatened species, listed endangered species, candidate species, and designated critical habitat.

Response: We agree that the commenter's list of covered resources is similar to our description of covered resources in section 3, Scope, of this policy. There we state that the policy applies to all species and habitat protected under the ESA and for which the Service has jurisdiction. Endangered and threatened species, species proposed as endangered or threatened, designated critical habitat, and proposed critical habitat are the primary focus of this policy. We also state that candidates and other at-risk species would benefit from adherence to this policy, and encourage all Service programs to develop programs and tools in cooperation with States and other partners.

F. At-Risk Species

Comment (36): Several commenters suggested only listed species should be covered by the policy, and ''at-risk'' species references should be removed. Commenters suggested there is no ESA basis for including at-risk species in the policy, that no standards exist for the definition of at-risk species, and that it would create additional burdens on the public. One comment requested clarification of the jurisdiction of the Service, States, and tribes regarding at-risk species.

Response: The Service has addressed at-risk species through implementation of the ESA under many voluntary programs. Often partners (*e.g.,* other agencies, private landowners) voluntarily consider ''at-risk'' species for greater regulatory certainty and to expedite future compliance if these ''at-risk'' species are later listed under the ESA. Under section 6 of the ESA, the Service partners with the States to fund research and recovery actions on listed and at-risk species. Candidate conservation agreements with assurances (CCAAs) are a highly successful program for private landowners providing voluntary conservation for at-risk species. Many HCPs under section 10 of the ESA also include voluntary coverage for at-risk species. These and other proactive efforts for at-risk species, including our draft Policy Regarding Voluntary Prelisting Conservation Actions (79 FR 42525, July 22, 2014), focus on preventing the need to list species under the ESA. The Service also values its partnerships with the States and tribes in conservation of fish and wildlife resources. This final policy aims to strengthen these partnerships and does not extend the Service's jurisdiction over at-risk species. We have included at-risk species, as appropriate, in the policy to further these efforts in preventing the decline of species to the point that protection under the ESA is necessary.

G. Equivalent Standards

Comment (37): One commenter thought the policy should emphasize that there are no prescribed standards that will dictate mitigation but that every situation will be considered fact-specific and flexible, and be based upon the voluntary actions of the proponent.

Response: The Service has written this policy in a manner that facilitates further clarification on a regional scale. As with many of the decisions made in impact analysis, determination of when and what type of mitigation should be implemented occurs on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 7 of this policy, Compensatory Mitigation Mechanisms, allows the Service flexibility in the type of mitigation mechanism used to meet this need. Section 5 of the policy, Compensatory Mitigation Standards, describes the standards we will require or recommend that all mechanisms meet.

H. Landscape-Scale Approach

Comment (38): Individual actions that harm ESA-listed, proposed, and at-risk species must not be discounted or minimized because they are considered to impart only small or moderate impacts within the broader context of the landscape. The policy should consider how these site-specific impacts could be identified and accounted for prior to development of the most appropriate compensatory approach.

Response: The Service agrees that small or moderate impacts that have cumulative effects are important to address. In each situation, the project effects analyses should identify all effects to the species under consideration, as well as measures to avoid, minimize, and compensate adverse effects. These analyses can characterize repeated, ongoing actions that may affect a species at a larger scale, and can help inform recovery efforts at a local or regional level. Ideally, the project proponent and the Service would also identify opportunities to support recovery/conservation of that species and include them in the action, if possible. This is a collaborative approach to conservation, consistent with relevant statutes and regulations, and can help offset the cumulative effects of many actions on the landscape.

Comment (39): One commenter said the draft policy should provide additional guidance on how landscape-scale indirect effects would be evaluated for buffers surrounding existing mitigation sites, including mitigation banks. They recommend clarification regarding the process when additional compensation may be necessary for landscape-scale indirect effects to existing mitigation sites.

Response: It is difficult at this time to provide specific guidance on buffers and indirect effects given the potential universe of actions that could arise and fact-specific situations of each mitigation site. We declined to provide such guidance in this policy.

Comment (40): Some commenters were concerned that the landscape-level approach to mitigation planning would focus too narrowly on certain species to the detriment of others, or that purchasing credits from a conservation bank or in-lieu fee program would not equate to replacing lost habitat.

Response: The goal of a landscape-scale approach to mitigation is to ensure functionally successful compensatory mitigation efforts for the habitats or species under consideration. While no project or habitat benefits all species all the time, using a landscape context to frame mitigation actions should reinforce functionality at the appropriate scale (*i.e.,* tract, regional, range) to benefit the target resource, and in most cases, other resources/species that also rely on that functional system. Using a landscape approach will help ensure the compensatory mitigation measures will meaningfully offset adverse effects to a species/habitat in a way that is ecologically sustainable over the long term. This is a more holistic approach to ensuring the functionality of the ecosystems on which federally listed and at-risk species depend.

Comment (41): One commenter recommends that the Service consider revising the guidance provided under section 5.1.2 of the draft policy to discuss not only economies of scale associated with conservation banks and small impacts, but also to state that large-scale impacts require large-scale mitigation and such development projects have the potential to create landscape-scale conservation benefit for species, which may not be best achieved through banks.

Response: The Service agrees large-scale projects have the potential to

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

provide large-scale mitigation measures to offset adverse effects and ideally contribute to recovery. The examples given in section 5.1.2 of the draft policy are compensatory mitigation programs that can be established in advance of impacts, such as conservation banking or in-lieu fee programs. A large-scale mitigation project implemented in advance of impacts will likely offset the impacts of multiple projects, and is essentially a conservation bank.

Comment (42): One commenter stated that landscape-scale mitigation is unauthorized and unfeasible. Landscape-scale impact evaluations and required mitigation measures on this basis imports a policy objective into official ESA decisions in excess of statutory authority and is incongruent with the ESA.

Response: The goal of the ESA is to conserve endangered and threatened species and the ecosystems on which they depend. Through science and technological advances, conservation has more tools than ever to effectively evaluate land use, populations, hydrology, and so forth, at scales relevant to the needs of federally listed and at-risk species. To ensure the most effective mitigation measures for these resources, it is critical to put them in an ecologically functional context, *i.e.,* a landscape. That does not mean every action requires advanced, ecosystem-level quantitative evaluations, but rather that the effects of an action and mitigation measures to offset those effects take into consideration truly functional strategies that will continue to provide long-term resource benefits. This does not expand any existing authorities for ESA implementation.

Comment (43): We received comments requesting clarification of when programmatic approaches to mitigation would be appropriate.

Response: This policy does not require the development of programmatic documents to support infrequent compensatory mitigations needs. The decision to develop programmatic approaches to mitigation will be made based upon resource-specific circumstances, such as how frequently agencies and applicants will need to compensate for their impacts.

Comment (44): Comments included concerns about the Service's proposed extension of critical habitat to areas not currently occupied by a listed species, on the basis that an area may become critical because the species' range is expected to expand to that area. In determining the scale of a landscape-level approach to mitigation, the Service should not ignore the need for a rational connection to the area of actual impact of a proposed project. Instead, it should base requirements for landscape-scale mitigation on demonstrable connections between truly foreseeable or predictable impacts, rather than speculative projections of habitat or range modifications due to climate change.

Response: The Service agrees that compensatory mitigation must be based on the best available science, and have a rational connection between project effects and proposed mitigation measures. The landscape approach provides the context within which to frame that connection. As our understanding of species' needs, habitats, and climate change increases, we will be better able to address potential future needs of species and their habitats. In planning mitigation strategies, it is also important to recognize uncertainties in future conditions, including habitats, water supplies, temperatures, etc. Those uncertainties should be built into the mitigation strategies to ensure that the proposed mitigation benefits adequately offset adverse effects over the long term. The policy does not address the designation of critical habitat; the regulations for the designation of critical habitat are found at 50 CFR 424.12.

Comment (45): One commenter said the focus on landscape-scale conservation is laudable, but the draft policy introduces new processes and standards that could make achieving this goal more costly, time-consuming, and burdensome. The policy should include ways to incentivize the creation of landscape-scale mitigation projects that capitalize on the multiple ecosystem services and efficiencies that landscapes provide. More consideration for the self-regulating aspects of natural landscapes that could reduce management and monitoring burdens (lowering costs), and the ability to unstack credits for different listed species when their habitats overlap in space but not in function (increasing market returns), would help make landscapes a priority for the conservation marketplace.

Response: The landscape approach to conservation provides a conceptual framework to design effective and durable mitigation strategies. The intent is to approach mitigation planning and implementation from an ecologically functional perspective for more effective, durable outcomes. Designing mitigation that works with natural landscapes will help reduce management costs and increase effectiveness. Monitoring also will help confirm our underlying understanding of mitigation benefits and may help identify where our assumptions need revision. This is critical to mitigation success.

Bundled or stacked credits cannot be unbundled or unstacked to offset the effects of multiple projects but can only be used to offset the effects of a single project. Once a unit of habitat is used as mitigation for one project, regardless of the number of listed species it supports, it cannot be used as mitigation a second time.

Comment (46): One comment suggested that it is unclear why the required inclusion of adjacent ecosystems and human systems, which is how landscapes are defined, into conservation plans will provide a benefit to species that do not require those habitats or ecosystems for survival. The Service should clarify whether it intends mitigation consistent with a landscape-scale approach to require grouping of permittee proposed compensatory mitigation projects or grouping of project proponents, and in situations where this is desired, the benefits should be explained.

Response: Including consideration of adjacent ecosystems and human systems into a landscape approach to compensatory mitigation recognizes the potential effects those systems may have on the species and habitats under consideration. This is especially important in ensuring long-term ecologic functioning of the compensatory mitigation that benefits the species/habitat. We are increasingly aware that adjacent landscapes and human management actions can significantly affect what was perceived as a protected area. This policy explicitly recognizes those factors in developing long-term, comprehensive conservation strategies for the resources under consideration. Because those strategies will be implemented using market-based and collaborative mitigation tools, the Service will work with our conservation partners to develop effective, feasible measures to put conservation on the ground. The policy does not require permittee proposed mitigation projects to be grouped, but they should be considered in the context of the landscape in which they occur.

Comment (47): One commenter said that most species lack an up-to-date analysis of conservation status, and few have forward-looking strategies that the Service intends to rely on in implementing the policy. Furthermore, not all landscape-scale conservation strategies noted by the Service are peer-reviewed, publicly vetted, scientifically sound, or without controversy. If the Service intends to rely on such strategies in the context of preparing

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

recovery plans, status reviews, and similar documents, then these landscape-scale conservation strategies and the process for implementing them must be vastly improved. The Service should let the conservation market identify lands that represent valuable conservation targets and take advantage of ''market efficiencies'' that are a benefit of the conservation banking and in-lieu fee forms of mitigation.

Response: The Service agrees on the importance of using the best available scientific information in developing conservation strategies. We rely on our conservation partners to bring their information and expertise into a collaborative process to help us develop those strategies. We also appreciate the assistance of the conservation market in designing, implementing, and expanding our suite of conservation tools to benefit listed and at-risk species.

Comment (48): One commenter said the policy would benefit from greater recognition that activities associated with the management, monitoring, protections, and assurances need not be as robust in some instances, yet will achieve a functional landscape that is capable of supporting the conservation of listed and at-risk species, different from the actions necessary to provide compensatory mitigation for wetlands and other aquatic resources.

Response: The Service agrees that some larger landscapes may require less intensive management than smaller areas. However, in most areas of the country, there are few ''self-regulating'' systems left that are not greatly influenced by invasive species, altered hydrology, ongoing erosion, and climate change. It is important in designing feasible, meaningful mitigation to appropriately scale the monitoring and management actions to most effectively provide resource benefits. This will depend on the resources, landscapes, and scale of the project, and should have a rational connection between the effects being offset and the benefits provided. We declined to modify the policy based on this comment.

Comment (49): One commenter said the draft policy's example of a proactive, landscape-scale mitigation approach provided by songbird mitigation guidance in Texas to encourage compensatory mitigation opportunities is misleading. The commenter cited two instances in which potential conservation banks were precluded from establishing species credits due to the requirements in the guidance.

Response: We respectfully disagree. The example used in the policy is intended to show instances where the Service has taken landscape-scale approaches for species conservation and compensatory mitigation. We recognize that not all proposals developed under the Texas example or other local guidance will ultimately be finalized and implemented, but the intent of this policy is to promote consistency and predictability so that mitigation providers may develop programs that are more likely to be implemented.

Comment (50): Some commenters indicated that the policy should offer far more guidance on when and how the Service would apply a ''landscape-level approach'' to ESA mitigation, questioned whether the Service would apply a landscape approach differently to species with different range sizes, and stated that the draft policy does not explicitly describe how or whether a landscape approach would apply to listed species with narrow ranges.

Response: The landscape approach to conservation considers the functional context of the species or habitat under consideration. Working with our conservation partners and project proponents, the Service will use a landscape context to provide the most effective and durable mitigation for listed and at-risk species, while preserving the greatest flexibility to implement those measures at many scales. Given the breadth of species and landscapes under consideration, it is impossible to give a ''one size fits all'' set of instructions. Using a landscape context to frame mitigation actions should reinforce functionality at the appropriate scale (*i.e.,* tract, regional, range) to benefit the target resource and, in most cases, other resources/species that also rely on that functional system. Though some species may have relatively narrow ranges, their threats may be best addressed at a landscape scale (*e.g.,* invasive species, altered hydrology, climate change). This approach will help ensure the compensatory mitigation measures will meaningfully offset adverse effects to a species/habitat in a way that is ecologically sustainable over the long term.

Comment (51): One commenter noted that the statement requiring compensatory mitigation to be ''sited in locations that have been identified in landscape level conservation plans or mitigation strategies'' does not take into account the limited lands available for acquisition or restoration in some areas of the United States and the need to acquire property from willing sellers.

Response: The Service recognizes conservation opportunities vary across the country by species and habitats. The landscape-scale approach is a way to place those opportunities in an ecologically functional context. The policy allows for compensatory mitigation on public lands (provided certain criteria are met, *e.g.,* ''additionality'') and on private lands. It also encourages market-based tools and incentives to take advantage of the unique circumstances in each area. While there may be limitations in available lands in some regions, the policy includes a suite of tools that should provide meaningful options for feasible, durable compensatory mitigation nationwide.

Comment (52): The policy will result in the creation of a landscape-scale system of conservation banks and other mitigation sites controlled by the Service that will take private land and their resources out of productive use.

Response: The landscape approach to conservation considers the functional context of the species or habitat under consideration. It does not affect land ownership or control. Working with our conservation partners and project proponents, the Service will use a landscape context to provide the most effective and durable mitigation for listed and at-risk species, while preserving the greatest flexibility to implement those measures at many scales. Providing incentives for a market-based approach to conservation allows many tools to better meet the needs of species as well as the needs of landowner/project proponents. Generally, the use of conservation banking and other mitigation projects will not take resources out of ''productive'' use. Rather, conservation banks and other mitigation projects located on private land remain under control of the property owner and often provide other productive uses, such as grazing livestock.

I. Metrics

Comment (53): One commenter stated that the policy should clarify that actions can meet ESA conservation standards using mitigation when adverse effects, and mitigation offsets of those effects, are calculated using tools that consider more than mere gain or loss of animals or habitat. For example, tools like Habitat Equivalency Analysis consider spatial, temporal, and functional parameters that look beyond mere loss or gain to calculate the extent and quality of mitigation required in given situations.

Response: A discussion of tools used to calculate mitigation is not within the scope of this policy.

Comment (54): Several commenters were concerned that adequate detail

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

about how assessment methodologies are developed and applied was not provided in the draft policy. Commenters were also concerned that the numerical loss and benefit to a site is largely a qualitative measurement, and the no methodology for quantification is offered. They said that transparent formulas to calculate ''mitigation ratios'' are needed to reduce subjectivity and increase transparency. They also noted that equivalent metrics for determining losses due to impacts and gains due to mitigation would aid in the assessment of ''no net loss'' or ''net gain.''

Response: The Service agrees that transparent formulas to calculate ''mitigation ratios'' reduce subjectivity and increase transparency. We also agree that equivalent metrics for determining losses due to impacts and gains due to mitigation would aid in the assessment of ''no net loss'' or ''net gain.'' This policy does include a statement that equivalent metrics should be used whenever possible.

Details about how to develop and apply assessment methodologies that are quantitative and transparent were not included in the draft, or this final, policy, because these details are species-specific and too complex to describe adequately within the framework of the policy. When detailed descriptions of assessment methodology development and application are prepared by the Service for a species-specific mitigation program, these descriptions are routinely shared with the public.

Comment (55): One commenter said that since buffers are so important, they should be counted in the crediting of a mitigation site at some ratio of a full credit.

Response: The Service agrees with this comment. In section 6.6, the policy states, ''If buffers also provide functions and services for the species or other resources of concern, compensatory mitigation credit will be provided at a level commensurate with the level of functions and/or services provided to the species.''

Comment (56): One commenter stated that for the purposes of mitigation, the Service has not shown compelling evidence that adequate assessment methodologies exist to consider adverse and beneficial actions that are fundamentally different in nature. Determining the numerical loss and benefit to a site is largely a qualitative measurement, and the draft policy offers no quantification methodology.

Response: The policy describes types of mitigation programs or projects that do not directly replace species or habitat losses resulting from development projects. These are the types of programs in which the adverse actions, like habitat development, would be offset by an action that is fundamentally different in nature, such as gating of caves that serve as habitat for the species. The Service acknowledges that these types of credit/debit systems can often be more subjective than the traditional habitat-for-habitat type of mitigation. However, this type of mitigation has been the exception rather than the rule, and we expect Service staff to use other programs or projects only when they are the best option to alleviate the greatest threats to the species involved. When these programs or projects are allowed as mitigation, the Service will clearly explain the link between the threat and the selected mitigation.

Comment (57): One commenter was concerned that there was no discussion of how successful ''surrogate'' indicators of incidental take have been in assuring adequate mitigation.

Response: The use of surrogate indicators for the species impacted, such as the species' habitat, when applying compensatory mitigation in accordance with 50 CFR 402.14(i)(1)(i) is discussed at section 5.2 of the policy. We declined to add additional detail to that discussion.

Comment (58): One commenter suggested that the Service require that all credits and debits associated with the same species and region be aggregated and reported across all compensatory mitigation mechanisms. They indicated this is critical to ensure an offset achieves ''net conservation gain,'' to ensure the offsets created by all mechanisms are using the best available science, and to ensure equivalency across multiple mechanisms. They also suggested when the same metric is not used by two different mechanisms; the requirement to define ''the relationship (conservation) between credits and debits'' can also be used to define the relationship between different credit metrics.

Response: Currently, the Service uses the Regulatory In-lieu Fee and Banking Information Tracking System (RIBITS) to track credits and debits for conservation banks. The Service intends to work with the USACE to adapt RIBITS for use by the Service to also track credits and debits for in-lieu fee programs. The type of credits that are acceptable for a given species is determined by the Service when a mitigation program for a specific species is developed and implemented. The Service agrees that tracking the types and amounts of credits used across a species' range is a good idea, as it informs our understanding of the species' status. Collecting this type of information and working to achieve consistency requires coordination among Service staff, including those from different program areas. Describing the actions necessary to ensure this coordination occurs is beyond the scope of this policy.

Comment (59): One commenter suggested a monitoring and verification process should be required of all mitigation. They said the verification process should include a method to verify that the outcomes of the project achieve the performance standard throughout the entire life of the mitigation project, and that method could be the initial assessment method or an abbreviated assessment that still quantifies the quality of the resource. They also suggested the party responsible for conducting the verification should be identified upfront.

Response: We agree that these are important requirements to ensure that mitigation remains adequate over time. Specific methodologies for such verification are beyond the scope of this policy.

Comment (60): One commenter said it should be made explicitly clear that while adaptive management is critical as knowledge and conditions change, the necessary updates to metrics or plans do not invalidate previous metrics or credits. They suggested that each credit, and debit if applicable, should be labeled with the method used at the time of assessment. They also suggested that reports should acknowledge when metrics are modified, but credits should still be aggregated across time. They noted that it may be necessary to use a correction method, and these correction methods should be transparent, scientifically supported, and included in all reports.

Response: We agree in concept; however, this comment goes beyond the scope of the policy.

Comment (61): One commenter asked that we clarify that plans should rely more on the criteria that define high-quality habitat, including criteria for landscape-scale attributes, indicating these criteria should be consistently reflected in the development of metrics used to define credits and debits within the region. They noted that opportunities to enhance and protect habitat may be outside of predefined conservation areas, but they must meet the definition for high-quality habitat and be deemed acceptable.

Response: We agree that metrics should define high-quality habitat. We also agree that opportunities to enhance

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

and protect habitat may be outside of predefined conservation areas, and regardless of location, they should meet the definition for high-quality habitat and be deemed acceptable. This concept is captured in the final policy.

Comment (62): One commenter liked the concept that ecological performance criteria must be tied to conservation goals and specific objectives identified in compensatory mitigation programs and projects, but they did not think the draft policy adequately describes how to accomplish this objective.

Response: The level of detail necessary to describe how to accomplish this objective is beyond the scope of this policy and may be addressed in implementation guidance.

Comment (63): One commenter stated the draft policy should more explicitly recognize the uncertainty associated with mitigation for certain species and describe a framework for managing the uncertainty. They said the policy should describe a framework the Service would use to assess the appropriate balance of avoidance, minimization, and mitigation, as informed by the likelihood of mitigation effectiveness and the species' recovery needs.

Response: The Service agrees that there is uncertainty associated with mitigation for certain species. This policy includes a discussion of risk management tools. These tools can be used after the Service determines that a mitigation program or project is appropriate. Assessing risks and determining if mitigation is appropriate for a species is not within the scope of this policy, as uncertainty associated with mitigation for certain species will be fact specific.

J. Additionality

Comment (64): We received two comments on the draft policy's use of ''additionality'' when developing compensatory mitigation on both public and private lands. Commenters believed additionality is not feasible when coupled with the ''no net loss'' goal, and that some inconsistencies exist in the descriptions in the text of the draft policy.

Response: One purpose of using ''additionality'' as a standard in the policy is to promote the ''net gain/no net loss'' goal. There are many examples of mitigation sites and programs that have achieved these standards. The concept of compensatory measures providing additional benefits above baseline conditions is described in general terms in the policy. Those descriptions in the text are intended to give context to the conservation benefits of mitigation actions being additive to baseline conditions on both private and public lands.

K. Durability

Comment (65): Some commenters were concerned that the requirement for perpetual management of mitigation sites places an undue burden on mitigation providers, or that perpetual management would be detrimental to the resource. They said that the imposition of perpetual endowment and adaptive management places burdens on all projects, and it would be impossible for industry to manage and maintain mitigation sites in perpetuity.

Response: Perpetual management of mitigation sites is essential to assure durability of compensatory mitigation. The species and resources present on a mitigation site will dictate what management actions are undertaken. Management plans are tailored to the needs of the site. Mitigation providers should carefully consider the long-term commitment they are making when they agree to implement a compensatory mitigation project. Mitigation that is permanent is expected to have appropriate financial and real estate assurances to meet the durability standard in the policy.

L. Collaboration and Coordination

Comment (66): One commenter said the policy would mandate the Service to work directly with landowners, potentially resulting in the loss of confidential information. The commenter noted recent conservation plans produced in Texas were developed by stakeholders and administered through State agencies to preserve confidentiality of private landowners.

Response: The Service has a long history of working with private landowners to conserve fish and wildlife resources, including endangered and threatened species. Our partnerships with private landowners are essential to achieving our conservation mission. The policy does not include a mandate to work directly with landowners, but supports the ESA and its implementing regulations, which allows us to work with a variety of entities towards the recovery of listed species, and encourages cooperative conservation with all of our partners, including the exchange of ideas and information to better inform species management and evaluation. As noted in the policy, transparency in compensatory mitigation programs and ESA implementation is essential to achieving success. The Service is considerate of confidentiality, and any personal information maintained by the Service is protected by law (*e.g.,* Freedom of Information Act, 5 U.S.C. 552; Privacy Act, 5 U.S.C. 552a) to prevent unlawful dissemination.

Comment (67): One commenter was concerned that the Service developed the policy without having addressed concerns raised by States and other parties regarding the Service's mitigation policy. They said that moving forward with this guidance without finalizing the overarching mitigation policy was premature, and created uncertainty and confusion over what the Service was likely to adopt.

Response: This compensatory mitigation policy is a step-down policy under the final Service mitigation policy, which published in the **Federal Register** on November 21, 2016 (81 FR 83440). There were no substantial changes between the draft and final Service mitigation policy. In finalizing the Service's mitigation policy, we fully considered all comments and concerns raised by States and other parties. We also considered those comments as we developed this policy.

Comment (68): Two commenters addressed the relationship between this policy and mitigation policy developments underway in other agencies. One commenter was concerned that while interagency cooperation is addressed in the draft policy, it only provided a history of previous ESA requirements. They were concerned that the draft policy did not address the relationship between similar policies being developed by other Federal land management agencies such as the Bureau of Land Management and the U.S. Forest Service. Another commenter noted that other Federal agencies are also responding to the Presidential memorandum (''Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment'') issued November 3, 2015. They said that this created the opportunity for the Service to enter into agreements with other Federal agencies to work together on the implementation of similar mitigation policies and to avoid conflicts, delays, and inefficiencies.

Response: At the time this policy is being finalized, neither the Bureau of Land Management nor the U.S. Forest Service has published final mitigation policies or regulations. The Service did provide comments on their proposed policies, and we did receive comments on this policy from those agencies. This policy, like the Service mitigation policy published November 21, 2016 (81 FR 83440), was developed in accordance with the November 3, 2015, Presidential Memorandum; the

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

Secretary of the Interior's Order 3330 entitled, ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013); and Departmental Manual chapter (600 DM 6) on Landscape-Scale Mitigation Policy (October 23, 2015). The commenter's concern is anticipated by those documents, which envision the various agencies' mitigation policies applying common principles, terms, and approaches, thereby providing greater consistency and predictability for the public. Subsequent agreements between the Service and other agencies may be developed as need arises.

Comment (69): One commenter said the draft policy would be improved if it built upon and utilized the USACE and EPA's definitions and mitigation policies. They said that a reconciliation of terms and process should be part of the Service's next steps.

Response: We agree that this policy should apply concepts and definitions compatible with those developed through decades of mitigation practice under the Clean Water Act. Accordingly, we have developed this policy to use the same terms and approaches found in regulations and guidance promulgated by the USACE and EPA whenever possible. In some cases, we also recognized the need for language tailored to authorities, processes, and resources covered by the ESA rather than the Clean Water Act; in these cases, the policy's language complies with the Departmental Manual on Landscape-Scale Mitigation Policy (600 DM 6).

Comment (70): One commenter said that the implementation of this policy will establish an inconsistent ESA framework because the National Marine Fisheries Service did not adopt the Service's mitigation policy (81 FR 83440, November 21, 2016). The commenter said this approach is contrary to the typical practice of promulgating joint regulations by the two agencies that provide for uniform application of the ESA. The commenter stated that by unilaterally proposing this policy and the Service mitigation policy (81 FR 83440, November 21, 2016), the Service is creating disparate requirements that will impose significant and additional regulations on project sponsors based on the possibility of a species being affected.

Response: This policy is not a rulemaking and cannot otherwise alter or substitute for the existing regulations applied by both the National Oceanic and Atmospheric Administration (NOAA) and the Service in implementing the ESA. We also have coordinated development of both this policy and the Service mitigation policy (81 FR 83440, November 21, 2016) with NOAA, and incorporated their suggestions and modifications. Also, this policy was required under the Presidential Memorandum on Mitigation, the Department of the Interior Secretarial Order 3330, and 600 DM 6.

Comment (71): One commenter said that the Service and other agencies risk unnecessary duplication of efforts and conflicting requirements, which will further delay project approval. They encouraged the Service to consider mitigation frameworks already in place before adding another layer of mitigation requirements to an already complex and burdensome project approval process.

Response: We agree that existing mitigation programs and frameworks, as well as existing mitigation and conservation plans, should be considered. The Service recognizes that there may be existing plans developed by State and local governments and other stakeholders with characteristics that may be useful in mitigation planning depending on the specific action and the affected resources. The Service will work with project proponents and other stakeholders in reviewing existing programs, frameworks, and plans for applicability in the context of a specific action.

Comment (72): One commenter said the policy would complicate other agencies' processes. They said that it would increase opportunities for the Service to force concessions from other Federal agencies and permittees, and that it has the potential to violate organic acts and will undoubtedly complicate the approval process for mining operations and other land users.

Response: The scope of this policy does not limit the existing discretion of an action agency, or hold the action agency or applicant responsible for mitigation beyond an action agency's own authority, mission, and responsibilities. The Service recognizes that the authorities and processes of different agencies may limit or provide discretion regarding the level of mitigation for a project. This policy is not controlling upon other agencies, and the Service acknowledges that there may be limitations (*e.g.,* agency-specific authorities and 600 DM 6) on the implementation of measures that would achieve the policy's goal of ''net conservation gain'' or a minimum of ''no net loss'' when the costs of such mitigation are reimbursable by project beneficiaries under laws and regulations controlling agencies' activities (*e.g.,* Bureau of Reclamation). Other agencies may voluntarily adopt Service recommendations, which may expedite their other requirements.

Comment (73): Some commenters expressed interest in a collaborative approach to mitigation planning on a landscape level. One commenter expressed support for additional engagement with stakeholders; another commented that the role of State wildlife data, analyses, and expertise should be utilized to the greatest extent possible; another commenter was skeptical of the collaborative approach preferred by the Service.

Response: The Service agrees that developing multi-scale conservation plans and strategies benefits from many invested stakeholders that bring their unique insights and perspectives to ensure a more comprehensive and robust blueprint, and looks forward to building on our conservation partnerships through collaborative planning efforts. Our State partners in particular are critical to successful compensatory mitigation of federally listed and at-risk species. They bring statutory responsibility, data, expertise, and management capabilities to better ensure successful, durable mitigation efforts on the ground.

Comment (74): Several commenters were concerned about the level of coordination undertaken by the Service on establishment of mitigation programs, and encouraged the Service to engage with both mitigation partners and with State agencies, to avoid duplication of effort and cross-jurisdictional issues and to improve outcomes. One commenter urged the Service to expedite reviews by working with agencies that already have established mitigation policies and programs.

Response: The Service agrees that we have common goals with our partners and achieve much better outcomes when we work together on coordinated mitigation programs, especially where our jurisdiction overlaps with that of other agencies as it often does with our State wildlife agency partners. The Service intends to continue working with all of our partners.

M. Transparency

Comment (75): One commenter requested clarification on the Service's meaning of ''direct oversight'' in the draft policy regarding compensatory mitigation programs and projects. The commenter also requested clarification on use of third-party evaluators in preparing monitoring reports for programs or projects.

Response: The policy identifies the Service's authority for direct oversight

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

of compensatory mitigation programs and projects through sections 7 and 10 of the ESA. Under sections 7 and 10, the Service oversees the terms and conditions of the incidental take permit (section 10) or of the incidental take statement (section 7). Details on the roles of third-party evaluators involved in specific project actions are beyond the scope of the policy.

Comment (76): We received several comments pertaining to the availability of information generated from mitigation programs. Commenters recommended the policy include standards for transparency of data and documents, participation of stakeholders, and consistency of data reported through mitigation programs.

Response: Information on conservation banks is available to the public on the Regulatory In-lieu Fee and Banking Information Tracking System (RIBITS), and the Service intends to work with the USACE to add Service-approved in-lieu fee programs to that platform. As noted in the policy, the Service will share appropriate information concerning mitigation programs with the public, with the exception of personally identifiable information or other information that would be exempt under the Freedom of Information Act. We declined to add specific standards for transparency to the policy. Prescriptive standards for the type of data to be shared would not be reasonable for a policy that covers the myriad listed species across the country. Such standards would be better suited for species-specific guidance.

N. Preference for Advance Mitigation

Comment (77): One commenter stated the policy should adopt an approach similar to that taken in the HCP handbook to identify exceptions to the requirement to mitigate in advance of impacts.

Response: The policy is intended to provide standards and guidance to improve consistency of compensatory mitigation programs and projects for listed, proposed, and at-risk species. The preference for advance mitigation is based on the years of experience with compensatory mitigation programs. We realize that in some cases advance mitigation may not be possible, or even preferable; however, attempting to identify exceptions for this preference would not be reasonable, considering the vast diversity of species and programs that would occur across the country.

Comment (78): Several commenters were concerned about the draft policy's preference for compensatory mitigation in advance of project impacts. One commenter specifically identified that reclamation of mining operations often lacks the ability for advanced mitigation on site. Other commenters cited that: The process of project permitting and financing determinations would likely not allow for advanced mitigation; the Service should provide incentives such as higher ratios for ''after impact mitigation''; advance mitigation would be considered pre-decisional; or it is impossible to provide mitigation in advance of impacts.

Response: We recognize that project scheduling and implementing on-site mitigation may not always align with the Service's preference for advance mitigation; however, conservation banks, in-lieu-fee programs, and other third-party mechanisms provide advanced mitigation options that reduce timing and other constraints. The Service's current practice to recommend mitigation in advance of impacts under sections 7 and 10 of the ESA is based on years of experience in compensatory mitigation practices. This policy promotes the development of advanced mitigation mechanisms, providing more options for mitigation users. The Service agrees that mitigation ratios can be used to incentivize mitigation accomplished in advance of impacts, but the discussion of specifics is beyond the scope of this policy. The Service does not consider advance mitigation to be pre-decisional, as the majority of advance mitigation programs, such as conservation banking, are established prior to any impacts, and projects that will mitigate at such sites may be unknown at the time of bank establishment. In all cases, the Service will evaluate the appropriateness of using a specific site or proposal as compensatory mitigation to offset the unavoidable impacts of a project at the time the Service reviews the project that will likely result in the impacts.

O. Eligible Lands

Comment (79): Several commenters supported mitigation projects and programs on public lands and wanted us to add more flexibility to the policy. One commenter stated that if mitigation projects and programs occur on public lands, the land manager should be prepared to implement and fund alternative mitigation if a change in law allows incompatible uses to occur on mitigation lands. One commenter did not support mitigation projects and programs on Federal lands, but was in favor of it on State lands, and wanted State lands specifically mentioned in the policy.

Response: Compensatory mitigation can occur on public lands, either Federal or State lands, and in some cases, such siting may lead to the best ecological outcome. Compensatory mitigation for impacts on public lands can be sited on both public and private lands. Compensatory mitigation for impacts on private lands can be located on public lands, but it is this combination, or that particular change in ownership classification, where Service staff should be attentive to additional considerations before making such a recommendation. These additional considerations are necessary to achieve the ''net gain'' or, at a minimum ''no net loss,'' goal of the policy.

Comment (80): Several commenters provided comments on split estates. Commenters said the Service is arbitrarily limiting areas on which mitigation can occur by not allowing lands with split estates to qualify as mitigation lands; split estates do not necessarily result in an unsuitable mitigation site; and the holder of the rights would have to secure their own authorization under the ESA from the Service prior to exercising their rights.

Response: The Service agrees that there are cases in which lands with split estates can be used for mitigation. The policy advises caution because we strive to ensure the durability of mitigation projects and programs, but the policy does mention possible remedies and that there could be other approaches to using lands with split estates for mitigation. A detailed discussion of remedies and other approaches is not within the scope of this policy.

P. Tribal Lands/Tribal Rights

Comment (81): We received some comments regarding the siting of mitigation projects on tribal lands or on lands on which tribes hold treaty rights. One commenter expressed the need for local mitigation projects to be sited in or near reservation lands as well as on traditional off-reservation sites, to benefit the natural resources of the native peoples; another commenter was concerned that locating mitigation outside of treaty areas for projects that impact the resources in treaty areas would harm the treaty rights and the resources of the tribes. Other commenters asked that tribes be consulted in the siting and approval of mitigation sites and programs. Others were concerned about the impacts of habitat restoration and long-term management on treaty resources.

Response: The Service is committed to upholding our trust responsibilities to federally recognized tribes to conserve shared natural resources, consistent with the Service's Native American

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

Policy (revised January 2016; see 81 FR 4638, January 27, 2016). This is accomplished under this policy by ensuring that mitigation projects and programs are located in areas that provide the most benefit to the affected resources, while respecting treaty rights. The Service recognizes the importance of tribal involvement and expertise when siting mitigation projects and when developing service areas and management plans for conservation banks and other types of mitigation mechanisms. Specific guidance on Service coordination with tribes is beyond the scope of this policy.

Comment (82): We received some comments requesting specific guidance on facilitating creation of conservation banks on tribal lands, comments on including tribal cultural uses and practices as allowable uses on mitigation lands, and a suggestion for developing mitigation principles similar to those developed with the USACE in the State of Washington for specific mitigation programs.

Response: The Service agrees that these are all important considerations, and such guidance and suggestions will be more effectively addressed in step-down guidance at a later time.

Comment (83): We received comments regarding the applicability of the policy to tribes, or to a specific HCP under development, and a suggestion that the Service consult with any tribes who so request before finalizing this policy.

Response: The Service notified tribal contacts when we made the draft policy available for review and comment (81 FR 61032, September 2, 2016). We addressed all tribal comments, as appropriate, as we developed the final policy. The policy applies to all forms of compensatory mitigation for all species and habitat protected under the ESA and for which the Service has jurisdiction. The policy is flexible with regard to its application to specific mitigation projects or programs that are under development at the time this policy is finalized, leaving that decision to individual Service offices.

Q. Service Areas

Comment (84): Several commenters requested more detail in the policy about requirements for developing service areas.

Response: Specific considerations for developing service areas are beyond the scope of this policy and will be provided in implementation guidance.

R. Credit Bundling

Comment (85): A few commenters were concerned about credit bundling, also known as credit stacking, where multiple resources exist on the same unit area. One commenter was concerned that any resources bundled or stacked with a listed species would suffer, as the site would be managed only for the benefit of the listed species and not the other resource(s), and wanted multi-agency review teams to be aware of this when authorizing mitigation banks. Other commenters wanted the Service to make it clear that credits could potentially be used for multiple purposes, and another wanted the Service to allow mitigation credits to be used to compensate for multiple impact projects.

Response: The Service encourages credit bundling where multiple resources exist on the same unit area and where management actions benefit those multiple resources. However, bundled credits can only be used to compensate for one impact project (*i.e.,* the credits can never be ''unbundled'' or ''unstacked'' to compensate for multiple projects). If two resources, such as a California red-legged frog (CRLF) and a wetland regulated pursuant to section 404 of the Clean Water Act are bundled together in a credit, that credit may be used to compensate for impacts to both resources from the same project, or to compensate for impacts to CRLF or to wetlands. If the credit were used to compensate for CRLF, then it can no longer be used to compensate for wetlands (*i.e.,* that portion of the credit is ''retired''). Unbundling these functions and services would result in a net loss of habitat and would undermine the Service's efforts to conserve the species. This approach is consistent with the policies and regulations of the USACE, and other State and Federal agencies the Service works with on multi-agency-approved mitigation projects and programs.

S. Mitigation Mechanisms

Comment (86): One commenter suggested the *Benefits of the Draft Policy* section be clarified to include other mitigation mechanisms that may not be market-based. The commenter suggested that the first sentence of the final paragraph of that section be modified to read: ''This draft policy would encourage mitigation in conjunction with programmatic approaches to ESA section 7 consultations and HCPs designed to focus on conservation outcomes that achieve ''no net loss'' or ''net gain'' through the use of market-based approaches (*e.g.,* conservation banks), in-lieu fee programs, permittee-responsible, and other third-party implemented mitigation programs.''

Response: The Service considers that one of the benefits of this policy is the opportunity it creates for a market-based approach to mitigation as highlighted in the Presidential Memorandum of November 3, 2015, on Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment (80 FR 68743, November 6, 2015), especially those that can be established in advance of impacts. Conservation banking is a proven example of this approach. The policy does not preclude the other mechanisms mentioned by the commenter. We declined to adopt the commenter's suggested sentence.

Comment (87): Several commenters stated that the draft policy was confusing and complex, citing the Service's definition of compensatory mitigation being too broad, lack of a mitigation protocol, and need for a guidance document to ensure a separation of regulatory and nonregulatory authority, goals, and standards. One comment stated the complexity of obtaining approval, as well as cost, for a mitigation site would discourage investment.

Response: One purpose of the policy is to provide predictability and thereby reduce uncertainty of investment for market-based mitigation programs. We acknowledge that the nature of existing compensatory mitigation mechanisms and programs currently being implemented is complex. We have revised the draft policy so that this final policy addresses overarching goals and standards only, and we will later provide more detailed implementation guidance. However, providing a mitigation ''protocol'' that covers the breadth of species and circumstances across the country would not be reasonable. We anticipate species- or geographic-specific guidance to be developed under the umbrella of this policy.

Comment (88): We received two comments regarding section 7.2, *Short-Term Compensatory Mitigation,* in the draft policy. One comment indicated it may not be helpful, particularly when dealing with aquatic species. The other requested more detail in this section and stressed it should be more widely used.

Response: The use of short-term compensatory mitigation is a novel approach, with long-term results yet to be evaluated. The policy fully acknowledges that it is likely to be limited in use, for a variety of reasons, primarily the ability to predict all temporal losses of an impact in order to provide an appropriate offset for those losses. However, the concept may be

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

useful in some circumstances. Thus, it is included in the policy in an effort to provide additional flexibility to conserve listed, proposed, and at-risk species.

Comment (89): Several commenters requested that the Service express a preference for conservation bank credits over other forms of compensatory mitigation. One commenter requested the Service add a preference for rehabilitation or restoration over preservation and that the Service prohibit use of alternative forms of mitigation if conservation bank credits are available in the same proposed service area.

Response: As stated in section 6 of this policy, the appropriate form of compensatory mitigation must be based on the species' needs and the nature of the impacts adversely affecting the species. All mitigation tools listed in the policy are capable of being strategically sited, consolidated, and provided in advance of impacts if they are designed to do so. These preferences will provide the best outcomes for species when they are implemented in any mitigation tool, and, therefore, we have retained flexibility for applicants when selecting mitigation tools. We decline to prohibit the use of alternative forms of mitigation where conservation bank credits are available, as that would limit flexibility and inherent choice of the applicant(s).

T. Climate Change

Comment (90): Several commenters addressed sections of the draft policy that referenced climate change for consideration in mitigation planning. Some commenters were concerned about the uncertainty of calculating the effects of climate change for compensatory mitigation and the use of mitigation ratios to address climate change. One commenter said the policy should provide more detail on integrating climate change effects in the analysis of mitigation programs. Another requested the basis for the term ''accelerated'' climate change used in the policy.

Response: Consistent with the Departmental Manual (600 DM 6), the Service recommends that climate change be considered when evaluating the effects of an action and developing appropriate mitigation measures. The Service recognizes the science of climate change is advancing, and assessment methodologies are continually being refined to address the effects of climate change to specific resources and at differing scales. Including specific information on these topics is beyond the scope of this policy. Therefore, the policy is written with language to ensure that it does not become quickly outdated as methodologies evolve. We use the term ''accelerated climate change'' in a general sense to reference a substantial portion of scientific literature and scholarly articles on the subject, including reports produced by the Intergovernmental Panel on Climate Change.

The final policy follows:

U.S. Fish and Wildlife Service

Endangered Species Act Compensatory Mitigation Policy

1. Purposes

This policy adopts the mitigation principles established in the U.S. Fish and Wildlife Service (Service) Mitigation Policy (81 FR 83440, November 21, 2016), establishes compensatory mitigation standards, and provides guidance for the application of compensatory mitigation through implementation of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Compensatory mitigation (compensation) is defined in this policy as compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C). This policy applies to all Service compensatory mitigation requirements and recommendations involving ESA compliance. It is also intended to assist other Federal agencies carrying out their statutory and regulatory responsibilities under the ESA and to provide applicants with guidance on the appropriate use of compensatory mitigation for proposed actions. The standards and guidance in the policy will also assist mitigation providers in developing compensatory mitigation project proposals.

Adherence to the principles, standards, and guidance identified in this policy is expected to: (1) Provide greater clarity on applying compensatory mitigation to actions subject to ESA compliance requirements; (2) improve consistency and predictability in the implementation of the ESA by standardizing compensatory mitigation practices; and (3) promote the use of compensatory mitigation at a landscape scale to help achieve the purposes of the ESA.

This policy encourages Service personnel to collaborate with other agencies, academic institutions, nongovernmental organizations, tribes, and other partners to develop and implement compensatory mitigation measures and programs through a landscape-scale approach to achieve the best possible conservation outcomes for activities subject to ESA compliance. It also encourages the use of programmatic approaches to compensatory mitigation that have the advantages of advance planning and economies of scale to: (1) Achieve a net gain in species' conservation; (2) reduce the unit cost of compensatory mitigation; and (3) improve regulatory procedural efficiency.

Appendices A and B provide a list of acronyms and a glossary of terms used in this policy, respectively.

2. Authorities and Coordination

This policy is focused on compensatory mitigation that can be achieved under the ESA. The Service's authority to require mitigation is limited, and our authority to require a ''net gain'' in the status of endangered and threatened (listed) or at-risk species has little or no application under the ESA. However, we can recommend the use of mitigation, and in particular compensatory mitigation, to offset the adverse impacts of actions under the ESA. Other statutes also provide the Service with authority for recommending compensatory mitigation for actions affecting fish, wildlife, plants, and their habitats (*e.g.,* Fish and Wildlife Coordination Act (FWCA; 16 U.S.C. 661–667e), National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), and Oil Pollution Act (33 U.S.C. 2701 *et seq.*)). In addition, statutes such as the Clean Water Act (CWA; 33 U.S.C. 1251 *et seq.*) and Federal Power Act (16 U.S.C. 791a–828c) provide other Federal agencies with authority to recommend or require compensatory mitigation for actions that result in adverse effects to species or their habitats. These other authorities are often used in combination with, or to supplement the authorities under, the ESA to recommend or require compensatory mitigation for a variety of resources including at-risk species and their habitats. For example, the ESA and the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*) together provide a greater impetus to conserve desert tortoise habitat than either statute alone.

Synchronizing environmental review processes, especially through early coordination with project proponents, allows the Service to provide comments

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

and recommendations for all mitigation types (*i.e.,* avoidance, minimization, and compensation) included as part of proposed actions in an effort to reduce impacts to listed, proposed, and at-risk species and designated and proposed critical habitat. For example, the Service may comment on proposed actions under NEPA and State environmental review statutes (*e.g.,* California Environmental Quality Act and Hawaii Environmental Policy Act). Coordination of environmental review processes generally results in conservation outcomes that have a greater likelihood of meeting the Service's mitigation goal.

The supplemental mandate of NEPA (42 U.S.C. 4335) adds to the existing authority and responsibility of the Service to protect the environment when carrying out our mission under the ESA. The Service's goal is to provide a coordinated review and analysis of the impacts of proposed actions on listed, proposed, and at-risk species, and designated and proposed critical habitat that are also subject to the requirements of other statutes such as NEPA, CWA, and FWCA. Consultation, conference, and biological assessment procedures under section 7 and permitting procedures under section 10(a)(1)(B) of the ESA can be integrated with interagency cooperation procedures required by other statutes such as NEPA or FWCA. This is particularly the case for cumulative effects. Cumulative effects are often difficult to analyze, are defined differently under different statutes, and are often not adequately considered when making decisions affecting the type and amount of mitigation recommended or required.

3. Scope

The ESA Compensatory Mitigation Policy covers all forms of compensatory mitigation, including, but not limited to, permittee-responsible mitigation, conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements, for all species and habitat protected under the ESA and for which the Service has jurisdiction. Endangered and threatened species, species proposed as endangered or threatened, and designated and proposed critical habitat, are the primary focus of this policy. Candidates and other at-risk species would also benefit from adherence to the standards set forth in this policy, and all Service programs are encouraged to develop compensatory mitigation programs and tools to conserve at-risk species in cooperation with States and other partners.

This policy does not apply retroactively to approved mitigation programs; however, it does apply to amendments and modifications to existing conservation banks, in-lieu fee programs, and other third-party compensatory mitigation arrangements unless otherwise stated in the mitigation instrument. Examples of amendments or modifications to which this policy applies include authorization of additional sites under an existing instrument or agreement, expansion of an existing site, or addition of a new type of resource credit such as addition of a new species credit.

This policy does apply to other Federal or non-Federal actions permitted or otherwise authorized or approved prior to issuance of this policy under circumstances where the action may require additional compliance review under the ESA if: New information becomes available that reveals effects of the action to listed species or critical habitat not previously considered; the action is modified in a manner that causes effects to listed species and critical habitat not previously considered; authorized levels of incidental take are exceeded; a new species is listed or critical habitat is designated that may be affected by the actions; or the project proponent specifically requests the Service to apply the policy. This policy does not apply to actions that are specifically exempted under the ESA. It also does not apply where the Service has already agreed in writing to mitigation measures for pending actions, except where new activities or changes in current activities associated with those actions would result in new impacts, or where new authorities, or failure to implement agreed upon recommendations warrant new consideration regarding mitigation. Service offices may elect to apply this policy to actions that are under review as of December 27, 2016,

This policy clarifies guidance given in the Service's ''Guidance for the Establishment, Use, and Operation of Conservation Banks,'' published in the **Federal Register** on May 8, 2003 (68 FR 24753), and ''Guidance on Recovery Crediting for the Conservation of Threatened and Endangered Species,'' published in the **Federal Register** on July 31, 2008 (73 FR 44761).

4. Application of Compensatory Mitigation Under the ESA

Sections of the ESA under which the Service has authority to recommend or require compensatory mitigation for species or their habitat are identified below. In this section, we provide guidance on applications of these ESA authorities within the context of compensatory mitigation. The compensatory mitigation standards set forth in section 5. Compensatory Mitigation Standards of this policy apply to compensatory mitigation programs and projects established under the ESA, as appropriate.

4.1. Section 7—Interagency Cooperation

Section 2(c)(1) of the ESA directs all Federal departments and agencies to conserve endangered and threatened species. ''Conserve'' is defined in section 3 of the ESA as all actions necessary to bring the species to the point that measures provided pursuant to the ESA are no longer necessary (*i.e.,* recovery or the process through which recovery of listed species is accomplished). This requirement to contribute to the conservation of listed species is reaffirmed in section 7(a)(1) of the ESA. Congress recognized the important role Federal agencies have in conserving listed species.

When the ESA was enacted in 1973, section 7 was a single paragraph directing ''all Federal departments and agencies . . . [to] utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of [the ESA] *and* [emphasis added] by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined . . . to be critical.'' In 1979, section 7 was amended to create subsections 7(a)(1) and 7(a)(2). Federal agencies have separate responsibilities concerning species and their habitats under these two subsections. Section 7(a)(1) is a recovery measure that requires Federal agencies to carry out programs for the conservation of listed species. Section 7(a)(2) is a stabilization measure that requires Federal agencies to ensure actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat.

4.1.1. Section 7(a)(1)

Section 7(a)(1) of the ESA states, ''. . . Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

endangered species and threatened species.'' The Secretary's section 7(a)(1) consultation role has been delegated to the Service, and the Service therefore consults with and assists Federal agencies to accomplish these conservation programs. ''Conservation,'' as it is defined in section 3 of the ESA, means ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' Through this policy, the Service encourages Federal agencies to use section 7(a)(1) to achieve a goal of a ''net gain'' through their mitigation policies and approaches so that they may help bring endangered and threatened species to the point where they no longer need to be listed pursuant to the ESA.

Mitigation Goal: Development of landscape-scale conservation programs for listed and at-risk species that are designed to achieve a net gain in conservation for the species.

Guidance: One way that Federal agencies can meet their responsibility under section 7(a)(1) of the ESA is by working with the Service and other conservation partners to develop landscape-scale conservation plans that include compensatory mitigation programs designed to contribute to species recovery. Landscape-scale approaches to compensatory mitigation, such as conservation banking and in-lieu fee programs, are more likely to be successful if Federal agencies, especially those that carry out, fund, permit, or otherwise authorize actions that can use these programs, are involved in their establishment and support their use. For example, the Federal Highway Administration, as part of its long-term planning process, can use its authorities to work with the Service and other conservation partners on conservation programs for listed species that may be impacted by anticipated future actions. The conservation programs can include identifying priority conservation areas, developing crediting methodologies to value affected species, and developing guidance for offsetting those impacts that is expected to achieve ''no net loss,'' or even a ''net gain,'' in conservation for the species. These tools and information can then be used by conservation bank sponsors and other mitigation providers to develop compensatory mitigation opportunities (*e.g.,* conservation banks) for use by the Federal Highway Administration, and also by State departments of transportation and other public and private entities seeking compensation to offset the impacts of their actions for those same species. The resulting compensatory mitigation program provides conservation for the species that would otherwise not have been achieved—a contribution to listed species conservation under section 7(a)(1) of the ESA by the Federal agency.

4.1.2. Section 7(a)(2)

Section 7(a)(2) of the ESA states, ''[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out, by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.'' The Service determines through consultation under section 7(a)(2) whether or not the proposed action is likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. The Service then issues a biological opinion stating our conclusion and, in the case of a finding of no jeopardy (or jeopardy accompanied by reasonable and prudent alternatives that can be taken by the Federal agency to avoid jeopardy), formulates an incidental take statement, if such take is reasonably certain to occur, that identifies the anticipated amount or extent of incidental take of listed species and specifies reasonable and prudent measures necessary or appropriate to minimize such impacts under section 7(b)(4) of the ESA. If the proposed action is likely to adversely affect critical habitat, the Service's biological opinion also analyzes whether adverse modification is likely to occur and specifies reasonable and prudent alternatives to avoid adverse modification, as necessary and if available. If the listed species is a marine mammal, incidental taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) prior to issuance of an incidental take statement under the ESA.

Mitigation Goal: The Service should work with Federal agencies to assist them in proposing actions that are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat, as required under section 7(a)(2) of the ESA. While not required under section 7(a)(2), the Service may also encourage Federal agencies and applicants (consistent with Federal action agency authorities) to include compensation as part of their proposed actions to offset any anticipated impacts to these resources that are not avoided to achieve a ''net gain'' or, at a minimum, ''no net loss'' in the conservation of listed species.

Guidance: The Service should coordinate with Federal agencies and encourage them to use their authorities under appropriate statutes (*e.g.,* Federal Land Policy and Management Act) to avoid, minimize, and offset adverse impacts to listed species and designated critical habitat using the full mitigation sequence. Compensation is a component of the mitigation sequence that can be applied to offset adverse effects of actions on listed species and critical habitat. Furthermore, the Service can work with Federal agencies to establish compensatory mitigation programs such as conservation banking and in-lieu fee programs that incentivize offsetting the effects of their actions through the appropriate use of compensation while expediting regulatory processes for the Federal agencies and applicants. Due to economies of scale, such mitigation programs are particularly effective at providing more effective and cost-efficient compensation opportunities for offsetting the effects of multiple actions that individually have small impacts.

4.1.2.1. Proposed Actions and Project Descriptions

To better implement section 7(a)(2) of the ESA and prevent species declines, the Service will work with Federal agencies and applicants to identify conservation measures, using the full mitigation sequence, that can be included as part of proposed actions for unavoidable impacts to listed species and critical habitat to achieve, at a minimum, ''no net loss'' in the species' conservation. The mitigation sequence should be observed (*i.e.,* avoid first, then minimize, then compensate), except where circumstances may warrant a departure from this preferred sequence. For example, it may be preferable to compensate for the loss of an occupied site that will be difficult to maintain based on projected future land use (*e.g.,* the site is likely to be isolated from the population in the future) or climate change impacts. The Service will consider conservation measures, including compensatory mitigation, as appropriate, proposed by the action agency or applicant as part of the proposed action when developing a biological opinion addressing the effects of the proposed action on listed species and critical habitat. This consideration of beneficial actions (*i.e.,* compensatory mitigation) is consistent with our implementing regulations at 50 CFR 402.14(g)(8). Federal agencies should coordinate early with the Service on the

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

appropriateness of such beneficial actions as compensation for anticipated future actions.

4.1.2.2. Jeopardy or Adverse Modification Determinations and RPAs

When the Service issues a biological opinion with a finding of jeopardy or adverse modification of critical habitat, we include reasonable and prudent alternatives (RPAs) when possible. RPAs may include any and all forms of mitigation, including compensatory mitigation, that can be applied to avoid proposed actions from jeopardizing the existence of listed species or destroying or adversely modifying critical habitat, provided they are consistent with the regulatory definition of RPAs at 50 CFR 402.02.

4.1.2.3. No Jeopardy and No Adverse Modification Determinations and RPMs

When the Service issues a biological opinion with a finding of no jeopardy, we provide the Federal agency and applicant (if any) with an incidental take statement, if take is reasonably certain to occur, in accordance with section 7(b)(4) of the ESA. The incidental take statement specifies the amount or extent of anticipated take, the impact of such take on the species, and any reasonable and prudent measures (RPMs) and implementing terms and conditions determined by the Service to be necessary or appropriate to minimize the impact of the take.

RPMs can include mitigation, in appropriate circumstances, if such a measure minimizes the effect of the incidental take on the species, and as long as the measure is consistent with the interagency consultation regulations at 50 CFR 402.14. RPMs should also be commensurate with and proportional to the impacts associated with the action. The Service should provide an explanation of why the measures are necessary or appropriate. If the proposed action includes conservation measures sufficient to fully compensate for incidental take, it may not be necessary to include additional minimization measures (beyond monitoring) through RPMs.

4.1.3. Section 7(a)(4)

Section 7(a)(4) of the ESA states, ''[e]ach Federal agency shall confer with [the Service] on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.'' The conference is designed to assist the Federal agency and any applicant to identify and resolve potential conflicts at an early stage in the planning process.

Mitigation Goal: The Service should work with Federal agencies to assist them in proposing actions that are not likely to jeopardize the continued existence of any species proposed for listing or result in the destruction or adverse modification of any proposed critical habitat, in accordance with section 7(a)(4) of the ESA. The Service should also encourage Federal agencies and applicants to include compensation as part of their proposed actions to offset any anticipated impacts to resources that are not avoided to achieve a net gain or, at a minimum, no net loss in their conservation.

Guidance: The Service should coordinate with Federal agencies and encourage them to use their authorities to avoid and minimize adverse impacts to proposed and at-risk species and proposed critical habitat using the full mitigation sequence. The Service may recommend compensatory mitigation for adverse effects to proposed or at-risk species during informal conference or in a conference report or conference opinion, or the Federal action agency or applicant may propose compensatory mitigation as part of the action. If a conference opinion or report determines that a proposed action is likely to jeopardize the continued existence of a proposed species or adversely modify or destroy proposed critical habitat, the Service will include RPAs, if any are available, that may include compensatory mitigation. If the species is subsequently listed or critical habitat is designated prior to completion of the action, the Service will give appropriate consideration to compensatory mitigation when confirming the conference opinion as a biological opinion or if formal consultation is necessary. This consideration of beneficial actions is consistent with our implementing regulations at 50 CFR 402.14(g)(8).

4.2. Section 10—Conservation Plans and Agreements

4.2.1. Safe Harbor and Candidate Conservation Agreements

Under a candidate conservation agreement with assurances (CCAA), private and other non-Federal property owners may voluntarily undertake conservation management activities on their properties to address threats to unlisted species and to enhance, restore, or maintain habitat benefiting species that are candidates or proposed for listing under the ESA or other at-risk species in exchange for assurances that no further action on their part is required should the species become listed during the term of the CCAA. Under a safe harbor agreement (SHA), private and other non-Federal property owners may voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the ESA in exchange for assurances that there will not be any increased property use restrictions as a result of their efforts that either attract listed species to their property or that increase the numbers or distribution of listed species already on their property during the term of the agreement. Both types of agreements are designed to encourage conservation of species on non-Federal land.

Mitigation Goal: Transitioning CCAAs and SHAs into long-term/permanent conservation that can serve as compensatory mitigation when appropriate and desired by landowners. Such transitions provide greater assurance that the species conservation efforts begun under the CCAA or SHA will persist on the landscape beyond the term of the original agreement.

Guidance: CCAAs or SHAs are not intended to be mitigation programs and do not require site protection and financial assurances that meet the compensatory mitigation standards set forth in this policy, however, the conservation achieved through implementation of a CCAA or SHA may be 'rolled over' for use as compensatory mitigation if: (1) The CCAA or SHA permit has expired or is surrendered; (2) the landowner is in compliance with the terms and conditions of the CCAA or SHA at the time of transition; (3) any commitments for conservation for which financial compensation from public sources was received has been fulfilled and if not fulfilled is prorated and deducted from the mitigation credit assigned to the property; and (4) all other requirements for providing compensatory mitigation are met. If the Service determines the CCAA or SHA would provide greater conservation to the species as compensatory mitigation, then the Service should inform the landowner of this assessment and provide the landowner with the opportunity to transition their property from a CCAA or SHA site to a mitigation site.

Landowners enrolled in CCAAs while the species remains unlisted can provide compensatory mitigation under a State or other non-Service mitigation program if the actions related to the mitigation are additional to those taken to satisfy the CCAA requirement. Should the species become listed before the CCAA expires, the landowner has the option to roll over the existing

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

mitigation agreement to a Service-approved mitigation instrument that meets the standards established in this policy.

4.2.2. Habitat Conservation Plans

Section 10(a)(1)(B) of the ESA allows the Service to issue an incidental take permit for ''any taking otherwise prohibited by section 9(a)(1)(B) [of the ESA] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.'' If, under section 10(a)(2)(B) of the ESA, the Service finds the issuance criteria are met by the applicant, including that the applicant will, ''to the maximum extent practicable, minimize and mitigate the impacts of such taking,'' the Service will issue a permit. Plant species and unlisted animal species may also be covered in the habitat conservation plan (HCP), provided the applicant meets requirements for their coverage described in the implementing regulations. The Service incorporates these measures as terms and conditions of the permit. Regulations governing incidental take permits for endangered and threatened wildlife species are found at 50 CFR 17.22 and 17.32. The Service is required to conduct a section 7(a)(2) consultation on issuance of an incidental take permit.

Mitigation Goal: Consistent with the purposes and polices of the ESA, the Service should work with applicants to assist them in developing HCPs that achieve a ''net gain'' or, at a minimum, ''no net loss'' in the conservation of covered species and critical habitat. Though the statute does not require this of HCP applicants, applicants often will request additional measures for greater future assurances. This is generally achievable through programmatic approaches, which provide opportunities for the use of landscape-scale compensatory mitigation programs to offset impacts of actions.

Guidance: Compensatory mitigation should be concurrent with or in advance of impacts, whenever possible. Programmatic approaches are recommended when they will produce regulatory efficiency and improved conservation outcomes for the covered species. These HCPs operate on a landscape scale and often use conservation banks, in-lieu fee programs, or other compensatory mitigation opportunities established by mitigation sponsors and approved by the Service. These landscape-scale programmatic approaches can achieve a net gain in conservation for the covered species as a result of economies of scale. See the revised HCP Handbook for the various options available to address compensatory mitigation for HCPs.

4.3. Other Sections of the ESA Where Compensatory Mitigation Can Play a Role

Section 4(d) of the ESA authorizes the Service to issue protective regulations that are necessary and advisable to provide for the conservation of threatened species. The Service used this authority to extend the prohibition of take (section 9 of the ESA) to all threatened species by regulation in 1978, through promulgation of a ''blanket 4(d) rule'' (50 CFR 17.31). This blanket 4(d) rule can be modified by a species-specific 4(d) rule (*e.g.,* Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher (58 FR 65088, December 10, 1993)). Depending on the threats, the inclusion of compensatory mitigation in a species-specific 4(d) rule may help offset habitat loss, and could hasten recovery or preclude the need to reclassify the species as endangered.

Section 5 of the ESA provides authority for the Service and the U.S. Department of Agriculture, with respect to the National Forest System, to establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species through:

- Use of land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a–742j, not including 742d–1); the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661 *et seq.*); and the Migratory Bird Conservation Act (16 U.S.C. 715–715d, 715e, 715f–715r), as appropriate; and
- Acquisition by purchase, donation, or otherwise, of lands, waters, or interests therein.

Establishment of compensatory mitigation programs that conserve listed or at-risk species on lands adjacent to National Forests could be used to offset losses to those species and their habitats by actions authorized by the Service and also help buffer National Forests from incompatible neighboring land uses.

5. Compensatory Mitigation Standards

The mitigation principles, as described in the Service's Mitigation Policy (81 FR 83440, November 21, 2016), are goals the Service intends to achieve, in part through recommending or requiring, as appropriate, under the ESA and other applicable authorities, the inclusion of compensatory mitigation in proposed actions with adverse impacts to listed, proposed, or at-risk species, and designated or proposed critical habitat. The compensatory mitigation standards described in this section of the policy will implement the mitigation principles, as outlined in the Mitigation Policy, including using a landscape approach to inform mitigation and aspiring to meet the goal to improve (*i.e.,* a ''net gain'') or, at minimum, to maintain (*i.e.,* ''no net loss'') the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority. Compensatory mitigation programs, projects, and measures that are consistent with the mitigation principles and adhere to the compensatory mitigation standards set forth in this section of the policy are expected to achieve the best conservation outcomes. The compensatory mitigation standards apply to all compensatory mitigation mechanisms (*i.e.,* permittee-responsible mitigation, conservation banks, in-lieu fee programs, etc.) and all forms of compensatory mitigation (*i.e.,* restoration, preservation, establishment, and enhancement) approved by the Service. Specific operational details regarding the standards will be in the implementation guidance to be issued by the Service. The standards are as follows:

5.1. Siting Sustainable Compensatory Mitigation

Compensatory mitigation will be sited in locations that have been identified in landscape-scale conservation plans or mitigation strategies as areas that will meet conservation objectives and provide the greatest long-term benefit to the listed, proposed, and/or at-risk species and other resources of primary conservation concern. The Service will rely upon existing conservation plans that are based upon the best available scientific information, consider climate-change adaptation, and contain specific objectives aimed at the biological needs of the affected resources. Where existing conservation plans are not available that incorporate all of these elements or are not updated with the best available scientific information, Service personnel will otherwise incorporate the best available science into mitigation decisions and recommendations and continually seek better information in areas of greatest uncertainty.

5.2. In-Kind for Species

Compensatory mitigation must be in-kind for the listed, proposed, or at-risk species affected by the proposed action. The same requirement does not

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

necessarily apply to the habitat type affected, as the best conservation outcome for the species may not be an offset of the same habitat type or ecological attribute of the habitat impacted by the action. Many species use different habitat types at different life stages or for different life-history requirements such as feeding, breeding, and sheltering. For example, some species are migratory. Selecting a habitat type different from that impacted by the action or selecting more than one type of habitat for compensatory mitigation may best meet the conservation needs of the species.

Offsetting impacts to designated or proposed critical habitat through the use of compensatory mitigation should target the maintenance, restoration, or improvement of the recovery support function of the affected critical habitat as described in the relevant biological or conference opinion, conservation or mitigation plan, mitigation instrument, permit, or conference report. Recovery plans, 5-year reviews, proposed and final critical habitat rules, and the best available science on species status, threats, and needs should be relied on to inform the selection of habitat types subject to compensatory mitigation actions for unavoidable adverse impacts to species or critical habitat.

The use of compensatory mitigation to minimize the impacts of incidental take on listed species can be based on habitat or another surrogate such as a similarly affected species or ecological conditions under circumstances where it is not practicable to express or monitor the amount or extent of take in terms of the number of individuals of the species, in accordance with 50 CFR 402.14(i)(1)(i). A causal link between the surrogate and take of the species must be explained and must be scientifically defensible. For example, occupied habitat of a listed species has been used as a surrogate to express the amount or extent of take of the vernal pool fairy shrimp (*Branchinecta lynchi*) because quantification of take in terms of individuals is not practicable, but the surface area of occupied vernal pool habitat is easily measured and monitored.

5.3. Reliable and Consistent Metrics

Metrics that measure ecological functions and/or services at compensatory mitigation sites and impact sites must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species. These metrics may be species- or habitat-based. Metrics used to calculate credits should be the same as those used to calculate debits for the same species or habitat type. If they are not the same, the relationship (conversion) between credits and debits must be transparent and scientifically defensible. Metrics must account for duration of the impact, temporal loss to the species, management of risk associated with compensatory mitigation, and other such measures. This does not mean that metrics developed to measure losses and gains on the landscape must be precise, as this is rarely possible in biological systems, but uncertainty should be noted where it exists and metrics must be based on the best scientific data available to gauge the adequacy of the compensatory mitigation. Modifying existing metrics on which approved conservation banks or other compensatory mitigation programs are based and still in use warrants careful consideration and must be based on best available science.

Scientifically defensible metrics also are needed to measure biological and ecological performance criteria used to monitor the outcome of compensatory mitigation. It may be necessary to adjust metrics over time through monitoring and adaptive management processes in order to respond to changing conditions and ensure they remain effective at assessing the conservation objectives of the compensatory mitigation program. However, modifying metrics used to monitor performance should not be a substitute for lack of compliance or failure to implement adaptive management.

5.4. Judicious Use of Additionality

Compensatory mitigation must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through legal authorities or contractual agreements. A compensatory mitigation measure is ''additional'' when the benefits of the measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure (600 DM 6.4G). The additional benefits may result from restoration or enhancement of habitat; preservation of existing habitat that lacks adequate protection; management actions that protect, maintain, or create habitat (*e.g.,* regularly scheduled prescribed burns or purchase of rights in a split estate); or other activities (*e.g.,* an action that reduces threats from disease or predation, or captive breeding and reintroduction of individuals or populations). Baseline conditions for the habitat relevant to the species must be assessed prior to implementing the compensatory mitigation project for comparison to conditions after completion of the compensatory mitigation project in order to quantify and verify the additional benefits derived from the mitigation project.

Demonstrating additionality on lands already designated for conservation purposes can be challenging, particularly when the lands under consideration are public lands. In general, credit can only be authorized for compensatory mitigation on public lands if additionality can be clearly demonstrated and is legally attainable. See section 6.2. *Eligible Lands* for guidance on using public lands for compensatory mitigation.

5.5. Timing and Duration

Compensatory mitigation projects must achieve conservation objectives within a reasonable timeframe and for at least the duration of the impacts. Ideally, compensatory mitigation should be implemented in advance of the action that adversely impacts the species or critical habitat. When this is not possible or practicable, temporal losses to the affected species must be compensated through some means (*e.g.,* increased mitigation ratio that reflects the degree of temporal loss). Temporal loss may include indirect effects of the action on the species that occur beyond the time period of any direct effects of the action (*e.g.,* removal of habitat during a season when individuals of a migratory species are absent). Temporal loss to the species as a result of both direct and indirect adverse effects must be addressed when determining appropriate compensatory mitigation. Losses of habitat that require many years to restore may best be offset by a combination of restored habitat, preservation of existing high-quality habitat, and improved management of existing habitat. The amount of temporal loss, the form of compensatory mitigation (*i.e.,* establishment, enhancement, restoration, preservation, or some combination of these forms), and the time anticipated to establish the compensatory mitigation on the landscape should be used to determine the amount of compensatory mitigation needed to meet the mitigation goal for the species, critical habitat, and/or other resources of concern.

5.6. Ensure Durability

Compensatory mitigation must be secured by adequate legal, real estate, and financial protections that ensure the success of the mitigation. Most compensatory mitigation projects are

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

permanent, and the viability of the assurances to achieve long-term stewardship of a mitigation site must be carefully planned and implemented to ensure durability. A compensatory mitigation measure is ''durable'' when the effectiveness of the measure is sustained for the duration of the associated impacts (including direct and indirect impacts) of the authorized action (600 DM 6.4H).

5.7. Effective Conservation Outcomes and Accountability

The Service has authority to conduct direct oversight of all compensatory mitigation programs and projects for which we have exempted or permitted incidental take under the ESA. A standard condition of HCP incidental take permits provides for such oversight. Incidental take exemptions provided by statute to Federal agencies and applicants through the ESA section 7 process require that mandatory terms and conditions included with the take statement must be implemented by the Federal agency or its applicant to activate the exemption in 7(o)(2) of the Act. Should a mitigation project fail to meet its performance criteria and therefore fail to provide the expected conservation for the species, the responsible party must provide equivalent compensation through other means.

5.8. Encourage Collaboration

Successful landscape-scale compensatory mitigation depends on the engagement of affected communities and stakeholders. Governments, communities, organizations, and individuals support what they help to develop. The Service will provide opportunities for and encourage appropriate stakeholder participation in development of landscape-scale compensatory mitigation strategies that affect listed, proposed, and at-risk species, and proposed and designated critical habitat through appropriate public processes such as those used for programmatic habitat conservation plans (HCPs). Programmatic approaches to compensatory mitigation programs for at-risk species are also encouraged, particularly when led by State agencies, and the Service will make every effort to participate in the planning, establishment, and operation of such programs as described in our draft Policy Regarding Voluntary Prelisting Conservation Actions (79 FR 42525, July 22, 2014). The Service's regional and field offices will determine or assist in determining, as appropriate, the level and methods of public participation using transparent processes.

5.9. Maintain Transparency and Predictability

Consistent implementation of ESA programs that permit or authorize incidental take of listed species will provide regulatory predictability for everyone. The Service will share appropriate information on the availability of compensatory mitigation programs and projects with the public through online media or other appropriate means. Information regarding conservation banks is available on the Regulatory In-lieu fee and Bank Information Tracking System (RIBITS) (*https://ribits.usace.army.mil*). The Service anticipates working with the USACE to update RIBITS so that it may be used for our in-lieu fee programs. Similar information for habitat credit exchanges and other third-party sponsored mitigation projects, or when it is not otherwise possible to use RIBITS, must be made publicly accessible.

6. General Considerations

Specific operational details, in addition to the information provided below in this section, will be in implementation guidance issued by the Service.

6.1. Preferences

The appropriate form of compensatory mitigation (*i.e.,* preservation, restoration, enhancement, establishment, or a combination of some or all of these forms) must be based on the species' needs and the nature of the impacts adversely affecting the species. The Service has the following general preferences related to compensatory mitigation.

6.1.1. Preference for Strategically Sited Compensatory Mitigation

Preference shall be given to compensatory mitigation projects sited within the boundaries of priority conservation areas identified in existing landscape-scale conservation plans as described in the Service's Mitigation Policy (81 FR 83440, November 21, 2016). Priority conservation areas for listed species may be identified in documents such as species status assessments, recovery plans, and/or 5-year reviews.

6.1.2. Preference for Compensatory Mitigation in Advance of Impacts

After following the principles and standards outlined in this policy and all other considerations being equal, preference will be given to compensatory mitigation projects implemented in advance of impacts to the species. Mitigation implemented in advance of impacts reduces risk and uncertainty. Demonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or subsequent to, the impacts of the actions even when that proposal is supplemented with higher mitigation ratios. While conservation banking is by definition mitigation in advance of impacts, other third-party mitigation arrangements and permittee-responsible mitigation may also satisfy this preference by implementing compensatory mitigation in advance of impacts. In-lieu fee programs can also satisfy this preference through a ''jump start'' that achieves and maintains a supply of credits that offer mitigation in advance of impacts.

6.1.3. Preference for Consolidated Compensatory Mitigation

Mitigation mechanisms that consolidate compensatory mitigation on the landscape, such as conservation banks and in-lieu fee programs, are generally preferred to small, disjunct compensatory mitigation sites spread across the landscape. Consolidated mitigation sites generally have several advantages over multiple, small, isolated mitigation sites. These advantages include:

- Avoidance of a piecemeal approach to conservation efforts that often results in small, non-sustainable parcels of habitat scattered throughout the landscape;
- Sites that are usually a component of a landscape-level strategy for conservation of high-value resources;
- Cost effective compensatory mitigation options for small projects, allowing for effective offsetting of the cumulative adverse effects that result from numerous, similar, small actions;
- An increase in public-private partnerships that plan in advance and a landscape-scale approach to mitigation to provide communities with opportunities to conserve highly valued natural resources while still allowing for community development and growth;
- Greater capacity for bringing together financial resources and scientific expertise not practicable for small conservation actions;
- Economies of scale that provide greater resources for design and implementation of compensatory mitigation sites and a decreased unit cost for mitigation;
- Improved administrative and ecological compliance through the use of third-party oversight;

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

• Greater regulatory and financial predictability for project proponents, greatly reducing the uncertainty that often causes project proponents to view compensatory mitigation as a burden; and

• Expedited regulatory compliance processes, particularly for small projects, saving all parties time and money.

6.2. Eligible Lands

6.2.1. Lands Eligible for Use as Compensatory Mitigation

Compensatory mitigation sites may be established by willing parties on private, public, or tribal lands that provide the maximum conservation benefit for the listed, proposed, and at-risk species and other affected resources. Maintaining the same classification of land ownership between the impact area and mitigation site may be important in preventing a long-term net loss in conservation, in particular a reduction in the range of the species. Because most private lands are not permanently protected for conservation and are generally the most vulnerable to development actions, the use of private lands for mitigating impacts to species occurring on any type of land ownership is usually acceptable as long as durability can be ensured. Locating compensatory mitigation on public lands for impacts to species on private lands is also possible, and in some circumstances may best achieve the conservation objectives for species, but should be carefully considered—see section 6.2.2. Use of Public Land to Mitigate Impacts on Private Land for additional guidance.

Good candidates for compensatory mitigation sites are unprotected lands that are high value for conservation and that are acceptable to the Service. Designations of high conservation value may include lands with existing high-value habitat or habitat that when restored, enhanced, established, or properly managed will provide high value to the species. In addition to these general considerations, lands that may be good candidates for compensatory mitigation sites include:

• Lands previously secured through easements or other means but that lack the full complement of protections necessary to conserve the species (*e.g.,* buffer lands for a military installation that do not include management, or private lands with existing conservation easements for which landowners have not received financial compensation from public sources or regulatory assurances from the Service.);

• Lands adjacent to undeveloped, protected public lands such as National Wildlife Refuges or State Wildlife Management Areas;

• Private lands enrolled in programs that provide financial compensation from public sources to landowners in exchange for agreements that protect, restore, or create habitat for federally listed or at-risk species for a limited period of time, such as the Service's Partners for Wildlife Program or some Farm Bill programs (*e.g.,* Environmental Quality Incentives Program) if additional conservation benefits are provided above and beyond the terms and conditions of the agreement or if the agreement/easement has expired; and

• Private lands enrolled in programs that provide regulatory assurances to the landowner such as SHAs or CCAAs that can be transitioned into compensatory mitigation, after all terms and conditions of the agreement have been met and the agreement has expired or the permit is surrendered in exchange for a mitigation instrument (see section 4.2.1. Safe Harbor and Candidate Conservation Agreements for additional guidance).

See section 5.1. *Siting Sustainable Compensatory Mitigation* for other considerations when selecting a site suitable for compensatory mitigation.

Lands that generally do not qualify as compensatory mitigation sites include:

• Lands without clear title unless the existing encumbrances (*e.g.,* liens, rights-of-way) are compatible with the objectives of the mitigation site or can be legally removed or subordinated;

• Split estates (*i.e.,* lands that have separate owners of various surface and subsurface rights, usually mineral rights), unless a remedy can be found (see below for guidance on split estates);

• Private or public lands already designated for conservation purposes, unless the proposed compensatory mitigation project would add additional conservation benefit for the species above and beyond that attainable under the existing land designation;

• Private lands enrolled in government programs that compensate landowners who permanently protect, restore, or create habitat for federally listed or at-risk species (*e.g.,* Wetland Reserve Program easements administered by the United States Department of Agriculture's Natural Resources Conservation Service);

• Inventory and debt restructure properties under the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*); and

• Lands protected or restored for conservation purposes under fee title transfers.

Additional guidance on limitations involving Federal funding and mitigation, including grants, is provided in the Service's Mitigation Policy (81 FR 83440, November 21, 2016).

Lands with split estate ownership and laws and policies governing existing rights (*e.g.,* mining laws) may prevent land protection instruments (*e.g.,* permanent conservation easements) from providing sufficient protection from future development of mineral rights, including oil and gas exploration or development. Many potential high-value conservation properties throughout the United States are split estates. The risk of using split estate properties as compensatory mitigation should be carefully considered. When legal remedies to restore single ownership are not possible or practicable, other approaches to managing the risks may be available to bolster durability on split estates. A mineral deed acquisition, mineral assessment report, or subsurface use agreement are a few of the options for managing mineral rights on compensatory mitigation sites that provide varying levels of protection (Raffini 2012). Service personnel tasked with assessing the viability of split estates as mitigation sites should work with the Service's Realty Specialists and the Department of the Interior Solicitor to assess risks and possible remedies or other approaches.

6.2.2. Use of Public Land To Mitigate Impacts on Private Land

In general, the Service supports compensatory mitigation on public lands that are already designated for the conservation of natural resources to offset impacts to the species on private lands only if additionality is clearly demonstrated and is legally attainable. Additionality is a reasonable expectation that the conservation benefits associated with the compensatory mitigation actions would not occur in the foreseeable future without those actions. Offsetting impacts to private lands by locating compensatory mitigation on public lands already designated for conservation purposes generally risks a long-term net loss in landscape capacity to sustain species (*e.g.,* future reduction in the range of the species) by relying increasingly on public lands to serve conservation purposes. However, we recognize under certain circumstances this offset arrangement may provide the best possible conservation outcome for the species based on best available science. When this is the case, the Service will consider mitigation on

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

public lands to offset impacts to the species on private lands appropriate if:

- Compensatory mitigation is an appropriate means of achieving the mitigation planning goal for the species;
- Additionality can be clearly demonstrated and quantified, and is supplemental to conservation the public agency is foreseeably expected to implement absent the mitigation (only conservation benefits that provide additionality are counted towards achieving the mitigation planning goal);
- Durability of the compensatory mitigation is ensured (see section 6.2.3. Ensuring Durability on Public Lands);
- It is consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies; and
- Private lands suitable for compensatory mitigation are unavailable or are available but cannot provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the species.

When the public lands under consideration for use as compensatory mitigation for impacts on private lands are National Wildlife Refuge (NWR) System lands, the Service's Final Policy on the NWR System and Compensatory Mitigation Under the Section 10/404 Program (USFWS 1999) states that the Regional Director must recommend the mitigation to the Service Director for approval. Additional considerations may apply to NWR System lands for habitat losses authorized through the section 10/404 program (*i.e.,* Rivers and Harbors Act/Clean Water Act).

6.2.3. Ensuring Durability on Public Lands

Ensuring the durability of compensatory mitigation on public lands presents particular challenges, especially regarding site protection assurances, long-term management, and funding assurances for long-term stewardship. Mechanisms available for ensuring durability of land protection for compensatory mitigation on public lands vary from agency to agency, are subject to site-specific limitations, and are likely to be politically and administratively challenging to secure. Some mechanisms may require a legislative act while other mechanisms can be achieved administratively at various levels of an agency's organization.

To ensure the durability of long-term management on public lands, there should be a high degree of confidence that incompatible uses are removed or precluded to ensure that uses of the public lands do not conflict with or compromise the conservation of the species for which the compensatory mitigation project was established.

6.2.4. Transfer of Private Mitigation Lands to Public Agencies

Private mitigation lands may be transferred to public agencies with a conservation mission if allowed by applicable laws, regulations, and policies.

6.2.5. Compensatory Mitigation on Tribal Lands

Tribal lands are generally eligible as compensatory mitigation sites if they meet the standards and other requirements set forth in this policy. Ensuring durability, particularly site protection, is usually a sensitive issue for a tribal nation because a conservation easement entrusts the land to another entity (Terzi 2012), but acceptable entities may be available to hold easements. Additional guidance regarding mitigation and tribes is included in the Service's Mitigation Policy (81 FR 83440, November 21, 2016).

6.3. Service Areas

A service area is the geographic area assigned to a compensatory mitigation site within which credits for a specific resource (*e.g.,* a species) can be utilized. The impacts for which mitigation is sought must be located within the designated service area for the species, unless otherwise approved by the Service. If a proposed action is located within the identified service area of a specific conservation bank, in-lieu fee program, or other third-party mitigation program or site, then the proponent of that action may offset unavoidable impacts, with the Service's approval, through transfer of the appropriate type and number of credits from that mitigation program or site. Use of the credits outside of service areas is subject to approval by the Service. Service areas that apply to all mitigation mechanisms may be designated by the Service's regional or field offices, usually through issuance of species-specific mitigation guidance.

The service area is an important component for a potential mitigation sponsor who will need to evaluate the market for credits prior to committing to a mitigation project. The mitigation sponsor has the responsibility to determine if a proposed mitigation project or program will be financially feasible and if they will move forward with the action.

6.4. Crediting and Debiting

A credit is a defined unit representing the accrual or attainment of ecological functions and/or services at a mitigation site. Credits are often expressed as a measure of surface area (*e.g.,* an acre or hectare), linear distance of constant width (*e.g.,* stream miles), number of individuals or mating pairs of a particular species, habitat function (*e.g.,* habitat suitability index), or other appropriate metric that can be consistently quantified.

Metrics developed to support credits by measuring an increase in ecological functions and services at compensatory mitigation sites and those developed to measure an expected loss or debit in ecological functions and services at impact sites must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species. In general, the method of calculating credits at a mitigation site should be the same as calculating debits at project impact sites. If use of a common ''currency'' between credits and debits is not practicable, the conversion between crediting and debiting metrics must be transparent.

Credits are available for use as mitigation once they are verified and released by the Service. Credits are released in proportion to administrative and ecological milestones. Credits are considered retired if they are no longer available for use as mitigation, including credits that have been transferred to fulfill mitigation obligations. Credits may also be voluntarily retired, without being used for mitigation, which may help achieve no net loss or net conservation benefit goals. Credits are not to be traded among developers or anyone else and cannot be re-sold. Once a credit has been transferred as mitigation for a particular action, it may not be used again.

A mitigation site may contain habitat that is suitable for multiple listed species or other resources in the same spatial area. When this occurs, it is important to establish how the credits will be stacked or bundled and if they can be unstacked and transferred separately. See section 8.3. *Credit Stacking and Bundling* for guidance.

Compensatory mitigation programs that use credits are voluntary, and permittees are never required to purchase credits from these compensatory mitigation sources. Pricing of credits is solely at the discretion of the mitigation provider.

6.5. Timelines

The Service does not have mandated timelines for review of conservation banks, in-lieu fee programs, or other compensatory mitigation projects that are not part of a consultation or permit decision. However, this does not mean

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

that compensatory mitigation programs and projects are not a priority for the Service. Establishment of programmatic compensatory mitigation options for project proponents will provide efficiencies, particularly when developed in coordination with programmatic consultations and HCPs for large landscapes. These efficiencies include reducing the Service's workloads associated with ESA sections 7 and 10, expediting incidental take authorization for project proponents, and achieving better conservation outcomes for listed and other at-risk species.

6.6. Managing Risk and Uncertainty

Compensatory mitigation can be a valuable conservation tool for offsetting unavoidable adverse impacts to listed and at-risk species if the risk can be sufficiently managed. Predictions about the effectiveness of compensatory mitigation measures have varying degrees of uncertainty. Compensatory mitigation accounting systems (*e.g.,* debiting and crediting methodologies) should consider risk and adjust metrics and mitigation ratios to account for uncertainty. An exact accounting of the functions and services lost at the impact sites and gained at the mitigation sites is rarely possible due to the variability and uncertainty inherent in biological systems and ecological processes. To buffer risk and reduce uncertainty, it is often helpful to design compensatory mitigation programs and projects to achieve measures beyond no net loss to attain sufficient conservation benefits for the species. Designing conservation plans with mitigation that is expected to achieve more than no net loss in species conservation generally increases regulatory predictability and can result in shorter project reviews and facilitated permitting.

7. Compensatory Mitigation Mechanisms

Compensatory mitigation mechanisms can be divided broadly into habitat-based mechanisms and other non-habitat-based mitigation programs or projects. Whatever mechanism(s) are selected, compensatory mitigation is expected to provide either equivalent or additional conservation for the species to that lost as a result of the action. Specific operational details regarding compensatory mitigation mechanisms will be in the implementation guidance to be issued by the Service.

7.1. Habitat-Based Compensatory Mitigation Mechanisms

Compensatory mitigation mechanisms based on habitat acquisition and protection may consist of restoration of damaged or degraded habitat, enhancement of existing habitat, establishment of new habitat, preservation of existing habitat not already protected, or some combination of these that offsets the impacts of the action and results in or contributes to sustainable, functioning ecosystems for the species. Preservation of existing habitat often includes a change in land management that renders the site suitable for the species or provides additional ecological function or services for the species. Preservation includes site protection and is a valid mechanism for achieving compensatory mitigation that, at a minimum, reduces threats to the species. Existing habitat that is not protected and managed for the long term is vulnerable to loss and cannot count toward recovery of listed species.

The five habitat-based mitigation mechanisms described below and compared in Table 1 differ by: (1) The party responsible for the success of the mitigation site (the permittee or a third party); (2) whether the mitigation site is within or adjacent to the action area (on-site) or elsewhere (off-site); and (3) whether credits are generated at the mitigation site for use by more than one action. Habitat-based compensatory mitigation will be held to equivalent standards (the standards set forth in this policy) regardless of the mitigation mechanism(s) proposed. Habitat-based compensatory mitigation programs developed to credit conservation actions that benefit unlisted species should meet all compensatory mitigation standards set forth in this policy if they are intended to be used as compensatory mitigation for adverse impacts of actions undertaken after listing.

7.1.1. Permittee-Responsible Compensatory Mitigation

Permittee-responsible compensatory mitigation is a conserved and managed mitigation site that provides ecological functions and services as part of the conservation measures associated with a permittee's proposed action. Permittee-responsible mitigation sites are usually permanent, as most proposed actions with a need for compensatory mitigation are anticipated to result in permanent impacts to the species. The permittee retains responsibility for ensuring the required compensatory mitigation is completed and successful. This includes long-term management and maintenance when the mitigation is intended to be permanent. Permittee-responsible compensatory mitigation may be on-site or off-site, and each permittee-responsible mitigation site is linked to the specific action that required the mitigation. Permittee-responsible mitigation approved for a specific action is not transferable to other actions and cannot be used for other mitigation needs.

7.1.2. Conservation Bank Program

A conservation bank is a site or suite of sites that is conserved and managed in perpetuity and provides ecological functions and services expressed as credits for specified species that are later used to compensate for adverse impacts occurring elsewhere to the same species. Bank sponsors may be public or private entities. Ensuring the required compensatory mitigation measures for a permitted action are completed and successful is the responsibility of the bank sponsor. The responsibility for success of the mitigation is transferred to the bank sponsor through the transfer (usually a purchase by the permittee) of credits. Conservation banks provide mitigation in advance of impacts.

7.1.3. In-Lieu Fee Program

An in-lieu fee site is a conserved and managed compensatory mitigation site established as part of an in-lieu fee program that provides ecological functions and services expressed as credits for specified species and used to compensate for adverse impacts occurring elsewhere to the same species. In-lieu fee sites are usually permanent as most proposed actions with a need for compensatory mitigation are anticipated to result in permanent impacts to the species. In-lieu fee programs may be sponsored by a government agency or an environmental, conservation-based, not-for-profit organization with a mission that is consistent with species or habitat conservation. The in-lieu fee sponsor collects fees from permittees that have been approved by the Service to use the in-lieu fee program, instead of providing permittee-responsible compensatory mitigation. An in-lieu fee site that meets the mitigation requirements for the impacts of permittees' actions will be established when the in-lieu fee program has collected sufficient funds. All responsibility for ensuring the required compensatory mitigation measures are completed and successful, including long-term management and maintenance, is transferred from the permittee to the in-lieu fee program sponsor through the transfer (usually purchase) of credits. In-lieu fee programs generally do not provide mitigation in advance of impacts.

In-lieu fee programs can also be established to fund non-habitat-based compensatory mitigation measures. See

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

section 7.3 *Other Compensatory Mitigation Programs or Projects* for guidance on these types of programs.

7.1.4. Habitat Credit Exchange

Habitat credit exchanges are relatively new and warrant additional care and consideration when being considered as a mitigation mechanism. A habitat credit exchange is an environmental market that operates as a clearinghouse in which an exchange administrator, operating as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and project permittees. This is in contrast to the direct transactions between compensatory mitigation providers and permittees that generally occur through conservation banking and in-lieu fee programs. Exchanges provide ecological functions and services expressed as credits that are conserved and managed for specified species and are used to compensate for adverse impacts occurring elsewhere to the same species. Exchanges may be designed to provide credits for permanent compensatory mitigation sites, short-term compensatory mitigation sites, or both types of sites. Habitat credit exchanges may operate at a local or larger landscape scale, may consist of one or more mitigation sites, and may obtain credits from conservation banks or in-lieu fee programs. Exchange administrators may be public or private entities. Exchanges developed for federally listed species will require Service approval as with all other mitigation mechanisms described in this policy.

TABLE 1—COMPARISON OF HABITAT-BASED COMPENSATORY MITIGATION SITES ESTABLISHED UNDER DIFFERENT MECHANISMS

Mitigation mechanism	Responsible party	Credits generated	Responsibility transferable
Permittee-responsible Mitigation Site	Permittee	No	No.
Conservation Bank	Bank Sponsor	Yes	Yes.
In-lieu Fee Program Site	In-lieu Fee Sponsor	Yes	Yes.
Habitat Credit Exchange Site	Exchange Administrator, Mitigation Sponsor, or other identified responsible entity.	Yes	Yes.

7.2. Short-Term Compensatory Mitigation

The concept of short-term compensatory mitigation has merit if it serves the conservation goals of the species. Short-term compensatory mitigation may be appropriate in some situations to offset impacts that can be completely rectified by repairing, rehabilitating, or restoring the affected environment within a short and predictable timeframe. Under this policy, short-term compensatory mitigation includes rectifying the damage at the impact site and providing short-term compensation to offset the temporal loss caused by the action to achieve a conservation outcome that results in, at a minimum, no net loss to the species.

A short-term impact is defined in this policy as an action that meets the following criteria: (1) The impact is limited to harassment or other forms of nonlethal take; (2) the impact can be completely rectified through natural or active processes, and the site will function long term within the landscape at the same or greater level than before the impact; (3) restoration of the impact site can occur within a short and predictable timeframe based on current science and the knowledge of the species; and (4) all temporal loss to the species by the impact can be estimated and compensated. Opportunities for short-term compensation are likely to be very limited and may not apply to most species.

Inherent in applying short-term compensatory mitigation is the recovery of the affected species' populations to pre-disturbance levels and any additional increase in population levels that was anticipated to occur if the action had not taken place (*i.e.,* adjusted for temporal loss). Determining the amount and duration of compensatory mitigation needed requires substantial knowledge of the biology of the species (*e.g.,* abundance, distribution, fecundity). Actions that meet the criteria for short-term impacts are not limited to short-term compensatory mitigation as a mitigation option. The Service prefers mitigation mechanisms that protect conservation values in perpetuity. Permanent compensatory mitigation either at the same or a reduced mitigation ratio (determined by the Service) is usually an alternative. Conservation banks or in-lieu fee programs with available credits that meet the compensatory mitigation needs for actions with short-term impacts are usually a good alternative to short-term compensatory mitigation.

7.3. Other Compensatory Mitigation Programs or Projects

Compensatory mitigation is based on the concept of replacing or providing substitute resources or environments for the impacted resource (40 CFR 1508.20). However, mechanisms or conservation measures that do not exactly meet this definition, but that meet the conservation objectives for the specified species and are expected to compensate for adverse effects to species or their habitats, may be suitable as compensatory mitigation. These types of compensatory mitigation measures are acceptable if they are closely tied to recovery actions identified in species status assessments, recovery plans, 5-year reviews, or best available science on the threats and needs of the species. Compensatory mitigation of this type is often funded through an in-lieu fee program. Examples of potentially suitable compensatory measures include, but are not limited to:

a. Transfer and retirement of timber, water, mineral, or other severed rights to an already existing conservation site, thereby significantly reducing or eliminating the risk of future development on the site that would be incompatible with conservation of the species;

b. Restricting human use of waterways or other public spaces through legal means to allow for increased or exclusive use by the species;

c. Controlled propagation, population augmentation, and reintroduction of individuals of the species to offset losses from an action;

d. Captive rearing and release of individuals of the species to offset losses from an action;

e. Administering vaccination programs vital to species survival and recovery;

f. Gating of caves that serve as habitat for the species;

g. Construction of wildlife overpasses or underpasses to protect migratory passages for the species; and/or

h. Programs that reduce the exposure of the species to contaminants in the

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

environment that are known to cause injury or mortality.

In rare circumstances, research or education that can be linked directly to the relative threats to the species and provide a quantifiable benefit to the species may be included as part of a mitigation package. Although research can assist in identifying substitute resources, it does not replace impacted resources or adequately compensate for adverse effects to species or habitat. See the Service's Mitigation Policy (81 FR 83440, November 21, 2016) for additional guidance on appropriate uses of research or education as mitigation.

8. Criteria for Use of Third-Party Mitigation

Specific operational details regarding the use of third-party mitigation will be in the implementation guidance to be issued by the Service.

8.1. Project Applicability

Activities regulated under sections 7 or 10 of the ESA may be eligible to use third-party sponsored mitigation, if the adverse impacts to the species from the particular project can be offset by transfer of the appropriate type and number of credits provided by the third-party sponsored mitigation program. The impacts for which third-party sponsored mitigation is sought must be located within the service area for the species provided by the third-party sponsored mitigation program unless otherwise approved by the Service. In no case may the same credit(s) be used to compensate for more than one action. However, the same credit(s) may be used to compensate for a single action that requires authorization under more than one regulatory authority (*e.g.,* a vernal pool restoration credit that provides mitigation for a listed species under the ESA and wetlands under section 404 of the CWA).

Only credits that have been verified by the Service and released are considered available. Only available credits can be used to mitigate actions.

8.2. Transfer of Responsibility

The mitigation sponsor assumes responsibility for success of the mitigation through the transfer (usually a purchase by the permittee) of credits or other quantified amount of compensatory mitigation.

The Service's role is regulatory. Credit transfers are subject to approval by the Service, as to their conservation value and appropriate application for use related to any authorization or permit issued under the ESA. Market and legal risks arising from the purchase and use of mitigation credits are borne solely by the parties to the sale of such credits.

8.3. Credit Stacking and Bundling

The Service recognizes the inherent efficiencies in leveraging multiple conservation efforts on the landscape and encourages these coordinated efforts. However, compensatory mitigation and other conservation actions that occur on the same mitigation site must be accounted for separately, and all aspects of the different actions must be managed and tracked in a transparent manner. Stacking mitigation credits within a mitigation site (*i.e.,* more than one credit type on spatially overlapping areas) is allowed, but the stacked credits cannot be used to provide mitigation for more than one permitted impact action even if all the resources included in the stacked credit are not needed for that action. To do so would result in a net loss of resources in most cases because using a species credit separately from the functions and services that accompany its habitat, such as carbon sequestration or pollination services, would result in double counting (*i.e.,* ''double dipping''). Double counting is selling or using a unit of the same ecosystem function or service on the ground more than once. This can occur through an accounting error in which the credit is sold twice, and it also can occur when stacked credits are unstacked and one or more functions or services are sold separately. For example, a credit representing an acre of habitat is sold once as a species habitat credit for a permitted action and again as a carbon credit for a different action in a different location. The loss of species habitat at the first impact site included all functions and services associated with that habitat including carbon sequestration, so selling that same unit of compensatory mitigation again for carbon sequestration results in no carbon offset for the loss of carbon sequestration at the second impact location. Using a stacked credit separately to reflect its various values is an ecologically challenging accounting exercise.

Compensatory mitigation projects may be designed to holistically address requirements under multiple programs and authorities for the same action and may use bundled credits to accomplish this goal. For example, a stream credit may satisfy requirements for an U.S. Army Corps of Engineers section 404 CWA permit and issuance of incidental take authority under the ESA for a listed mussel species occurring in that stream, or a county-wide HCP may establish an in-lieu fee program for which a single fee is collected from project applicants for a permit which covers multiple mitigation obligations under Federal, State, and local authorities. In both these examples, the bundled credit is used as a single commodity (*i.e.,* it is not unbundled or unstacked) and is only used once.

8.4. Use of Credits for Mitigation Under Authorities Other Than the ESA

Compensatory mitigation projects established for use under one Service program (*e.g.,* Ecological Services) may also be used to satisfy the environmental requirements of other Service programs (*e.g.,* Migratory Birds or Refuges) or other Federal, State, or local agency programs consistent with the laws and requirements of each respective program. However, the same credits may not be used for more than one authorized or permitted action (*i.e.,* no double counting of mitigation credits).

9. Compliance and Tracking

A tracking system is essential in ensuring compliance with the mitigation instruments used to implement compensatory mitigation programs described in this policy. Tracking systems also facilitate consistency in the implementation of compensatory mitigation programs and projects. It is vital that the Service track compliance directly for permittee-responsible mitigation and, at a minimum, through third parties responsible for operating compensatory mitigation programs or projects such as in-lieu fee programs and habitat exchanges. Transactions (credit withdrawals) at a Service authorized mitigation program or project that are not related to ESA compliance and are not approved by the Service must be tracked in the same tracking system. The Service is not liable for any event or transaction that eludes detection through the Service's tracking function. Specific operational details regarding compliance and tracking will be in the implementation guidance to be issued by the Service.

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Appendix A: List of Acronyms and Abbreviations Used in This Policy

CCAA—Candidate conservation agreement with assurances
CEQ—Council on Environmental Quality
CFR—Code of Federal Regulations
CWA—Clean Water Act
EPA—Environmental Protection Agency
ESA—Endangered Species Act
FWCA—Fish and Wildlife Coordination Act
HCP—Habitat conservation plan
MMPA—Marine Mammal Protection Act
NEPA—National Environmental Policy Act
NWR—National Wildlife Refuge
RPA—Reasonable and prudent alternative
RPM—Reasonable and prudent measure
RIBITS—Regulatory In-lieu fee and Bank Information Tracking System
SHA—Safe harbor agreement
USACE—United States Army Corps of Engineers
USFWS—United States Fish and Wildlife Service

Appendix B: Glossary of Terms Related to Compensatory Mitigation

Definitions in this section apply to the implementation of the U.S. Fish and Wildlife Service (Service) Endangered Species Act Compensatory Mitigation Policy and were developed to provide clarity and consistency. Some definitions are defined in Service authorities such as the Endangered Species Act or the National Environmental Policy Act, or in regulations or policies existing at the time this policy was issued. Other definitions have been developed based on compensatory mitigation practices. Definitions in the glossary do not substitute for statutory or regulatory definitions in the exercise of those authorities.

Action—an activity or program implemented, authorized, or funded, in whole or in part, by Federal agencies; or a non-Federal activity or program for which one or more of the Service's authorities apply to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning (81 FR 83440; November 21, 2016).

Action area—all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR 402.02).

Adaptive management—a systematic approach for improving resource management by learning from management outcomes. An adaptive approach involves exploring alternative ways to meet management objectives, predicting the outcomes of alternatives based on the current state of knowledge, implementing one or more of these alternatives, monitoring to learn about the impacts of management actions, and then using the results to update knowledge and adjust management actions. Adaptive management focuses on learning and adapting, through partnerships of managers, scientists, and other stakeholders who learn together how to create and maintain sustainable resource systems (Williams et al. 2009). As applied to compensatory mitigation, it is a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of activities to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to achieve stated biological goals. It includes the selection of appropriate measures that will ensure that the resource functions and services are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems (modified from 33 CFR 332.2).

Additionality—conservation benefits of a compensatory mitigation measure that improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure (600 DM 6.4G).

Additive impacts, additive effects—the combined effects of past actions on a species, other resource, or community; impacts of an action may be relatively insignificant on their own, but when considered with the impacts from other actions as they accumulate over time collectively lead to significant overall loss or degradation of resources. See also ''*cumulative effects.*''

Applicant—any person who requires formal approval or authorization from a Federal agency as a prerequisite to conducting an action (50 CFR 402.02); ''person'' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States (16 U.S.C. 1532(13)).

At-risk species—candidate species and other unlisted species that are declining and are at risk of becoming a candidate for listing under the Endangered Species Act. This may include, but is not limited to, State listed species, species identified by States as species of greatest conservation need, or species with State heritage ranks of G1 or G2.

Avoidance—avoiding the impact altogether by not taking a certain action or parts of an action (40 CFR 1508.20).

Bank Sponsor—any public or private entity responsible for establishing and, in most circumstances, operating a conservation bank. Bank sponsors are most often private individuals, companies, or Limited Liability Corporations, but they may also be nongovernmental organizations, Tribes, or government agencies. See also ''*mitigation sponsor.*''

Baseline—the pre-existing condition of a defined area of habitat or a species population that can be quantified by an appropriate metric to determine level of functions and/or services and re-measured at a later time to determine if the same area of habitat or species population has increased, decreased, or maintained the same level of functions and/or services.

Candidate conservation agreement with assurances (CCAA)—a formal agreement between the Service or the National Marine Fisheries Service and one or more non-Federal parties who voluntarily agree to manage their lands or waters to remove threats to candidate or proposed species and in exchange receive assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agreed to at the time they entered into the agreement. The management activities included in the agreement must significantly contribute to elimination of the need to list the target species when considered in conjunction with other landowners conducting similar management activities within the range of the species (USFWS CCAA Policy).

Candidate species (candidate)—any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule (50 CFR 424.02); a species for which the Service or the National Marine Fisheries Service has on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

threatened under the Endangered Species Act.

Compensatory mitigation (compensation)—compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C).

Compensatory mitigation project—compensatory mitigation implemented by the action agency, a permittee, or a mitigation sponsor. Compensatory mitigation projects include permittee-responsible mitigation, conservation banks, in lieu fee programs and sites, habitat credit exchanges, and other third-party compensatory mitigation projects.

Conservation, conserve, conserving—to use and the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Endangered Species Act are no longer necessary (16 U.S.C. 1532(3)).

Conservation bank—a site, or suite of sites, that is conserved and managed in perpetuity and provides ecological functions and services expressed as credits for specified species that are later used to compensate for impacts occurring elsewhere to the same species.

Conservation easement—a recorded legal document established to conserve biological resources for a specified duration, usually in perpetuity, on a identified conservation property and which restricts certain activities and requires certain habitat management obligations for the conservation property.

Conservation measures (conservation actions)—measures pledged in the project description that the Federal agency or applicant will implement to minimize, rectify, reduce, and/or compensate for the adverse impacts of the development project on the species. Conservation measures designed to compensate for unavoidable impacts may include the restoration, enhancement, establishment, and/or preservation of species habitat or other measures conducted for the purpose of offsetting adverse impacts to the species. Upon issuance of a permit, license or other such authorization associated with the proposed project, implementation of that project requires implementation of the conservation measures as well as any other terms and conditions of the permit.

Conservation objective—a measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain the species (81 FR 83440; November 21, 2016).

Conservation plan (species conservation plan)—a plan developed by Federal, State, and/or local government agencies, Tribes, or appropriate nongovernmental organizations, in consultation with relevant stakeholders, for the specific goal of conserving one or more listed or at-risk species. A conservation plan is developed using a landscape-scale approach and addresses the status of, needs of, and threats to the species, and usually includes recommended conservation measures for the conservation/recovery of the species. Examples of species conservation plans include species conservation frameworks, rangewide conservation plans, and conservation plans developed as part of a large landscape habitat conservation plan.

Covered species—species specifically included in a conservation bank, habitat conservation plan, safe harbor agreement, candidate conservation agreement with assurances, rangewide conservation plan, or other such conservation plan for which a commitment is made to achieve specific conservation measures for the species.

Credit (species credit, habitat credit)—a defined unit representing the accrual or attainment of ecological functions and/or services for a species at a mitigation site or within a mitigation program.

Credit bundling—allowing a single unit of a mitigation site to provide compensation for two or more spatially overlapping ecosystem functions or services that are grouped together into a single credit type and used as a single commodity to compensate for a single permitted action. A bundled credit may be used to compensate for all or a subset of the functions or services included in the credit type but may only be used once, even if all functions and services represented in the credit type were not required for the permitted action. See also ''*credit stacking*.''

Credit reserve account—credits set aside in reserve to offset force majeure or other unforeseen events as agreed to by the Service, allowing a mitigation program to continue uninterrupted.

Credit stacking—allowing a single unit of a mitigation site to provide two or more credit types representing spatially overlapping ecosystem functions or services which can be unstacked and used as separate commodities to compensate for different permitted actions. Credit stacking can result in double counting (*i.e.,* a net loss of resources on the landscape) if the same functions or services are not also accounted for separately at all impact sites. See also ''*credit bundling*'' and ''*double-counting*.''

Credit transfer—the use, sale, or conveyance of credits by a bank sponsor or mitigation provider to a permittee or other entity for the purposes of offsetting impacts of an action.

Critical habitat—specific areas within the geographical area occupied by the species at the time it is listed as endangered or threatened under the Endangered Species Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed, which are determined by the Secretary of the Department of the Interior to be areas essential for the conservation of the species (16 U.S.C. 1532(5)(A)).

Cumulative effects—those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation under the Endangered Species Act (50 CFR 402.14(g)(3)). Under the National Environmental Policy Act, cumulative effects are defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions (40 CFR 1508.7).

Debit—a defined unit representing the loss of ecological functions and/or services for a species at an impact site. Debits should be expressed using the same metrics used to value credits at mitigation sites.

Direct effects—those effects to the species or other resource that are caused by the action and occur at the same time and place (81 FR 83440; November 21, 2016).

Double-counting (double-dipping)—using a credit, however defined, representing the same unit of ecosystem function or service on a mitigation site more than once. This is not allowed.

Durability—the condition or state in which the measurable environment benefits of the compensatory mitigation project or measure are sustained, at a minimum, for the duration of the associated impacts (including direct and indirect impacts) of the authorized action. To be durable, mitigation measures effectively compensate for remaining unavoidable impacts that warrant compensatory mitigation; use long-term administrative and legal provisions to prevent actions that are incompatible with the measure; and employ financial instruments to ensure the availability of sufficient funding for the measure's long-term monitoring, site protection, and management (600 DM 6.4G).

Effects (effects of the action)—changes in the environmental conditions caused by an action that are relevant to the species or other resources (81 FR 83440; November 21, 2016), including the direct, indirect, and cumulative effects of the action on the species and other activities that are interrelated to, or interdependent with, that action as defined at 50 CFR 402.02. See also ''*cumulative effects*.''

Endangered species—any species which is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)).

Endowment—as used in this policy, funds that are conveyed solely for the long-term stewardship of a mitigation property and are permanently restricted to paying the costs of management and stewardship of that property. The management of endowment funds is generally governed by State and Federal laws, as applicable. Endowments do not include funds conveyed for meeting short-term performance objectives of a mitigation project.

Enhancement—activities conducted in existing habitat of the species that improve one or more ecological functions or services for that species, or otherwise provide added

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

benefit to the species and do not negatively affect other resources of concern. Compare with ''*restoration.*''

Establishment—construction of habitat of a type that did not previously exist on a mitigation site but which will provide a benefit to the species and does not negatively affect other resources of concern. Compare with ''*restoration.*''

Fee title (fee)—an interest in land that is the most complete and absolute ownership in land; it is of indefinite duration, freely transferable, and inheritable.

Functions—the physical, chemical, and biological processes that occur in ecosystems (33 CFR 332.2); functions are the ecological processes necessary for meeting species' habitat and lifecycle needs.

Habitat—an area with spatially identifiable physical, chemical, and biological attributes that supports one or more life-history processes for the species (81 FR 83440; November 21, 2016).

Habitat conservation plan (HCP)—a planning document that describes the anticipated effects of a proposed activity on the taking of federally listed species, how those impacts will be minimized and mitigated, and how the plan will be funded (16 U.S.C. 1539). The HCP is required as part of an incidental take permit application to the Service or the National Marine Fisheries Service (see ''*incidental take*'').

Habitat credit exchange (habitat credit exchange program)—a market-based system that operates as a clearinghouse in which an exchange administrator, acting as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and permittees or others authorized to implement actions that adversely affect protected species.

Impact(s) (of an action)—adverse effects relative to the affected resources (81 FR 83440; November 21, 2016). More specifically under this policy, adverse effects on the species or its habitat anticipated in a proposed action or resulting from an authorized or permitted action.

Incidental take—take of any endangered or threatened species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or an applicant (50 CFR 402.02). Incidental take may be authorized for endangered or threatened species through section 7 or 10, or for threatened species, through a rule codified under section 4(d) of the Endangered Species Act. (See also, ''*take.*'')

Indirect effects—those effects to the species that are caused by the action at a later time or another place, but are reasonably certain to occur (50 CFR 402.02).

In-kind—a resource of a similar structural and functional type to the impacted resource (33 CFR 332.2); when used in reference to a species, in-kind means the same species.

In-lieu fee program—a program involving the restoration, establishment, enhancement, and/or preservation of habitat through funds paid to a governmental or nonprofit natural resources management entity to satisfy compensatory mitigation requirements for impacts to specified species or habitat (modified from 33 CFR 332.2).

In-lieu fee program sponsor—any government agency or nonprofit natural resources management organization responsible for establishing, and in most circumstances, operating an in-lieu fee program. See also, ''*sponsor.*''

In-lieu fee site—a compensatory mitigation site established under an approved in-lieu fee program.

Landscape—an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context (600 DM 6D).

Landscape-scale approach—an approach to conservation planning that applies the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however narrow or broad, necessary to sustain, or otherwise achieve established goals for those resources and their values, services, and functions. A landscape-scale approach should be used when developing and approving strategies or plans, reviewing projects, or issuing permits. The approach identifies the needs and baseline conditions of targeted resources and their values, services and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources and their values, services, and functions, with full consideration of the conditions of additionality and durability (600 DM 6E).

Listed species—any species or subspecies of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Endangered Species Act (50 CFR 402.02). Listed species are found at 50 CFR 17.11 and 17.12.

Management plan—the stewardship plan prepared to instruct the land manager in the operations and biological management for the compensatory mitigation site to, at a minimum, maintain the functions and services for specified species and other resources on the mitigation site. These are generally long-term plans that include a detailed estimate of the itemized costs for all management actions required by the plan. These annual costs are used to estimate the size of the endowment that will be needed to maintain and monitor the mitigation site for the intended duration.

Mitigation (mitigation hierarchy, mitigation sequence)—as defined and codified in the Council on Environmental Quality (CEQ) National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) regulations (40 CFR 1508.20), mitigation includes:

- Avoid the impact altogether by not taking the action or parts of the action;
- Minimize the impact by limiting the degree or magnitude of the action and its implementation;
- Rectify the impact by repairing, rehabilitating, or restoring the affected environment;
- Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; and
- Compensate for the impact by replacing or providing substitute resources or environments.

This sequence is often condensed to: Avoidance, minimization, and compensation.

Mitigation ratio—the relationship between the amount of the compensatory offset for, and the impacts to, the species, habitat for the species, or other resource of concern.

Mitigation sponsor (mitigation project sponsor, sponsor, mitigation provider)—any public or private entity responsible for establishing, and in most circumstances, operating a compensatory mitigation program or project such as a conservation bank, in-lieu fee program, or habitat credit exchange (modified from 33 CFR 332.2).

Off-site—a mitigation area that is located neither on nor adjacent to the same parcel of land as the impact site (33 CFR 332.2).

On-site—a mitigation site located on or adjacent to the same parcel of land as the impact site (33 CFR 332.2).

Performance criteria—observable or measurable administrative and ecological (physical, chemical, or biological) attributes that are used to determine if a compensatory mitigation project meets the agreed upon conservation objectives identified in a mitigation instrument or the conservation measures proposed as part of a permitted or otherwise authorized action.

Permittee—any person who receives formal approval or authorization, generally in the form of a permit or license, from a Federal agency to conduct an action. See also, ''*applicant.*''

Permittee-responsible mitigation—activities or projects undertaken by a permittee or an authorized agent or contractor to provide compensatory mitigation for which the permittee retains full responsibility. As used in this policy, permittee-responsible mitigation also includes compensatory mitigation undertaken by Federal agencies to offset impacts resulting from actions carried out directly by the Federal agency.

Perpetuity—endless or infinitely long duration or existence; permanent.

Practicable—available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale (81 FR 83440; November 21, 2016).

Preservation—the protection and management of existing resources for the species that would not otherwise be protected through removal of a threat to, or preventing the decline of, the resources to compensate for the loss of the same species or resources elsewhere.

Proponent (project proponent)—the agency proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action (81 FR 83440; November 21, 2016). For purposes of this policy, any person, organization, or agency advocating a development proposal that is anticipated to result in adverse impacts to one or more listed or at-risk species. See also, ''*applicant*'' and ''*permittee.*''

17-01174_017006;17-01174_017006;17-01174_017007;17-01174_017008;17-01174_017009;17-01174_017010;1...

Resources (resources of concern)—fish, wildlife, plants, and their habitats for which the Service has authority to recommend or require the mitigation of impacts resulting from proposed actions (81 FR 83440; November 21, 2016) .

Restoration—repairing or rehabilitating habitat for the benefit of the species on a mitigation site with the goal of returning it to its natural/historic habitat type with the same or similar functions where they have ceased to exist, or exist in a substantially degraded state.

Retired credit—a credit that is no longer available for use as mitigation. Credits that have been sold or otherwise used to fulfill a mitigation obligation are considered retired. Credits may also be voluntarily retired or forfeited, without being used for mitigation.

Safe harbor agreement (SHA)—formal agreement between the Service or National Marine Fisheries Service and one or more non-Federal property owners in which property owners voluntarily manage for listed species for an agreed amount of time providing a net conservation benefit to the species and, in return, receive assurances from the Service or National Marine Fisheries Service that no additional future regulatory restrictions will be imposed (USFWS Safe Harbor Policy). Under the Safe Harbor Policy, ''net conservation benefit'' is defined as contributing to the recovery of the listed species covered by the SHA.

Service area—the geographic area within which impacts to the species or other resources of concern can be mitigated at a specific compensatory mitigation site.

Species—the term ''species'' includes any species, subspecies of fish, or wildlife, or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)).

Take—means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect a federally listed species, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). ''Take'' applies only to fish and wildlife, not plants.

Temporal loss—the cumulative loss of functions and/or services relevant to the species attributed to the time between the loss of habitat functions and/or services or individuals of the population(s) caused by the action and the replacement of habitat functions and/or services or repopulation of the species at the compensatory mitigation site to the same level had the action not occurred.

Threatened species—any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)).

Unavoidable impact—an impact for which an appropriate and practicable alternative to the proposed action that would not cause the impact is not available (81 FR 83440; November 21, 2016).

Determinations Under Other Authorities

As mentioned above, we intend to apply this policy when considering the adequacy of compensatory mitigation programs, projects, and measures proposed by Federal agencies and applicants as part of a proposed action and mitigation sponsors. Below we discuss compliance with several Executive Orders and statutes as they pertain to this policy.

National Environmental Policy Act (NEPA)

We have analyzed this policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). Based on comments received, we determined that a categorical exclusion can apply to this policy; nevertheless, the Service chose to prepare an environmental assessment (EA) to inform decision makers and the public regarding the possible effects of the policy revisions.

We announced our intent to prepare an EA pursuant to NEPA when we published the draft policy. We requested comments on the scope of the NEPA review, information regarding important environmental issues that should be addressed, the alternatives to be analyzed, and issues that should be addressed at the programmatic stage in order to inform the site-specific stage during the comment period on the draft policy. Comments from the public were considered in the drafting of the final EA. The final EA is available on the Internet at *http://www.regulations.gov* under Docket Number FWS–HQ–ES–2015–0165.

Paperwork Reduction Act of 1995

This final policy does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has reviewed and approved the information collection requirements for applications for incidental take permits, annual reports, and notifications of incidental take for native endangered and threatened species for safe harbor agreements, candidate conservation agreements with assurances, and habitat conservation plans under OMB Control Number 1018–0094, which expires on January 31, 2017. We are currently in the process of seeking renewal for OMB Control Number 1018–0094. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior Manual at 512 DM 2, we have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of issuing this policy. Our intent with the policy is to provide a consistent approach to the consideration of compensatory mitigation programs, projects, and measures, including those taken on Tribal lands. We will work with Tribes as applicants proposing compensatory mitigation as part of proposed actions and with Tribes as mitigation sponsors.

Authority: The authorities for this action include the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Dated: December 15, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–30929 Filed 12–23–16; 8:45 am]

BILLING CODE 4333–15–P

To: Douglas Domenech[douglas_domenech@ios.doi.gov]
From: Jorjani, Daniel
Sent: 2017-03-14T16:29:10-04:00
Importance: Normal
Subject: Fwd: Mitigation Policy
Received: 2017-03-14T16:30:09-04:00
FWS Mitigation Policy.pdf
ESA Compensatory Mitigation Policy.pdf

2 items for you -
---------- Forwarded message ----------
From: **Frazer, Gary** <gary_frazer@fws.gov>
Date: Tue, Mar 14, 2017 at 4:19 PM
Subject: Re: Mitigation Policy
To: "Jorjani, Daniel" <daniel_jorjani@ios.doi.gov>
Cc: "Foster, Maureen" <maureen_foster@ios.doi.gov>, Virginia Johnson <virginia_johnson@ios.doi.gov>, Casey Hammond <casey_hammond@ios.doi.gov>, Jim Kurth <jim_kurth@fws.gov>, "Navaro, Ann" <ann.navaro@sol.doi.gov>

Dan -- Here you go. And FYI, I also sent these both to Jim Cason a couple weeks ago, at his request. Let me know if you have any questions or want to discuss further.
I'll pass on your question about an MBTA stepdown to Jerome Ford. -- GDF

Gary Frazer
Assistant Director -- Ecological Services
U.S. Fish and Wildlife Service
(202) 208-4646

On Tue, Mar 14, 2017 at 1:02 PM, Jorjani, Daniel <daniel_jorjani@ios.doi.gov> wrote:

> Gary -
> When you have a chance, please send me a copy of - or link to - the overarching FWS Mitigation Policy, first established in 1981 and for which revisions were finalized in November of last year. It is the one that applies to all FWS program areas that are engaged in mitigation in some way.
>
> If possible, please also send the ESA Compensatory Mitigation Policy, which updates the 2003 conservation banking guidance and provides policy direction to ensure that all forms of mitigation considered under the ESA are held to equivalent standards. I understand that there is not MBTA stepdown to date, but would welcome learning more about that possibility.
>
> No rush on any of this and I hope you get a chance to enjoy the snow.
>
> Best wishes,
>
> Dan

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2015–0126; FXHC11220900000–156–FF09E33000]

U.S. Fish and Wildlife Service Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of final policy.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce revisions to our Mitigation Policy, which has guided Service recommendations on mitigating the adverse impacts of land and water developments on fish, wildlife, plants, and their habitats since 1981. The revisions are motivated by changes in conservation challenges and practices since 1981, including accelerating loss of habitats, effects of climate change, and advances in conservation science. The revised Policy provides a framework for applying a landscape-scale approach to achieve, through application of the mitigation hierarchy, a net gain in conservation outcomes, or at a minimum, no net loss of resources and their values, services, and functions resulting from proposed actions. The primary intent of the Policy is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales.

DATES: This Policy is effective on November 21, 2016.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this Policy, including an environmental assessment, are available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803, telephone 703–358–2442.

SUPPLEMENTARY INFORMATION: The revised Policy integrates all authorities that allow the Service either to recommend or to require mitigation of impacts to Federal trust fish and wildlife resources, and other resources identified in statute, during development processes. It is intended to serve as a single umbrella policy under which the Service may issue more detailed policies or guidance documents covering specific activities in the future. Citations for the many statutes and other authorities referenced in this document are in Appendix A.

Background

The primary intent of revising the 1981 Mitigation Policy (1981 Policy) is to apply mitigation in a strategic manner that ensures an effective linkage with conservation strategies at appropriate landscape scales, consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013), and the Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015). Within this context, our revisions of the 1981 Policy: (a) Clarify that this Policy addresses all resources for which the Service has authorities to recommend mitigation for impacts to resources; and (b) provide an updated framework for applying mitigation measures that will maximize their effectiveness at multiple geographic scales.

By memorandum, the President directed all Federal agencies that manage natural resources to avoid and minimize damage to natural resources and to effectively offset remaining impacts, consistent with the principles declared in the memorandum and existing statutory authority. Under the memorandum, all Federal mitigation policies shall clearly set a net benefit goal or, at minimum, a no net loss goal for natural resources, wherever doing so is allowed by existing statutory authority and is consistent with agency mission and established natural resource objectives. This Policy implements the President's directions for the Service.

Secretarial Order 3330 established a Department-wide mitigation strategy to ensure consistency and efficiency in the review and permitting of infrastructure development projects and in conserving natural and cultural resources. The Order charged the Department's Energy and Climate Change Task Force with developing a report that addresses how to best implement consistent, Department-wide mitigation practices and strategies. The report of the Task Force, ''A Strategy for Improving the Mitigation Policies and Practices of the Department of the Interior'' (April 2014), describes guiding principles for mitigation to improve process efficiency, including the use of landscape-scale approaches rather than project-by-project or single-resource mitigation approaches. This revision of the Service's Mitigation Policy complies with a deliverable identified in the Strategy that seeks to implement the guiding principles set forth in the Secretary's Order, the corresponding Strategy, and subsequent 600 DM 6.

In 600 DM 6, the Department of the Interior established policy intended to improve permitting processes and help achieve beneficial outcomes for project proponents, affected communities, and the environment. By implementing this Manual Chapter, the Department will:

(a) Effectively mitigate impacts to Department-managed resources and their values, services, and functions;

(b) provide project developers with added predictability and efficient and timely environmental reviews;

(c) improve the resilience of resources in the face of climate change;

(d) encourage strategic conservation investments in lands and other resources; increase compensatory mitigation effectiveness, durability, transparency, and consistency; and

(e) better utilize mitigation measures to help achieve Departmental goals.

The final Policy implements the Department's directions for the Service. As with the 1981 Policy, the Service intends, with this revision, to conserve, protect, and enhance fish, wildlife, plants, and their habitats for future generations. Effective mitigation is a powerful tool for furthering this mission.

Changes From the Draft Policy

This final Policy differs from the proposed revised Policy in a few substantive respects, which we list below, and contains many editorial changes in response to comments we received that requested greater clarity of expression regarding various aspects of the Policy purpose, authorities, scope, general principles, framework for formulating mitigation measures, and definitions. The most common editorial change to the final Policy addresses the concern that the proposed revised Policy was unclear regarding the Service's authorities to either recommend or require mitigation. The proposed revised Policy frequently used the phrase ''recommend or require'' as a general descriptor for Service-formulated mitigation measures, because we have authority to require mitigation in some contexts, but not in others. The final Policy adds new text to the Authority section that identifies those circumstances under which we have specific authority to require, consistent with other applicable laws and regulations, one or more forms of

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

mitigation for impacts to fish and wildlife resources.

This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation, but the Policy cannot and does not alter or substitute for the regulations implementing any of our authorities. We summarize below the few substantive changes to the proposed revised Policy, listed by section.

In section 4 of the Policy, General Policy and Principles, we added a principle to emphasize the importance of the avoidance tier of the mitigation hierarchy. This new principle reinforces existing direction in the proposed revised Policy that Service staff will recommend avoidance of all impacts to high-value habitats as the only effective means of mitigating impacts at these locations.

In section 5.5, Habitat Valuation, we clarify that habitats of ''high-value'' to an evaluation species are scarce and of high suitability and high importance. As with the proposed revised Policy, the final Policy directs Service personnel to seek avoidance of all impacts to high-value habitats.

In section 5.6.3, Compensation, we added a paragraph that describes onsite compensation and distinguishes it from rectifying impacts. We added another paragraph that indicates how third parties may assume the responsibilities for implementing proponent-responsible compensation. Other revisions to this section are editorial in nature, intended to better communicate Service intentions about the use of compensation in mitigating impacts to species. These revisions include reorganizing material into new subsections at 5.6.3.1, Equivalent Standards, and at 5.6.3.2, Research and Education.

In section 6, Definitions, we added definitions for ''baseline'' and ''habitat credit exchange'' and modified the definition of ''practicable.''

In Appendix A, Authorities and Direction for Service Mitigation Recommendations, we updated the listed authorities, regulations, and guidance documents where necessary. To better reflect their relationship with this Policy and to respond to comments received, we have modified the discussions of the Bald and Golden Eagle Protection Act, Clean Water Act, Fish and Wildlife Conservation Act, Marine Mammal Protection Act, Migratory Bird Treaty Act, and Natural Resource Damage Assessment and Restoration processes.

We made clarifying edits and additions to Appendix C, Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service. We added a sentence in the first paragraph recognizing that the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as a match in the National Coastal Wetlands Conservation Program. In part B, we added ''the proposed use of mitigation funds on land acquired with Federal financial assistance'' as a common issue related to mitigation in financial assistance. In part G, we clarified the circumstances under which the Service can approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments. In part H, we revised the topic question from ''Can a mitigation proposal be located on land acquired under a Service financial assistance award?'' to ''Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?'' and revised the answer accordingly. We added a topic to those included in the proposed revised Policy at part I: ''Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?'' This addition describes the various circumstances in which this question is relevant.

Discussion

The Service's motivations for revising the 1981 Policy include:

- Accelerating loss, including degradation and fragmentation, of habitats and subsequent loss of ecosystem function since 1981;
- Threats that were not fully evident in 1981, such as effects of climate change, the spread of invasive species, and outbreaks of epizootic diseases, are now challenging the Service's conservation mission;
- The science of fish and wildlife conservation has substantially advanced in the past three decades;
- The Federal statutory, regulatory, and policy context of fish and wildlife conservation has substantially changed since the 1981 Policy; and
- A need to clarify the Service's definition and usage of mitigation in various contexts, including the conservation of species listed as threatened or endangered under the Endangered Species Act of 1973, as amended (ESA), which was expressly excluded from the 1981 Policy.

Mitigation Defined

In the context of impacts to environmental resources (including their values, services, and functions) resulting from proposed actions, ''mitigation'' is a general label for measures that a proponent takes to avoid, minimize, and compensate for such impacts. The 1981 Policy adopted the definition of mitigation in the Council on Environmental Quality (CEQ) National Environmental Policy Act (NEPA) regulations (40 CFR 1508.20). The CEQ mitigation definition remains unchanged since codification in 1978 and states that ''Mitigation includes:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- compensating for the impact by replacing or providing substitute resources or environments.''

This definition is adopted in this Policy, and the use of its components in various contexts is clarified. In 600 DM 6, the Department of the Interior states that mitigation, as enumerated by CEQ, is compatible with Departmental policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts. The 1981 Policy further stated that the Service considers the sequence of the CEQ mitigation definition elements to represent the desirable sequence of steps in the mitigation planning process. The Service generally affirms this hierarchical approach in this Policy. We advocate first avoiding and then minimizing impacts that critically impair our ability to achieve conservation objectives for affected resources. We also provide guidance that recognizes how action- and resource-specific circumstances may warrant departures from the preferred mitigation sequence; for example, when impacts to a species may occur at a location that is not critical to achieving the conservation objectives for that species, or when current conditions are likely to change substantially due to the effects of a changing climate. In such

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

circumstances, relying more on compensating for the impacts at another location may more effectively serve the conservation objectives for the affected resources. This Policy provides a logical framework for the Service to consistently make such choices.

Scope of the Revised Mitigation Policy

The Service's mission is to conserve, protect, and enhance fish, wildlife, and plants, and their habitats for the continuing benefit of the American people. This mission includes a responsibility to make mitigation recommendations or to specify mitigation requirements during the review of actions based on numerous authorities related to specific plant and animal species, habitats, and broader ecological functions. Our authorities to engage actions that may affect these resources extends to all U.S. States and territories, on public and on private property. This unique standing necessitates that we clarify our integrated interests and expectations when seeking mitigation for impacts to fish, wildlife, plants, and their habitats.

This Policy serves as overarching Service guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. In most cases, applications of this Policy are advisory. Service recommendations provided under the guidance of this Policy are intended to help action proponents incorporate appropriate means and measures into their actions that will most effectively conserve resources affected by those actions. As necessary and as budgetary resources permit, we intend to adapt or develop Service program-specific policies, handbooks, and guidance documents, consistent with the applicable statutes, to integrate the spirit and intent of this Policy.

New Threats and New Science

Since the publication of the Service's 1981 Policy, land use changes in the United States have reduced the habitats available to fish and wildlife. By 1982, approximately 72 million acres of the lower 48 States had already been developed. Between 1982 and 2012, the American people developed an additional 44 million acres for a total of 114 million acres developed. Of all historic land development in the United States, excluding Alaska, over 37 percent has occurred since 1982. Much of this newly developed land had been existing habitats, including 17 million acres converted from forests.

A projection that the U.S. population will increase from 310 million to 439 million between 2010 and 2050 suggests that land conversion trends like these will continue. In that period, development in the residential housing sector alone may add 52 million (42 percent more) units, plus 37 million replacement units. By 2060, a loss of up to 38 million acres (an area the size of Florida) of forest habitats alone is possible. Attendant pressures on remaining habitats will also increase fragmentation, isolation, and degradation through myriad indirect effects. The loss of ecological function will radiate beyond the extent of direct habitat losses. Given these projections, the near-future challenges for conserving species and habitats are daunting. As more lands and waters are developed for human uses, it is incumbent on the Service to help project proponents successfully and strategically mitigate impacts to fish and wildlife and prevent systemic losses of ecological function.

Accelerating climate change is resulting in impacts that pose a significant challenge to conserving species, habitat, and ecosystem functions. Climatic changes can have direct and indirect effects on species abundance and distribution, and may exacerbate the effects of other stressors, such as habitat fragmentation and diseases. The conservation of habitats within ecologically functioning landscapes is essential to sustaining fish, wildlife, and plant populations and improving their resilience in the face of climate change impacts, new diseases, invasive species, habitat loss, and other threats. Therefore, this Policy emphasizes the integration of mitigation planning with a landscape approach to conservation.

Over the past 30 years, the concepts of adaptive management (resource management decisionmaking when outcomes are uncertain) have gained general acceptance as the preferred science-based approach to conservation. Adaptive management is an iterative process that involves: (a) Formulating alternative actions to meet measurable objectives; (b) predicting the outcomes of alternatives based on current knowledge; (c) conducting research that tests the assumptions underlying those predictions; (d) implementing alternatives; (e) monitoring the results; and (f) using the research and monitoring results to improve knowledge and adjust actions and objectives accordingly. Adaptive management further serves the need of most natural resources managers and policy makers to provide accountability for the outcomes of their efforts, *i.e.,* progress toward achieving defensible and transparent objectives.

Working with many partners, the Service is increasingly applying the principles of adaptive management in a landscape approach to conservation. Mitigating the impacts of actions for which the Service has advisory or regulatory authorities continues to play a significant role in accomplishing our conservation mission under this approach. Our aim with this Policy is to align mitigation with conservation strategies at appropriate landscape scales so that mitigation most effectively contributes to achieving the conservation objectives we are pursuing with our partners, and to align mitigation recommendations and requirements with Secretarial Order 3330 and 600 DM.

A Focus on Habitat Conservation

Although many Service authorities pertain to specific taxa or groups of species, most specifically recognize that these resources rely on functional ecosystems to survive and persist for the continuing benefit of the American people. Mitigation is a powerful tool for sustaining species and the habitats upon which they depend; therefore, the Service's Mitigation Policy must effectively deal with impacts to the ecosystem functions, properties, and components that sustain fish, wildlife, plants, and their habitats. The 1981 Policy focused on habitat: ''the area which provides direct support for a given species, population, or community.'' It defined criteria for assigning the habitats of project-specific evaluation species to one of four resource categories, using a two-factor framework based on the relative scarcity of the affected habitat type and its suitability for the evaluation species, with mitigation guidelines for each category. We maintain a focus on habitats in this Policy by using evaluation species and a valuation framework for their affected habitats, because habitat conservation is still generally the best means of achieving conservation objectives for species. However, our revisions of the evaluation species and habitat valuation concepts are intended to address more explicitly the landscape context of species and habitat conservation to improve mitigation effectiveness and efficiency. In addition, we recognize that some situations warrant measures that are not habitat based to address certain species-specific impacts.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Applicability to the Endangered Species Act

The 1981 Policy did not apply to the conservation of species listed as threatened or endangered under the ESA. Excluding listed species from the 1981 Policy was based on: (a) A recognition that all Federal actions that could affect listed species and designated critical habitats must comply with the consultation provisions of section 7 of the ESA; and (b) a position that ''the traditional concept of mitigation'' did not apply to such actions. This Policy supersedes this exclusion for the Service. Mitigation, which we define in this Policy as measures to avoid, minimize, and compensate for impacts, is an essential means of achieving the overarching purpose of the ESA, which is to conserve listed species and the ecosystems upon which they depend.

Effective mitigation prevents or reduces further declines in populations and/or habitat resources that would otherwise slow or impede recovery of listed species. It is fully consistent with the purposes of the ESA for the Service to identify measures that mitigate the impacts of proposed actions to listed species and designated critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA or its implementing regulations.

Under ESA section 7, the Service has consistently recognized or applied mitigation in the form of:

(a) Measures that are voluntarily included as part of a proposed Federal action that avoid, minimize, rectify, reduce over time, or compensate for unavoidable (also known as residual) impacts to a listed species;

(b) components of reasonable and prudent alternatives (RPAs) to avoid jeopardizing the continued existence of listed species or destroying or adversely modifying designated critical habitat; and

(c) reasonable and prudent measures (RPMs) within an incidental take statement to minimize the impacts of anticipated incidental taking on the affected listed species.

As another example, the 1982 amendments to the ESA created incidental take permitting provisions (section 10(a)(1)(B)) with specific requirements (sections 10(a)(2)(A)(ii) and 10(a)(2)(B)(ii)) for applicants to minimize and mitigate impacts to listed species to the maximum extent practicable.

Summary of Comments and Responses

The March 8, 2016, notice announcing our proposed revisions to the U.S. Fish and Wildlife Service (Service) Mitigation Policy (Policy) (81 FR 12380) requested written comments, information, and recommendations from governmental agencies, tribes, the scientific community, industry groups, environmental interest groups, and any other interested members of the public.

That notice established a 60-day comment period ending May 9, 2016. Several commenters requested an extension of time to provide their comments, asked the Service to revise and recirculate the Policy for comment, or asked the Service to withdraw the Policy to allow interested parties additional time to comment. We subsequently published a notice on May 12, 2016 (81 FR 29574), reopening the comment period for an additional 30 days, through June 13, 2016.

During the comment period, we received approximately 189 comments from Federal, State, and local government entities, industry, trade associations, conservation organizations, nongovernmental organizations, private citizens, and others. The range of comments varied from those that provided general statements of support or opposition to the draft Policy, to those that provided extensive comments and information supporting or opposing the draft Policy or specific aspects thereof. The majority of comments submitted included detailed suggestions for revisions addressing major concepts as well as editorial suggestions for specific wording or line edits.

All comments submitted during the comment period have been fully considered in preparing the final Policy. All substantive information provided has been incorporated, where appropriate, directly into this final Policy or is addressed below. The comments we received were grouped into general issues specifically relating to the draft Policy, and are presented below along with the Service's responses to these substantive comments.

A. Clarify How the Policy Guides Formulation of Service Mitigation Recommendations vs. Requirements

Comment (1): Many commenters indicated that the proposed Policy was unclear regarding the Service's authorities to require mitigation, and requested clarification to distinguish between requirements and recommendations. Several of these commenters noted that various authorities cited for the Policy, such as the ESA, Fish and Wildlife Coordination Act (FWCA), and NEPA, do not require actions to maintain or improve the status of affected resources, or to apply a landscape approach to their conservation, which are features of the Policy.

Response: We agree with comments that the proposed Policy provided an unclear distinction between circumstances under which the Policy would guide the Service's formulation of: (a) Mitigation requirements, *i.e.,* measures that the Service may impose upon an action proponent as conditions of Service funding, approval, or regulatory decision; vs. (b) mitigation recommendations, *i.e.,* measures that we advise an action proponent to adopt for conservation purposes. We used the phrase ''recommend or require'' because the Service has authority to require mitigation in some contexts, but not in others, and our aim with this Policy is to provide a common framework for the Service to implement across the full range of our authorities. However, we recognize the need to clearly distinguish these two general contexts, and have revised the final Policy accordingly.

Circumstances under which the Service currently has specific authority to *require,* consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include the following:

1. Actions that the Service carries out, *i.e.,* the Service is the action proponent;

2. Actions that the Service funds;

3. Actions to restore damages to fish and wildlife resources caused by oil spills and other hazardous substance releases, under the Oil Pollution Act (OPA) and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA);

4. Actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impacts of incidental taking on the species);

5. Actions that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);

6. Fishway prescriptions under section 18 of the Federal Power Act (FPA), which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;

7. License conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;

8. Actions that require a Letter of Authorization or Incidental Harassment Authorization under the Marine Mammal Protection Act (MMPA); and

9. Actions that require a permit for non-purposeful (incidental) take of eagles under the Bald and Golden Eagle Protection Act (BGEPA).

The circumstances cited above under which the Service currently has specific authority to *require,* consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources are further clarified in subsequent responses to comments, the Policy, and its appendices.

In all other circumstances not listed above, the Policy will guide the Service's formulation of recommendations, not requirements, to proponents of actions that cause impacts to fish and wildlife resources and which are within the defined scope (section 3) of the Policy.

B. Policy Is Based on Existing Authority

Comment (2): Several commenters stated that the draft Policy attempted to inappropriately create new authority for the Service to engage in mitigation processes, circumventing appropriate legislative or rulemaking processes. They stated that the Policy could not be used to expand Service authority to take actions beyond those authorized by Congress, noting that the Policy itself is not an independent grant of authority and the imposition of any mitigation measures advocated by it would be constrained by authority provided by the applicable statute. The commenters requested we clarify that the Policy does not expand existing Service authorities.

Response: The commenters are correct that the Policy cannot create or assume new authority for making mitigation recommendations. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations remain in effect and are not superseded by this Policy. In implementing this Policy and carrying out our broader mission, the Service recognizes these authorities and processes, and their limitations.

C. Scope of the Policy

Comment (3): One commenter stated their concerns that the scope of the Policy appeared to limit the discretion of an action agency, potentially holding the action agency or applicant responsible for mitigation beyond an action agency's own authority, mission, and responsibilities.

Response: The Service recognizes that the authorities and processes of different agencies may limit or provide discretion regarding the level of mitigation for a project. This Policy is not controlling upon other agencies. There may be limitations (*e.g.,* agency-specific authorities and 600 DM 6) on the implementation of measures that would achieve the Policy's goal of net conservation gain or a minimum of no net loss, when the costs of such mitigation are reimbursable by project beneficiaries under laws and regulations controlling agencies' activities (*e.g.,* Bureau of Reclamation).

Comment (4): Two commenters stated their belief that the Policy inappropriately expands Service authority to lands beyond National Wildlife Refuges or other Service-managed lands, and beyond the authorities of the ESA.

Several commenters wanted the Policy to contain explicit guidance on the function of the Service's mitigation authorities under each statute and on implementation of the new Policy in relation to those authorities. Two commenters were concerned about the way the Service will coordinate its responsibilities with similar duties carried out by other agencies and how the Policy applies in situations when more than one statute applies to a particular action.

Response: The Service's authorities to recommend mitigation are described in section 2 and in Appendix A. The Policy's overall coverage is described in the Scope, section 3. The commenters are correct that the Policy's coverage is dictated by the underlying statutory authorities. If a relevant statute provides the Service with authority to make mitigation recommendations, the Service may provide recommendations that cover the resources that are described in that statute. The Policy cannot create or assume new authority for making mitigation recommendations or exceed existing statutory or regulatory authority, and it does not extend the geographic or taxonomic extent of coverage beyond existing Service practice. Authorities for making mitigation recommendations may be applicable, regardless of the location of the action, and whether the action has an effect on a species listed under the ESA. For example, the Service routinely reviews projects to provide mitigation recommendations for inter-jurisdictional fish under NEPA, FWCA, FPA, and the Clean Water Act (CWA) for projects that are planned on lands and waters not owned or managed by the Service.

This Policy covers engagement under all of the Service's mitigation authorities, and does not replace interagency procedure established in another document. The Policy was developed in accordance with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015), and the Secretary of the Interior's Order 3330 entitled ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013). Having multiple agency mitigation policies using common principles, terms, and approaches provides greater consistency and predictability for the public.

Comment (5): Two commenters stated that the Service cannot prioritize fish, wildlife, plants, and their habitats above all other resources. One said that the Policy must incorporate the Mining and Minerals Policy Act of 1970 (30 U.S.C. 21a) that states that it is the policy of the Federal Government in the national interest to foster and encourage private enterprise in the development of economically sound and stable domestic mining, minerals, metal and mineral reclamation industries, and to promote the orderly and economic development of domestic mineral resources and reserves. They also stated the Policy must incorporate the National Materials and Minerals Policy, Research and Development Act, (30 U.S.C. 1601 *et seq.*), which states it is the continuing policy of the United States to promote an adequate and stable supply of materials necessary to maintain national security, economic well-being, and industrial production, with appropriate attention to a long-term balance between resource production, energy use, a healthy environment, natural resources conservation, and social needs. The commenter noted that the Service ignored these statutes and proposed requirements that restrict and discourage mineral development in violation of these laws. They added that any mitigation must be balanced against Congress' policy of encouraging mineral development.

Response: The Service recognizes the national importance of resource development referenced by the commenter, along with many other types of economic development and activities. Statutes that encourage such development are not modified by this Policy. By enacting the various statutes

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

that provide for natural resource mitigation authority across multiple Federal agencies, Congress has recognized that fish and wildlife resources provide commercial, recreational, social, and ecological value to the American people. These statutes providing mitigation authority do not supersede statutes encouraging economic development. Conversely, statutes encouraging economic development do not supersede those providing mitigation authorities. Mitigation is a process by which agencies, proponents, and partners can facilitate sustainable development while simultaneously addressing the long-term conservation of native plants, animals, and ecosystems.

Comment (6): One commenter stated there were constitutional limits on requiring mitigation, referencing the *Koontz* v. *St. Johns River Water Management District* case decided by the U.S. Supreme Court 570 US 2588 (2013). This commenter noted that any compensatory mitigation measures must have an essential nexus with the proposed impacts and be roughly proportional, or have a reasonable relationship between the permit conditions required and the impacts of the proposed development being addressed by those permit conditions.

Response: Like all agencies, the Service has responsibility to implement its authorities consistent with any applicable case law. The Service will implement the Policy in a manner that is consistent with the *Koontz* case and any other relevant court decisions. We have included the following language in the Policy in section 5.6, Means and Measures: All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

D. Trust Resources

Comment (7): Several commenters addressed the concept of Federal trust fish and wildlife resources. They noted that in section 3.2, the Policy states that it applies to Service trust resources, but gives Service staff discretion to engage in mitigation processes on an expanded basis under appropriate authorities. They were unclear what authorities were being referenced and recommended that they be clarified, especially if they were expanding the Service's efforts. They asked that we clarify what the term ''expanded basis'' means.

Commenters stated that the Service's authority is limited to migratory birds, threatened or endangered species, eagles, and certain marine mammals. They said that States have authority for all other species. They also requested acknowledgement that States have sole authority for resource management and that the Service should restrict the Policy to only federally protected species.

Response: This Policy applies to all resources listed or described within the Service's various mitigation authorities. The language used within those authorities to describe the covered resources determines the scope of Service recommendations made under each authority. Some authorities apply to resources defined very broadly. The types of resources for which the Service is authorized to recommend mitigation include those that contribute broadly to ecological functions that sustain species. For example, the definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment, including fish and wildlife resources, while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

In this Policy, we note that the Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Our engagement in mitigation processes is likely to focus on those trust resources, but under certain authorities, the Service's recommendations are not strictly limited to covering only trust resources. This Policy does not establish new authority. We respect the role of States and State authorities. We have revised section 3.2 to replace the term ''expanded basis'' to avoid the perception that the Policy is expanding authorities.

E. Applicability to Endangered and Threatened Species

Comment (8): Several commenters recommended excluding species that are listed as endangered or threatened under the ESA as resources to which the Policy would apply, and several others supported such applicability. Reasons cited by the commenters for excluding listed species included: (a) The Service does not explain the circumstances that have changed and warrant reversing the listed-species exclusion of the 1981 Policy; (b) the Policy cannot substitute for ESA-specific requirements; (c) the ESA does not provide authority to require mitigation; and (d) Policy concepts such as ''net conservation gain,'' ''high-value habitat,'' and a ''landscape approach'' to conservation are inconsistent with ESA statutory authority and regulatory requirements.

Response: The Policy addresses all fish and wildlife resources for which the Service has authority to recommend or require mitigation, including ESA-listed species, because of our need to more strategically provide such recommendations. The primary purpose of the ESA is to provide a means for conserving the ecosystems upon which listed species depend. Avoiding, minimizing, and compensating for impacts is as important, if not more so, to the conservation of listed species as it is to any other resource of conservation concern (*e.g.,* wetlands), because listed species are in danger of extinction or are likely to become so in the foreseeable future. The Service can and should advise others about how they may help conserve listed species when their proposed actions would cause impacts to their populations, because conserving listed species is part of our agency's mission. Identifying those means and measures that would, at minimum, result in no net loss to the status of affected listed species will inform action proponents about what they can do, consistent with their authorities and abilities, to prevent further status declines or contribute to their recovery. As mentioned earlier, the 1982 amendments to the ESA are another example of the changed circumstances since the 1981 Policy, and changes in knowledge, conservation, and management of listed species support this Policy's concepts.

Comment (9): In ESA section 7(a)(2) consultations, several commenters noted that reasonable and prudent alternatives (RPAs) to actions that jeopardize listed species or destroy or adversely modify designated critical habitat are not required to meet the no-net-loss or net gain goal of the Policy.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Response: When an agency has proposed an action that the Service has determined in a biological opinion is likely to jeopardize listed species or destroy or adversely modify designated critical habitat, we agree that RPA(s) to that action are not required to meet the no-net loss/net gain goal of the Policy. The definition of RPAs at 50 CFR 402.02 applies to the formulation of RPAs, not this Policy. In discussions with both the action agency and any applicant involved, the Service is required to suggest RPAs, if available, to the action agency and to rely on the expertise of both in identifying RPAs.

The ESA does not prohibit impacts to critical habitat, but section 7(a)(2) does prohibit Federal actions from destroying or adversely modifying critical habitat, without special exemption under section 7(h). We do not anticipate conflicts between the advisory recommendations under this Policy provided in advance of the initiation of consultation and subsequent review of actions under section 7(a)(2) relative to critical habitat. However, we have added language in the Policy that specifically cautions Service personnel about providing compensation recommendations in the context of actions that may affect designated critical habitat. Recommendations for measures that mitigate impacts (all five types) to the listed species *within* critical habitat will receive preference over compensation *outside* critical habitat to avoid the possibility that adverse effects to the physical and biological features of critical habitat could appreciably diminish its conservation value.

Comment (10): In ESA section 7(a)(2) consultations, several commenters requested that the Service clarify whether the reasonable and prudent measures (RPMs) and the accompanying nondiscretionary terms and conditions that the Service includes in incidental take statements may require compensating for the impacts of take on the species. Most stated that RPMs are limited to actions that minimize take, and may not include requirements to compensate for taking impacts. In support of such comments, some quoted the Services' 1998 Consultation Handbook language at page 4–50, which states in a section about RPMs: ''Section 7 requires minimization of the level of take. It is not appropriate to require mitigation for the impacts of incidental take.''

Response: The Service's authority to require or recommend mitigation, including all forms of mitigation covered by the CEQ's definition of mitigation, are governed by the ESA and the regulations addressing consultations at 50 CFR part 402. While this Policy addresses ESA compensatory mitigation to a limited extent, further detail regarding the role of compensatory mitigation in implementing the ESA will be provided through authority-specific step-down policy (see proposed Endangered Species Act—Compensatory Mitigation Policy at 81 FR 61032–61065, September 2, 2016).

Comment (11): Two commenters asked that we clarify this sentence in the Discussion material on Applicability to the Endangered Species Act: ''This Policy encourages the Service to utilize a broader definition of mitigation where allowed by law.''

Response: We removed the sentence from the Discussion material in this final Policy.

F. Policy Addresses Multiple Authorities

Comment (12): Several commenters addressed aspects of the Service's authority under the Bald and Golden Eagle Protection Act (BGEPA). One commenter supported the acknowledgement that compensatory mitigation for bald and golden eagles may include preservation of those species' habitats and enhancing their prey base. They noted that existing regulations establishing a permit program for the non-purposeful take of bald and golden eagles recognize these options but that these options have not been used. One commenter stated the Service was incorrect in stating in the proposed Policy: ''the statute and implementing regulations allow the Service to require habitat preservation and/or enhancement as compensatory mitigation for eagle take.'' They said that Congress has not exercised jurisdiction over the habitats of eagles, meaning the Service lacks authority to require mitigation for impacts to eagle habitats. One commenter suggested the Policy should articulate whether compensatory mitigation would be in addition to current requirements of a 1-for-1 take offset.

Response: The Service has revised the BGEPA material in Appendix A section (A)(1) to address the concepts raised by the commenters. Although BGEPA does not directly protect eagle habitat beyond nest structures, nothing in the statute precludes the use of habitat restoration, enhancement, and protection as compensatory mitigation. Because golden eagle populations are currently constrained by a high level of unauthorized human-caused mortality rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction to a human-caused source of mortality. However, habitat restoration and enhancement could potentially offset permitted take in some situations, once standards and metrics are developed to ensure the habitat-based mitigation provided will adequately compensate for the detrimental impacts of the permit.

As we developed this Policy, the Service is simultaneously in the process of developing revised regulations that will establish the specific mitigation ratio (prior to being adjusted to account for uncertainties and risks in the mitigation method) for eagle permits.

Comment (13): Three commenters stated that section 404(m) of the CWA does not provide the Service with any substantive authority to ''secure mitigation'' as stated in Appendix A (A)(2). They suggested the Service's role is limited to commenting upon section 404 permits and providing recommendations to the U.S. Army Corps of Engineers (Corps) and that final decisionmaking rests with that agency.

Response: We have edited Appendix A to remove the word ''secure,'' replacing it with ''recommend.'' This change better reflects the Service's authority, provided in the CWA, to provide mitigation recommendations during permitting processes. The Service makes such recommendations with the intention that they be considered and adopted by the Corps as their permit conditions or requirements, but the commenters are correct that the Service's recommendations themselves are advisory.

Comment (14): Two commenters were concerned that the language in the Policy provides an inappropriate method of requiring mitigation measures on projects permitted under CWA section 404 where the Service could not do so under its own authority, by asking the Corps to impose them.

Response: The language regarding the CWA in Appendix A (A)(2) does not introduce any new authority or process. It describes the existing means by which the Service, under statutory authority in the CWA, provides recommendations to the Corps. The Service uses those recommendations to advise the Corps on the effects of proposed permitting actions on aquatic habitats and wildlife and how to mitigate those effects. The Corps then decides whether to adopt the Service's advice in making their CWA permitting decision.

Comment (15): One commenter was concerned that the Policy could be applied to activities authorized under CWA section 404 Nationwide Permits (NWP) that have only minimal environmental impacts. They said that the Service should expressly exclude

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

activities authorized by NWPs from the Policy because such activities have only minimal environmental impacts and any current mitigation requirements are unwarranted.

Response: Mitigation does apply to the NWP program. The Corps addresses mitigation for NWP-authorized activities in General Condition 23 (77 FR 10285, February 21, 2012). Activities authorized by NWPs are not excluded from this Policy. Also see the agency coordination provisions of General Condition 31, Pre-construction Notification, in the NWPs issued by the Corps on February 21, 2012 (77 FR 10286). For the listed NWPs and in the circumstances described in General Condition 31, the Service is afforded a review opportunity, after which the U.S. Army Corps District Engineer will consider any comments from Federal and State agencies concerning the proposed activity's compliance with the terms and conditions of the NWPs and the need for mitigation to reduce the project's adverse environmental effects to a minimal level.

Comment (16): One commenter suggested clarifying the application of the Policy to the Service's role in CWA section 404 permits and mitigation by adding the following sentence to Section 3.4, Applicability to Service Actions: This Policy applies to the Service's review of all CWA permits, both in coordination and consultation roles.

Response: We agree with the commenter that the Policy applies to the Service's review of CWA section 404 permits. We did not add the suggested sentence but address the Service's application of our statutory authority to make recommendations that mitigate the impacts of these permitted actions on aquatic environments in Appendix A (A)(2).

Comment (17): Two commenters addressed the Service's authority under the Fish and Wildlife Coordination Act. One commenter said the Policy should acknowledge that the FWCA is advisory in nature. Another commenter said that the Policy should acknowledge that the FWCA provides a basis for recommending mitigation of impacts to ecological functions.

Response: Mitigation recommendations the Service makes under the FWCA to Federal agencies planning water resource development projects are advisory. Section 2(a) of the FWCA requires agencies to consult with the Service whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, channelized, controlled, or modified for any purpose whatever, with a view to the conservation and development of fish and wildlife resources. Section 2(b) of the FWCA requires that Service reports and recommendations be given full consideration and included in project reports to Congress or to any other relevant agency or person for authorization or approval. These aspects of FWCA compliance are required. Adoption of Service recommendations by the Federal water resource construction agency is not required.

The FWCA applies to those resources described in section 8 of the statute, where the terms ''wildlife'' and ''wildlife resources'' are defined to include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. In practice, Service recommendations made under FWCA are likely to focus on linkages of effects to trust resources, as prioritized by Service field and regional offices, but recommendations can cover resources as the statute defines. Because of the breadth of this coverage, we agree with the commenter that Service recommendations under the FWCA can include measures intended to address systemic ecological functions and agree that the purposes of the statute envision this application.

Comment (18): Several commenters addressed the Service's authority under the Migratory Bird Treaty Act (MBTA). One commenter said the Service was incorrect in describing implied authority to permit incidental take of migratory birds under the MBTA and noted that the Service has no authority to require compensatory mitigation for incidental take of migratory birds. Several commenters said that mitigation for migratory birds exceeds MBTA authority and that the Policy should exclude potential incidental impacts to migratory birds under the MBTA until the Service establishes statutory or regulatory authority to require landowners to obtain incidental take authorization prior to undertaking otherwise lawful activities. They added that the MBTA does not directly address mitigation or habitat impacts.

One commenter said the Service was incorrect in writing that the Fish and Wildlife Conservation Act implicitly provided for mitigation of impacts to migratory birds. They said that the language does not authorize the Service to engage in any management activities associated with migratory birds, particularly over private parties, only directing the Service to monitor and assess population trends and species status of migratory nongame birds.

Response: The Service has consistently interpreted the MBTA to apply to the incidental take of migratory birds. Currently, there is no express authority to permit the incidental take of migratory birds under the MBTA. Thus, the Service uses an enforcement discretion approach whereby the Service provides technical assistance to project proponents with strategies to avoid or minimize project-related take of migratory birds that is not the purpose of the otherwise legal action. Under this approach, the Service recommends voluntary measures that can mitigate the direct take of migratory birds and works with project proponents to address impacts to migratory bird habitat, including voluntary compensation for loss of migratory bird habitat. In May 2015, the Service published a notice of intent to conduct a National Environmental Policy Act review of a proposed rule that would establish the authority to permit incidental take as provided by the Act itself. An environmental impact statement will evaluate multiple alternatives for authorizing the incidental take of migratory birds. Subsequently, the Service will develop a regulation that provides the clear authority to permit incidental take and require mitigation measures to avoid and minimize incidental take, and compensation for unavoidable take. Until the regulation is finalized, the Service will continue working with project proponents and industries to manage impacts to migratory birds and their habitats.

The Service does not have specific statutory authority pursuant to the MBTA to *require* Federal action agencies and/or their permittees to provide compensatory mitigation for unavoidable impacts to (loss of) migratory bird habitat resulting from federally conducted or approved, authorized, or funded projects or activities. However, many Federal agency-specific authorities, as well as procedural authorities such as NEPA and the FWCA, require consultation with the Service, State natural resource agencies, and others, and evaluation of environmental effects of proposed actions, which may include considering impacts to migratory bird habitat. Through these authorities, the Service may recommend compensatory mitigation for unavoidable impacts to migratory bird habitat. Federal action agencies may include terms and conditions in permits, licenses, and certificates that mitigate a full range of adverse environmental effects, such as recommendations to compensate for

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

unavoidable impacts to migratory bird habitat, if they determine they have authority, consistent with their statutes and regulations, to require such compensatory mitigation.

In addition, Executive Order (E.O.) 13186 directs Federal agencies ''taking actions that have, or are likely to have, a measurable negative effect on migratory bird populations'' to sign a Memorandum of Understanding (MOU) with the Service ''that shall promote the conservation of migratory bird populations.''

In Appendix A, we have modified the text of section (A)(7) to clarify the requirements of the Fish and Wildlife Conservation Act and have made minor clarifying edits to the MBTA text of section (A)(10).

Comment (19): Four commenters addressed the Marine Mammal Protection Act (MMPA) discussion in Appendix A (A)(9). One commenter suggested that the Service provide more clarification on existing authorities under the MMPA. These included specifying that this section of Appendix A only discusses incidental take authorizations for non-commercial fishing activities; clarifying requirements as they apply to military readiness activities; providing additional information on other means of affecting the least practicable adverse impact; and clarifying that the permissible methods of taking and the mitigation and reporting are required measures as provided under Incidental Take Regulations (ITRs) and Incidental Harassment Authorizations (IHAs).

Response: Although the MMPA section of Appendix A was intended to provide a general overview for part of this Act, we agree that Appendix A of the Mitigation Policy could benefit from these additional clarifications. We have revised Appendix A to address these points as appropriate.

Comment (20): Commenters stated that the Policy is incompatible with the MMPA in that it adopts a new position inconsistent with the existing regulations or otherwise effects a substantive change in the MMPA.

Response: This Policy does not alter or amend any existing regulation, law, or policy other than the 1981 Policy itself. Instead, where mitigation measures are compatible with the standards of other statutes, *e.g.,* the MMPA, the Service would recommend their use. On the other hand, there are mitigation measures that may be required under statutes besides the MMPA regardless of this Mitigation Policy, *e.g.,* mitigation measures to ensure the least practicable adverse impact on a marine mammal species or stock and its habitat, and on their availability for subsistence use.

Comment (21): Commenters stated that the draft mitigation Policy is incompatible with the MMPA in that it indicates that recipients of incidental take authorizations would be required to take actions to achieve a net conservation gain or no net loss to the affected marine mammal species or stock. They commented that the Service does not have such authority under the MMPA.

Response: The MMPA states that species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population. In this manner, the mitigation Policy is compatible with the MMPA in that it implies there should be no conservation loss. However, the Service agrees that the MMPA does not require recipients to achieve a net conservation gain or no net loss to marine mammals. It was not the intent of this Policy to make such a requirement. Instead, should the Service make the required findings under section 101(a)(5) of the MMPA and authorize incidental take, it would prescribe the permissible methods of taking and other means of ensuring the least practicable adverse impact on the marine mammal species or stock and its habitat, and on the availability for subsistence use as a part of that authorization. We have revised Appendix A of the Policy to clarify this point.

Comment (22): One commenter suggested that the Policy should include language to ensure that review and consultation under Section 106 of the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, takes place at the early planning stage of the action and not wait until mitigation is being considered.

Response: We have revised section 3.4 of the Policy to state that the Service's responsibilities begin ''during early planning for design of the action.'' In addition, we have added the following language: ''Consistent with the NEPA, and the NEPA and NHPA Section 106 Handbook, these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action rather than wait until mitigation is considered.''

Comment (23): One commenter said that in Appendix B, to help meet its overarching Tribal Trust Doctrine responsibilities under the NHPA, the Service should initiate Section 106 consultation with Indian tribes early within the time of mitigation planning for the FWS proposed action (instead of after the preferred mitigation approach is selected).

Response: We have revised Appendix B accordingly. The Service will initiate Section 106 consultation with Indian tribes during early planning for Service-proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation, and will follow the Service's Tribal Consultation Handbook and the Service's Native American Policy.

Comment (24): One commenter specifically questioned the treatment of Natural Resource Damage Assessment actions conducted under CERCLA, OPA, and the CWA, stating that the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, dated November 3, 2015, requires that separate guidance be developed for when restoration banking or advance restoration would be appropriate.

Response: When a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, or Federal agencies, the type of restoration conducted depends on the resources injured by the release and, by nature of the action, must happen after impacts occur. Thus, this Policy's preference for compensatory mitigation measures that are implemented and earn credits in advance of project impacts cannot apply. However, pending promulgation of further DOI guidance, the tools provided in section 5 maintain flexibility useful in implementing restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals. Therefore, in agreement with the commenter, we have made edits to section 5.6 and to Appendix A to clarify the relationship of this Policy with Natural Resource Damage Assessment and the Presidential Memorandum on Mitigation.

Comment (25): Two commenters said that combining the fish and wildlife resources provisions of the Stream Protection Rule under the Surface Mining Control and Reclamation Act (SMCRA) with the language of the proposed Mitigation Policy could result in the Service inserting mitigation

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

requirements not otherwise called for in a SMCRA permit.

Response: At the time this Policy was completed, the proposed Stream Protection Rule, published July 27, 2015 (80 FR 44436), was not yet finalized. The statutory language of SMCRA and its implementing regulations, including the Stream Protection Rule when finalized, will determine the scope of resources covered by Service recommendations under that statute. This Policy does not exceed existing statutory or regulatory authority to engage in mitigation processes for the purpose of making mitigation recommendations, and in limited cases, specifying mitigation requirements. Processes established by applicable statutes and regulations are not superseded by this Policy.

G. Exemptions

Comment (26): Several commenters provided observations regarding exemptions from the Policy. One commenter said that the Policy should further identify those activities and projects that are exempt, adding that the Policy should make clear that any new procedural or other requirements apply only to new project applications or proposals. Several commenters said that the Policy should not apply to actions for which a complete application is already submitted. They stated that the Policy should apply neither to actions already under review nor to actions where coordination was initiated prior to publication of the final Policy.

Response: In section 3.3, Exclusions, we describe the circumstances when the Policy does not apply, but we do not specifically exempt any category of action. The Policy applies when one or more of our authorities apply to the review of a particular action for purposes of making mitigation recommendations. It is the language of those authorities that specifies their coverage of particular actions and resources. In section 3.3, we establish that the Policy does not apply when the Service has already agreed to a mitigation plan for pending actions, except in the specified circumstances. Complete applications that are submitted prior to the finalization of this Policy, but that are not yet under review, do not satisfy those circumstances. If an action is under active review as of the date of final publication of this Policy, Service personnel may elect to apply this Policy to that action. For actions where coordination was initiated prior to the final Policy, Service personnel would determine whether that coordination constitutes active review.

Comment (27): Two commenters said the Policy should exempt landowners who have participated or are currently participating in voluntary programs designed to conserve endangered species.

Response: We do not specifically exempt any category of action in section 3.3. This Policy, as an umbrella policy, integrates all of the Service's authorities for engaging in mitigation. We cannot legally exempt the landowners referenced by the commenters on the basis of their status pursuant to an agreement entered into under a single authority, because their future actions may trigger applicability of one or more other authorities. The Policy does not, however, override or modify any such agreements or substitute for the regulations governing those agreements.

Comment (28): Four commenters stated that the Policy should explicitly exempt activities with *de minimus* impacts. They said that projects with small and/or temporary impacts should not be burdened by mitigation measures.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of the size of activities planned or on the size of their impacts. The Policy provides a framework to guide Service personnel in their review of actions, including their application of the mitigation hierarchy and their recommendations for mitigation. Application of this guidance will assist Service personnel in determining whether to engage actions in mitigation planning and then in the formulation of mitigation recommendations. Application of this guidance could result, in appropriate circumstances, in a decision not to engage in mitigation planning for actions with *de minimus* impacts, but we do not specifically exempt actions based on the scale of anticipated impacts.

Comment (29): One commenter stated the Policy should include an exemption for conservation projects sponsored by local, State, or Federal resource agencies that seek beneficial restoration and implement conservation objectives.

Response: We do not specifically exempt any category of action and do not exempt actions on the basis of their primary purpose. We acknowledge that actions designed to restore or create habitats are generally less likely to require, for example, compensatory mitigation, and support their role in fulfilling the Service's larger mission. The Policy does not establish new or increased scrutiny of conservation or restoration actions than under existing statutes and regulations. The Service may apply this Policy in review of a conservation action that is intended to benefit one resource, but may adversely affect others for which the Service is authorized to provide mitigation recommendations and/or mitigation requirements.

Comment (30): Two commenters stated that this Policy should not apply to military testing, training, or readiness activities. They stated that such an exclusion is necessary to be consistent with the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment (November 3, 2015).

Response: The Service interprets the Presidential Memorandum, which instructs agencies to develop or update their mitigation policies, to exempt agencies that conduct military testing, training, and readiness activities from the requirement to update or create policies for those activities. The Presidential Memorandum cannot exempt any particular activity from the applicability of existing statutory authority that provides for mitigation.

Comment (31): One commenter stated the Policy should define or describe ''habitat'' and recommended that the Service exclude dredge material placement sites, and other such manmade areas, from mitigation planning processes.

Response: Habitat develops on sites with a history of human manipulation, including levees, reclaimed mine sites, timber harvest sites, agricultural areas, and dredged material placement sites. The commenter does not reference a particular timeframe over which their proposed exemption would be valid. We note that sites with a history of human manipulation may have been disturbed or modified hundreds of years prior, with multiple episodes of habitat recovery and re-disturbance in the intervening years. The Policy does not exclude areas solely because they are manmade or disturbed habitats. Mitigation requirements and recommendations will be informed by the framework established in this Policy, including section 5.5, Valuation.

H. Net Conservation Gain/No Net Loss

Comment (32): Many commenters addressed the Policy's mitigation planning goal to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources. A number of commenters supported the goal while a number of commenters opposed the inclusion of a net conservation gain. Many commenters stated that the Service lacks the statutory authority to implement the

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

net gain goal for mitigation planning. Several commenters suggested that a net gain goal imposes a new standard for mitigation and that mitigation requirements should be commensurate with the level of impacts. Others expressed concern about the costs associated with achieving a net gain.

Response: The Policy applies to those resources identified in statutes and regulations that provide the Service with the authority to make mitigation recommendations or specify mitigation requirements and are described in section 2 and in Appendix A. The purpose of the net conservation goal in mitigation planning is to improve conservation outcomes to affected resources, but the Policy does not require project proponents to achieve those outcomes. The Policy provides a framework for Service recommendations to conserve fish, wildlife, plants, and their habitats that are negatively affected by proposed actions. The identification of those means and measures that would result in a net conservation gain to the affected resources will not only help prevent further declines but contribute to a net improvement in the status of affected species and their habitats. The Service will seek a net gain in conservation outcomes in developing mitigation measures consistent with our mission to identify and promote opportunities to decrease the gap between the current and desired status of a resource.

Comment (33): Several commenters questioned the ability to achieve the net conservation gain and how it would be measured. Other commenters stated that the Policy should provide the methodology to assess or measure the net conservation gain.

Response: It is beyond the scope of the Policy to provide specific quantifiable measures to achieve the net conservation gain goal. The Service's mitigation goal is to achieve a net conservation gain or, at a minimum, no net loss of the affected resources. The Policy provides the framework for assessing the effects of an action and formulating mitigation measures (sections 5.1 through 5.9) to achieve this goal, which will be specific to the conservation objectives of the affected resources.

Comment (34): Several commenters stated that neither no net loss, nor net conservation gain, are compatible with the standards of the ESA sections 7 and 10. One commenter asked that we clarify that the net conservation gain goal does not modify or expand proponents' obligations under ESA sections 7 or 10 permitting programs. One commenter stated that the Policy's goal would have limited relevance to section 10 decisions other than serving as an aspiration or goal for negotiating conservation measures. One commenter asked that we specify how the Policy's goal will be applied to processing incidental take permit applications under section 10(a)(2)(B)(ii), especially for projects predicted to directly kill listed species. This commenter added that neither no net loss nor net gain is an appropriate goal under section 10 if the goal implies that impacts at the individual level will not be minimized to the maximum extent practicable.

Response: This Policy is intended to guide mitigation for impacts to listed species. It does not expand the Service's authorities for recommending or requiring mitigation under the ESA. As an administrator of the ESA, the Service has an obligation to work with others to recover listed species and preclude the need to list species, including guiding compensatory mitigation to offset the adverse impacts of actions to threatened and endangered species. The Service anticipates further defining the mitigation goal in relation to compensatory mitigation for impacts to listed species and designated critical habitat in the forthcoming Endangered Species Act Compensatory Mitigation Policy.

Comment (35): One commenter recommended the use of regional conservation goals and objectives in developing landscape-scale mitigation where the conservation goals and objectives are clear, explicit, and defensible. The commenter recommended that the Policy define a conservation goal as a ''formal statement describing the future status of a species or habitat.''

Response: We acknowledge that there may be variability in conservation plans developed by different entities, and agree that the commenter's descriptions are among the possibilities. This Policy describes an overall goal of a net conservation gain. The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate. Service mitigation recommendations or requirements will specify the means and measures that achieve this goal, as informed by established conservation objectives and strategies. This Policy defines conservation objectives as a measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

I. Landscape-Scale Approach

Comment (36): Two commenters stated the Policy should include nearshore, estuarine, and marine habitats in describing landscapes. They asked that we clarify that the concept is inclusive of ecologically connected areas of the aquatic environment, such as watersheds.

Response: We concur with the commenters that the definition of and concept of landscape and a landscape approach must include aquatic environments. The concept does include ecologically connected areas of the aquatic environment such as watersheds. The existing definition of landscape in section 6 accommodates this inclusion.

Comment (37): Three commenters suggested providing more clarity regarding what it means to take a landscape approach to mitigation in the absence of an existing conservation plan. They said that a landscape approach in the absence of an appropriate plan will necessitate an analytical process and the Policy should identify the information that should be used in such a process. They suggested adopting language from the rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (Corps) and 40 CFR part 230 (Environmental Protection Agency (EPA)), 33 U.S.C. 1344, that describes the Corps and EPA watershed approach in the absence of appropriate plans.

Response: The availability of plans will be variable, and the Policy's instruction to Service staff to take a landscape approach when conservation plans are not available is sound. The diversity in the habitats, species, project impacts, and mitigation in the implementation of the Service's suite of mitigation authorities make detailed specification of landscape approach instructions beyond the scope of this umbrella policy. In concurrence with the commenters, we have added text to the end of section 5.1, Integrating Mitigation with Conservation Planning.

Comment (38): Multiple commenters expressed concerns regarding how the landscape approach will be

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

implemented, suggesting that clarity be provided through specific criteria, guidance on process, and how data will be used or appropriateness of data, for consistent application.

Response: The Service has written the national Policy in a manner that facilitates further clarification on a regional scale. As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies including landscape scale must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that allows comparison of present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

J. Advance Mitigation Planning at Larger Scales

Comment (39): Two commenters stated that the term ''Advance Mitigation Planning at Larger Scales'' in section 5.1, Integrating Mitigation with Conservation Planning, might be confused with the Policy's preference for Advance Mitigation in section 5.7.1, Preferences.

Response: We agree and have changed the term within section 5.1 to read ''Proactive Mitigation Planning at Larger Scales.''

K. Climate Change

Comment (40): Many commenters addressed the Policy's inclusion of climate change in assessing the effects of a proposed action and mitigation. One commenter stated the Policy should make it a requirement that climate change be assessed, while others urged the Service to refrain from using climate change projections to govern mitigation efforts. Several commenters stated that climate change predictions and the effects to species and their habitats are uncertain and that the current state of climate projections are not of a scale sufficient to assess project-related impacts or mitigation. Several commenters suggested the Policy include guidance on how the effects of climate change should be determined. One commenter stated the Service should ensure that the temporal scope of the analyses is well defined and supported by data and that the impacts to species and their habitats can be assessed with reliable predictability.

Response: Consistent with the Departmental Manual Chapter (600 DM 6), this Policy recommends that climate change be considered when evaluating the effects of an action and developing appropriate mitigation measures. The Service recognizes that the science of climate change is advancing and assessment methodologies are continually being refined to address the effects of climate change to specific resources and at differing scales. Because of the broad scope of resources covered by this Policy and the evolving state of climate change science and assessment methodologies, including specific information on these topics is beyond the scope of the Policy. Therefore, the Policy is written with language to ensure that it does not become quickly outdated as methodologies evolve. As stated in section 5.3, Assessment, the Service will use the best available information and methodologies when considering the effects of climate change to the resources covered by this Policy and in designing mitigation measures.

Comment (41): One commenter provided an in-depth discussion of the broad-scale consequences of greenhouse gas emissions, climate change, and carbon sequestration.

Response: The Service shares the commenter's emphasis of the importance of climate change as a systemic challenge that must be a focus of integrated natural resource management. That is why it is written in the Policy to inform the scale, nature, and location of mitigation measures when employing the Policy's fundamental principle of using the landscape approach (section 4.c). It is not possible to provide exhaustive details for addressing climate change in this umbrella policy. Our mitigation authorities give us ability to recommend mitigation for impacts to species and habitats, but we do not have explicit authorities to recommend offsets for carbon emissions. In the course of integrating mitigation with conservation planning (section 5.1), assessing project impacts and formulating mitigation measures (section 5.3), and recommending siting of compensatory mitigation (section 5.7.1), this Policy directs Service staff to integrate consideration of climate change.

L. Collaboration and Coordination

Comment (42): Several commenters supported the Policy's clear desire for collaboration and coordination with stakeholders. However, other commenters were concerned with the lack of detail in regard to coordination with State, tribal, or other local conservation partners during various steps in the process, and the extent to which data, analyses, and expertise of these entities will be used, and conflict with existing planning efforts avoided. Multiple comments indicated the importance of early coordination with State, tribal, and Federal organizations, local conservation partners, and private landowners, especially to avoid delay in the process. Some commenters requested minimum standards for plans or data, and indicated multiple types of plans or data that would be useful (*e.g.,* ESA Recovery Plans, State Wildlife Action Plans, watershed plans, State natural heritage data, and plans associated with State or metropolitan transportation planning processes). One commenter in particular pointed to the importance of collaborating to avoid conflicts and ''negative externalities'' for Alaska and its citizens. Multiple commenters requested we specifically list State and local entities in section 5.2.

Response: State and local conservation partners often have data or planning documents important to project mitigation scenarios. Thus, we acknowledge the benefits of collaboration and coordination in the early planning and design of mitigation in section 5.2. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek mutual goals and avoid inconsistency. Therefore, we revised the text in sections 4(c) and 5.2(a) and (d) to better reference local government entities.

Comment (43): One commenter requested reaffirmation that States can, with guidance and participation of the Service, develop and implement mitigation programs to achieve Service mitigation goals, while aligning with local conservation plans and multiple use objectives. Several commenters requested identification of specific Service representatives to engage in these planning efforts, and clarification on process, especially to avoid disputes related to inconsistency. One commenter requested the Service require State concurrence with recommendations when related to resources under State authority; others were specifically concerned with the Policy's interface with current mitigation systems.

Response: We agree that alignment with local mitigation efforts mutually

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

benefits conservation agencies, and this Policy formally recognizes the shared responsibility with State, local, and tribal governments, and other Federal agencies and stakeholders. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs to seek common goals and avoid inconsistency.

Comment (44): Several commenters requested more information specifically on how conflicts between agencies or regulations, plans, or mitigation or permitting requirements would be handled.

Response: Conflicts between agencies are handled through direct engagement and through existing mechanisms that will be unchanged by this Policy. For example, in NEPA, regulations at 40 CFR part 1504 establish procedures for referring Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects to the Council on Environmental Quality. The same regulations provide means for early resolution of such disagreements. In CWA permitting processes, disagreements over issuance of specific permits or on policy issues between the Service and Corps or between EPA and the Corps are resolved following procedures established at section 404(q) of that act and detailed within a Memorandum of Agreement between the agencies. The Corps/EPA joint 2008 Compensatory Mitigation Rule also features a dispute resolution process for agencies to resolve disagreements concerning the approval of mitigation banks or in-lieu-fee programs. We will continue to use existing processes.

Comment (45): One commenter requested that the Service include requirements that all mitigation data, including data associated with amount and type of mitigation, ecological outcomes, landscape scale and conservation plans used in mitigation planning, and monitoring be made public in an easily accessible manner, such as being submitted electronically to publicly available databases.

Response: We agree that data should be made broadly available to facilitate future conservation at a landscape level, dependent on the relevant regulations under which the mitigation is required. If there is the potential for disclosure of personal, private, or proprietary information, there are limitations on the Service's or other agencies' ability to require public availability. While most of the Service's mitigation authorities allow for recommendations, the ability to disclose monitoring data may be at the discretion of another agency. A blanket requirement to post all monitoring data to public databases would, therefore, be beyond the scope of this Policy.

M. Assessment

Comment (46): One commenter stated that indirect effects from some actions are greater than the direct effects and should, therefore, be made more prominent in the Policy.

Response: We added indirect and cumulative impacts to section 5.3 of the Policy.

Comment (47): Several commenters expressed concern regarding the use of best professional judgment during and as subjective predictions of impact, as described in section 5.3.4. Some commenters seemed particularly concerned about coincidental changes in magnitude of probable impacts caused by indirect sources, or those falling outside Service jurisdiction, such as climate change.

Response: The Service, in section 5.3, allows use of ''best professional judgment'' using information described in the remainder of that section (recognition of and adjustment for uncertainty, use of information provided by the action proponent, and best available methodologies to predict impact). Thus, even where predictions may be uncertain, the Service will support decisions on the best available scientific information. As with many of the decisions made in impact analysis, prediction of impacts through time must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. We look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (48): Multiple commenters stated that assessment methodologies should be designed to ensure predictable mitigation credits, measure both beneficial and adverse effects, and be based on biological and/or habitat conditions that are accurate, sensitive, repeatable, and transparent. Two commenters were concerned that the Service should provide additional guidance to Federal and State agencies to avoid inefficiencies, and provide clarification in methodologies.

Response: As with many of the decisions made in impact analysis, determination of appropriate assessment methodologies must occur on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 5.3.3 allows the Service flexibility in methodology to meet this need by allowing use of any methodology that compares present to predicted conditions, measures beneficial and adverse impacts by a common metric, and predicts effects over time. We look forward to using existing means of engagement with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency.

Comment (49): One commenter suggested that ''key ecological attributes'' (KEA) be used as a landscape-scale mitigation framework to guide impact assessment and ensure ''like for like'' benefits. The commenter categorized KEAs as: (1) Size (measure of a resource's area of occurrence or population abundance); (2) condition (measure of the biological composition, structure, and biotic interactions that characterize the space in which the resource occurs); and (3) landscape context (assessment of the resource's environment including the ecological processes and regimes that maintain it, and connectivity that allows species to access habitats and resources or allows them to respond to environmental change through dispersal or migration).

Response: While use of the assessment approach involving application of KEAs would be consistent with the assessment principles and attributes of the best available effect assessment methodologies that we describe in section 5.3, we do not specify use of specific methodologies because the Policy's breadth of geographical, ecological, and authority coverage warrant flexibility.

Comment (50): One commenter stated the Policy should provide science quality standards while another commenter stated that science provided by a project proponent to support a mitigation action should be evaluated fairly.

Response: As stated in the Policy, the Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy. This will include an objective evaluation of science-based information provided by the project proponent.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

N. Evaluation Species

Comment (51): Numerous commenters expressed opinions and concerns on how the evaluation species should be selected. Suggestions focused on coordination with States and other parties and on selecting species identified in local government plans that have met appropriate standards or in State Wildlife Action Plans.

Response: The Policy is not meant to be exhaustive in identifying the resources or characteristics of evaluation species. The Service recognizes that there may be existing plans (*e.g.,* local government plans, State Wildlife Action plans) other than those identified in the Policy as well as other characteristics that may be useful in mitigation planning depending on the specific action and the affected resources. We agree that the use of existing plans such as State Wildlife Action plans or other sources that have established species conservation objectives will be useful in selecting evaluation species within the affected area. The Service will work with project proponents and other stakeholders in reviewing existing plans and identifying evaluation species for a specific action following the guidance outlined in section 5.4, Evaluation Species.

Comment (52): One commenter stated that section 5.4, Evaluation Species should be expanded to focus beyond evaluation species to species and their habitats for use in impact assessments and mitigation planning.

Response: Section 5.4 in the Policy adequately addresses the identification and characteristics of evaluation species, and does not need to be expanded. The purpose of selecting evaluation species is part of the Policy's framework to evaluate affected habitats and make mitigation recommendations based on their scarcity, suitability, and importance to achieving conservation objectives as discussed in section 5.5, Habitat Valuation.

Comment (53): A number of commenters suggested that the Policy's approach to evaluation species will expand the Service's jurisdiction to all wildlife and that mitigation will be required for species (and habitats) for which there is no direct statutory or regulatory obligation.

Response: Evaluation species are a utility used by agencies in mitigation planning. The Service defines them as the fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning. We need evaluation species because we cannot exhaustively assess all impacts and formulate mitigation for all resources affected by a proposed action. The purpose of Service mitigation planning is to develop a set of recommendations that, if implemented with the proposed action as a package, would achieve conservation objectives for the affected resources. Accordingly, the Service would select evaluation species for which conservation objectives have the greatest overlap with the effects of a proposed action. The Service will select others to represent the suite of fish and wildlife impacts caused by an action. The Policy provides guidance for selecting evaluation species and is not a means of expanding our jurisdiction. Evaluation species are, in effect, a planning tool and were a major feature of the 1981 Policy.

Comment (54): A number of commenters addressed the selection of evaluation species in those instances identified in the Policy where an evaluation species does not need to occur within the affected habitat: Species identified in an approved plan that includes the affected area, or the species is likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession. One commenter stated that the Policy places clear and defined limits on what constitutes both the ''reasonably foreseeable future'' and ''natural species succession'' when selecting evaluation species so mitigation actions are not overly expansive. Some commenters questioned the Service's authority to expand the scope of analysis to species that do not occur in the affected area but could occur at some point in the foreseeable future due to natural species succession.

Response: The selection of evaluation species that is not currently present in the affected area was a component of the Service's 1981 Policy. Under this Policy, the Service retains the ability to consider such selections, as authorities permit. Such selections will be subject to the conditions described in section 5.4 and are not a means of expanding the Service's authorities.

Comment (55): A few commenters stated that there is no basis for evaluating other non-listed species when assessing actions under the ESA, while another commenter expressed concern that the consultation and permitting for specific species will be complicated by the addition of evaluation species resulting in additional analysis and costs.

Response: Nothing in this Policy supersedes statutes and regulations governing treatment of federally listed species. Section 5.4, Evaluation Species, provides guidance on the selection of evaluation species that the Service will recommend in the assessment of affected resources and mitigation planning. The Service will recommend the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for a specific species, that species will be, at a minimum, identified as an evaluation species. The recommendation to use additional evaluation species will depend on the specific project and affected resources. Use of evaluation species beyond federally listed species will improve conservation outcomes for other resources affected by an action, but the Policy does not require such usage.

Comment (56): One commenter stated that the Policy creates a new category of species by using evaluation species.

Response: Evaluation species is not a new term and has been brought forth from the Service's 1981 Policy. Section 5.4, of the Policy, Evaluation Species, provides additional guidance on the selection and use of evaluation species to assess impacts and develop mitigation strategies.

O. Habitat Valuation

Comment (57): Several commenters requested the Service provide additional details on habitat valuation in section 5.5 of the Policy. To avoid the potential for ''lengthy disputes'' between the Service and other stakeholders in mitigation planning, some recommended including measurable/repeatable metrics in the Policy for quantifying habitat scarcity, suitability, and importance. Others wanted a very clear standard for identifying ''habitats of high-value,'' for which the Policy guidance is to avoid all impacts.

Response: The scope of the Policy covers all authorities that give the Service a role in mitigating the impacts of actions to fish and wildlife resources, which encompasses a broad range of action types and species. The types and quality of available information vary widely across this range; therefore, highly prescriptive methods of habitat valuation are not advisable. Scarcity, suitability, and importance are the characteristics most relevant to our purpose for habitat valuation, which is to inform the relative emphasis we place on avoiding, minimizing, and compensating for impacts to the conservation of evaluation species. Our definitions of these parameters are sufficiently clear to provide useful guidance to Service personnel in

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

formulating mitigation recommendations to action proponents. However, we have revised the Policy to clarify that ''habitats of high-value'' are those that are rare and both highly suitable for, and important to, the conservation of the evaluation species.

Our authority to require specific mitigation actions of action proponents is limited, and is governed by the regulations of the statute that confers such authority, not this Policy. Our goal with this Policy is to provide a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities to promote better conservation outcomes for species. Service personnel are obligated to explain mitigation recommendations, including our valuation of the affected habitats. Action proponents may adopt or reject Service recommendations about how they may maintain or improve the status of species as part of their proposed actions. Therefore, we do not anticipate ''lengthy disputes'' between the Service and action proponents over habitat valuations.

Comment (58): Several commenters recommended that the Service use habitat valuation as the basis for variable mitigation standards or goals, similar to the 1981 Policy.

Response: This Policy adopts a minimum goal of no-net-loss for mitigating impacts to evaluation species, regardless of the value of the affected habitat, which is a fundamental change relative to the 1981 Policy. Instead of determining variable objectives that apply to affected habitats, variable habitat value informs the priority we assign to avoid, minimize, and compensate for impacts to evaluation species. Our rationale for this change is that all occupied habitats contribute to the current status of an evaluation species. Discounting the contribution of lower value habitat would increase the difficulty of achieving conservation objectives for evaluation species. However, we recognize that to maintain or improve a species' status, it is more efficient to avoid and minimize impacts to higher value habitats, and to minimize and strategically compensate for impacts to lower value habitats. The Service will engage action proponents in mitigation planning only when we have authority to do so and when an action may adversely affect resources of conservation interest to a degree that warrants application of the Policy.

Comment (59): Two commenters recommended the Service retain the four Resource Categories of the 1981 Policy.

Response: In the 1981 Policy, the Resource Categories established variable mitigation objectives based on habitat value, which was a function of scarcity and suitability. Under this Policy, the objective is a minimum of no net loss, regardless of habitat value. Instead, habitat value informs the priority we assign to avoid, minimize, and compensate for impacts. By adding habitat ''importance'' to the scarcity and suitability parameters of the 1981 Policy, the revised Policy more explicitly integrates mitigation recommendations with conservation strategies applicable to the evaluation species. Our valuation considers all three parameters, and we will seek to avoid and minimize impacts to habitats of higher value, and to minimize and compensate for impacts to habitats of lower value. We considered prescribing a prioritization of mitigation types through a revised resource category system but determined that it added little practical value beyond stating that we should recommend avoiding impacts to rare habitats that are of both high suitability and importance (the equivalent of Resource Category 1 in the 1981 Policy) and give greater emphasis to compensating for impacts to low-value habitats.

Comment (60): Three commenters expressed specific concerns about the three habitat-valuation parameters, each recommending possible revisions/substitutions. One stated that our definition of importance was mostly a function of scarcity and/or suitability, and suggested substituting ''irreplaceability'' and ''landscape position'' as more independent parameters. Another suggested that ''unique and irreplaceable'' was the criterion for recommending avoiding all impacts to a habitat, as opposed to high-value assessed by all three valuation parameters. The third urged the Service to use ''vulnerability'' as an additional parameter.

Response: Our definitions of the three habitat-valuation parameters are distinct and do not overlap, but we recognize potential correlations between the parameters (*e.g.,* rare habitats of high suitability are very likely also of high importance). Our definition of importance captures the significance of a location in the conservation of a species, regardless of its scarcity or suitability, and we disagree that importance is mostly a function of scarcity and suitability. The definition of importance refers to both the ability to replace the affected habitat and its role in the conservation of the evaluation species as a core habitat, a linkage between habitats, or its provision of a species-relevant ecological function. Therefore, ''irreplaceability'' and ''landscape position'' are already considered in the importance parameter.

A ''unique'' habitat is the rarest valuation possible on the scarcity parameter, and an ''irreplaceable'' habitat rates high on the importance parameter. The third parameter, suitability, is defined as ''the relative ability of the affected habitat to support one or more elements of the evaluation species' life history compared to other similar habitats in the landscape context.'' A unique habitat would have no other similar habitats in the relevant landscape context for comparative purposes; therefore, its suitability is not assessable. In practice, if a unique and irreplaceable habitat is supporting an evaluation species, we will consider it as a ''high-value'' habitat under this Policy.

Our view of ''vulnerability'' as a habitat-valuation parameter is that it is difficult to define and assess consistently. A workable definition would likely overlap substantially with the scarcity parameter, which is more readily evaluated given data about the spatial distribution of a habitat type in the relevant landscape context, and also with the replicability concept under the importance parameter. Regardless whether a non-overlapping definition is possible, adding vulnerability as a fourth habitat-valuation parameter would then dilute the influence of the other three. Scarcity and suitability, which were features of the 1981 Policy, and importance, which is applicable to interpreting how conservation plans describe the significance of particular areas, are each amenable to reasonably consistent assessment by Service personnel. These three parameters sufficiently serve the purpose of habitat valuation under this Policy, which is to prioritize the type of mitigation we recommend.

Comment (61): One commenter suggested that when more than one evaluation species uses an affected habitat, some situations may warrant not using the highest valuation to govern the Service's mitigation recommendations, contrary to the Policy's guidance in section 5.6.3. The commenter offered the following example of such a situation. An affected habitat is used by two evaluation species; but regulatory requirements (*e.g.,* ESA compliance) apply to the species associated with the lower habitat valuation, and conservation bank credits are available to compensate for impacts to this species. Two other commenters requested clarification of

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

the Service's methodology for valuation of a habitat used by multiple evaluation species.

Response: Because the goal of the Policy is to improve, or at minimum, maintain the current status of evaluation species, the Policy's guidance to assign the highest valuation among evaluation species associated with an affected habitat most efficiently achieves this goal for all evaluation species. Avoiding or minimizing impacts to the higher value habitat reduces the level of compensation necessary to achieve the Policy goal for both species. The availability of conservation bank credits, while advantageous, should not dictate Service recommendations for achieving the Policy goal.

Although species to which regulatory requirements apply, such as species listed under the ESA, are automatic evaluation species under the Policy, the Policy does not assign priorities among evaluation species. Accordingly, our habitat-valuation methodology is the same whether one or multiple evaluation species use an affected habitat. The scarcity parameter is not species-specific; however, the suitability and importance parameters are. A particular affected habitat is not necessarily of the same suitability for and importance to different evaluation species and may, therefore, receive different valuations. The highest valuation informs the relative priority for avoiding, minimizing, and compensating for impacts.

P. Mitigation Hierarchy

Comment (62): We received comments from many entities related to our use of the mitigation hierarchy concept in the Policy. Most expressed support for strict adherence to the avoid-minimize-compensate sequence of the hierarchy and concern that the Policy's recognition of circumstances warranting a departure from this preferred sequence provides Service personnel an inappropriate amount of discretion. Others supported such departures and requested greater specificity in defining the circumstances that would justify greater emphasis on compensation.

Response: The first three general principles listed in section 4 will guide the Service's application of the mitigation hierarchy: (a) The goal is to improve or, at minimum, to maintain the current status of affected resources; (b) observe an appropriate mitigation sequence; and (c) integrate mitigation into a broader ecological context with applicable landscape-level conservation plans. Action- and resource-specific application of these principles under the framework of section 5 will determine the relative emphasis that Service mitigation recommendations afford to measures that avoid, minimize, and compensate for impacts.

We are clarifying Service determinations of ''high-value habitat,'' for which the Service recommendation is to avoid all impacts. Consistent with our commitment to the mitigation hierarchy under Principle ''b'' of section 4, the Service will not recommend compensation as the sole means of mitigating impacts when practicable options for avoiding or minimizing impacts are available. However, to achieve the Policy's goal of maintaining or improving the status of evaluation species, all Service mitigation recommendations will necessarily include some degree of compensation, unless it is the rare circumstance where it is possible to avoid all impacts while still accomplishing the purpose of the action or we are compelled to recommend the no-action alternative. Our habitat-valuation guidance (section 5.5) informs the relative emphasis we place on the mitigation types in the hierarchy. Higher valued habitats warrant primarily avoidance and minimization measures, in that order, to the maximum extent practicable. Compensation is likely, but not necessarily, a more effective means of maintaining or improving the status of species affected in lower valued habitats. Applicable conservation plans for the evaluation species (Principle ''c'' of section 4) will inform Service personnel whether compensation should receive greater emphasis. Service personnel are obligated to explain recommendations per the guidance of section 5.8, Documentation.

Comment (63): One commenter stated the Policy should include a mechanism to credit a project proponent for implementing avoidance or minimization measures.

Response: Avoidance and minimization are components of the mitigation hierarchy. Impacts that are avoided will negate the need for further mitigation measures. Impacts that are minimized will lessen the need to reduce, rectify, and compensate for residual impacts.

Comment (64): One commenter requested the Policy clarify how mitigation credits will be calculated at banking sites and that the Policy should provide for the ability to ''stack'' credits. Another commenter suggested the Policy include the definition of the term ''credit.''

Response: This is not a compensatory mitigation policy. It is beyond the scope of this Policy to provide detailed procedural or operational information. Based on the applicable authority, such implementation detail for compensatory mitigation processes is provided in other regulatory or policy documents. For example, details for CWA processes is provided through regulation (Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344). For ESA processes, the Service expects to finalize such guidance through policy (see proposed ESA Compensatory Mitigation Policy at (81 FR 61032–61065, September 2, 2016)).

Q. Avoidance

Comment (65): Several commenters strongly supported the Policy's statements on avoidance, or said the Policy should increase the emphasis on avoidance generally, and especially with respect to the most highly valued resources. They suggested the Policy more strongly acknowledge that some habitats are unique and irreplaceable, making the ''no action'' alternative the only way of achieving conservation goals for species that depend on those habitats. They added that ensuring the long-term protection of high-value habitat is especially critical for imperiled species.

Some commenters said the Policy should not require avoidance of all impacts to high-value habitats, as strict adherence to this measure has the potential to stop crucial infrastructure projects. They said requiring avoidance of high-value habitats and imposing limitations on timing, location, and operation of the project will result in added project costs. They proposed that avoidance recommendations be made or implemented on a case-by-case basis. Some commenters suggested the Policy clarify the Service's authority for recommending a ''no action'' alternative. One commenter said the Service cannot recommend avoidance of all impacts when such a position would deny a property owner any beneficial use of their property. Otherwise, a regulatory taking would result. Commenters said that because the Service has no basis to deny an action, the Policy should expressly state it does not allow for the Service to veto proposed projects on which it consults.

Response: We agree the proposed Policy's existing statements regarding recommendation of avoidance of impacts to high-value habitats are important themes, as they were in the 1981 Policy. For clarity, we have edited section 4, General Policy and Principles, to add a principle highlighting the

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Service's policy of recommending avoidance of high-value habitats.

This Policy provides a common framework for identifying mitigation measures. It does not create authorities for requiring mitigation measures to be implemented. The authorities for reviewing projects and providing mitigation recommendations or requirements derive from the underlying statutes and regulations. On a case-by-case basis, as noted in the Policy at section 5.7, Recommendations, we may recommend the ''no action'' alternative when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available. These recommendations will be linked to avoiding impacts to high-value habitats. Depending on the spatial configuration and location of habitats relative to project elements, recommending avoidance of all impacts to high-value habitats will not always equate to recommending no action.

Also, we note that the Policy does not indicate avoidance of all high-value habitats is required. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. If we provide such materials to an action agency for consideration in their authorization process, a regulatory taking would not result from making recommendations. This Policy will not effectively compel a property owner to suffer a physical invasion of property and will not deny all economically beneficial or productive use of the land or aquatic resources. This Policy provides a common framework for the Service to apply when identifying mitigation measures across the full range of our authorities, including those for which we may require mitigation. This broad program direction for the Service's application of its various authorities does not itself result in any particular action concerning a specific property. In addition, this Policy substantially advances a legitimate government interest (conservation of species and their habitat) and does not present a barrier to all reasonable and expected beneficial use of private property.

Comment (66): Three commenters said identifying and requiring avoidance of all high-value habitat conflicts with the statutory and regulatory requirements of the ESA. They pointed out that regulations at 50 CFR 402.14(i)(2) state reasonable and prudent measures cannot alter basic design, location, scope, duration, or timing of an action. They said the Service would prohibit any activity impacting areas determined to be high-value habitat and that no such parallel requiring complete avoidance exists under the ESA. They said the Service has no authority to mandate the complete avoidance of designated critical habitat or require all impacts to critical habitat be offset with mitigation measures that achieve a net gain or no net loss.

Response: The Policy does not prohibit any activity impacting areas determined to be high-value habitat. The Policy provides guidance to Service staff for making a recommendation to avoid all high-value habitats or to adopt a ''no action'' alternative in certain circumstances. Through the Policy, we are neither requiring nor mandating the complete avoidance of designated critical habitat. Regulations and procedures that implement the ESA are not superseded. The Policy does apply to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although the Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing in it replaces, supersedes, or substitutes for the ESA implementing regulations. In early stages of interagency consultation under the ESA, we routinely provide advice to action agencies on avoiding impacts to listed species and designated critical habitats that may be reflected in subsequent project descriptions or in action agency permits or authorizations. The provision of that advice is consistent with the Policy's guidance to Service staff on recommending avoidance of all high-value habitats.

Comment (67): One commenter said requiring onsite avoidance can lead to piecemeal mitigation and undermines the goal of supporting regional mitigation planning. They suggested removing the preference for onsite avoidance over compensatory mitigation to better support regional mitigation planning goals.

Response: The Service agrees that defaulting to avoidance can, in some cases, result in a less desirable outcome than pursuing compensatory mitigation elsewhere that better serves broader landscape-level conservation goals. However, in the Policy, we note that those cases involve impacts to lower value habitats. Even then, the Service will consider avoidance, consistent with the mitigation hierarchy. For the most highly valued habitats, the Policy guides Service staff to recommend avoidance. If adopted, recommendations to avoid impacts to high-value habitats directly support regional mitigation planning by ensuring the scarcest, most suitable, and most important habitats within a landscape remain unaltered.

Comment (68): Three commenters discussed whether avoidance of all impacts to high-value habitats is always necessary or desirable. They asked what the Service's response would be when an action is likely to be implemented despite recommendations to avoid high-value habitats. They suggested the Policy recognize that avoidance of all impacts to high-value habitats is not always necessary or practicable, and that unavoidable impacts to those resources will sometimes be authorized.

Response: Through this Policy, we provide guidance to Service staff that recommendations should seek to avoid all impacts to habitats they determine to be of high-value. Therefore, our policy is that it is always desirable to avoid impacts to high-value habitats. We recognize circumstances will vary, and in section 5.7, Recommendations, we note that when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative. We further recognize that our recommendations, either to avoid all impacts to high-value habitats or to adopt the no action alternative if necessary, will not be adopted or implemented by action agencies in all cases.

R. Compensatory Mitigation

Comment (69): Several commenters said they strongly supported application of equivalent standards for compensatory mitigation mechanisms as advocated by the Policy. One commenter said that, without equivalency, mitigation programs with lower standards will have competitive pricing advantages that create a ''race to the bottom'' as developers seek the lowest cost compliance option, producing lower conservation outcomes and undermining chances of species recovery. Several said the Policy should give greater emphasis to the sentence: ''The Service will ensure the application of equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms.'' These commenters felt that, while the Policy's intent to support equivalent standards is clear, the statement is not easily located within a paragraph in section 5.6.3. They suggested creating a new paragraph with this sentence as the lead, or creating a new subsection titled ''Equivalent Standards'' under the existing section 5.6. Two commenters said equivalent standards should be

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

required by the Policy. One commenter said a monitoring and verification process should be required of all mitigation.

Response: We agree with the commenters that equivalent standards must be applied to ensure compensatory mitigation is successfully implemented regardless of the mechanism used to provide the mitigation. A level playing field allows for more transparency, fairness, and a greater likelihood of successful mitigation. In this Policy, we do not state that equivalent standards are required because of the breadth of authorities and processes it covers. In many cases, our authority is advisory, with the permitting authority resting with another agency. In such cases, requiring equivalent standards is another agency's provision to implement or enforce. This Policy covers multiple authorities, so it would be inaccurate to state that it can require equivalent standards in all cases. However, the Policy's statement of support for application of equivalent standards is accurate in all cases. Similarly, we support the monitoring and verification processes suggested by one commenter, but cannot provide a blanket requirement for such processes through this Policy. We agree with the commenters who suggested that our support for equivalent standards is not well highlighted or located within the Policy. We have now placed the information under a header for a new section 5.6.3.1, Equivalent Standards.

Comment (70): One commenter supported the Policy's definition of ''additionality,'' while two commenters expressed concern for the use of the term ''baseline'' in defining additionality and suggested the Policy distinguish between baseline and pre-project or pre-existing conditions.

Response: For purposes of the Policy, the baseline is the existing condition that will be used as the starting point by which to compare the adverse or beneficial effects of an action. In assessing compensatory mitigation, the Service will evaluate if the proposed mitigation measures are demonstrably new and would not have occurred without the compensatory mitigation measure and if they provide a conservation benefit above the baseline condition (*i.e.,* additionality). We have included the definition of baseline in section 6.

Comment (71): Several commenters requested the Service recognize in the Policy the ability of proponents to transfer responsibility for compensatory mitigation actions they initiate to a third party.

Response: We have revised the Policy to recognize that third parties may assume responsibility for implementing proponent-responsible compensation. This Policy advocates equivalent ecological, procedural, and administrative performance standards among all compensatory mitigation mechanisms. Therefore, conversion of a proponent-responsible plan to one administered by a third party is inconsequential relative to the Policy's goals. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations to ensure success and durability.

Comment (72): One commenter suggested the Policy indicate that Service-approved conservation banks for aquatic and aquatic-dependent species may also serve the purpose of compensating for impacts to waters regulated under the CWA, but that the Corps has discretion to use a conservation bank for those purposes.

Response: We agree that a wetland protected and managed as a conservation bank to compensate for impacts to species may also serve as a wetland mitigation bank, provided the Corps has approved the bank for that purpose. Because the Policy addresses mitigation for impacts to fish and wildlife species and not impacts to regulated wetlands, per se, the comment exceeds the scope of this Policy and does not warrant a specific revision. However, we intend to address operational considerations for compensatory mitigation mechanisms in step-down policies, such as the proposed ESA Compensatory Mitigation Policy (81 FR 61032–61065, September 2, 2016).

Comment (73): One commenter questioned whether measures that are considered ''onsite compensation'' in the context of permitting processes under the CWA (*i.e.,* restoring, enhancing, and/or preserving wetlands on or adjacent to the impact site) are considered a form of minimization under the Policy. The commenter noted section 5.6.3 indicates that compensation occurs ''generally in an area outside the action's affected area,'' but also refers to compensation sites that are either ''within or adjacent to the impact site.''

Response: The Policy adopts the five mitigation types defined in the NEPA regulations. We include ''rectifying the impact by repairing, rehabilitating, or restoring the affected environment'' (rectify) and ''reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action'' (reduce) under the ''minimizing'' label, but have not discarded these definitions, which have specific utility for species conservation. Our purpose for consolidating the five NEPA mitigation types into three was to align the general language of this Policy with that of the existing three-tiered DOI and CWA mitigation policies (avoid, minimize, and compensate). We group ''rectify'' and ''reduce'' with ''minimization'' to recognize the priority of these types of measures over compensation in the mitigation hierarchy, because such measures are, by definition, onsite measures focused specifically on the action-affected resources. We recognize that, unlike proactive minimization measures, measures to rectify and reduce impacts over time occur after impacts and are, therefore, more similar to compensation measures. Compensation replaces, or provides substitute resources or environments for, the affected resources, not necessarily within the affected area. Replacing or providing an onsite substitute for an affected resource meets the definition of rectify, but in the three-tier scheme of mitigation under CWA processes, is typically called onsite compensation. Because this Policy addresses species and not waters of the United States, some differences in terminology with mitigation under the CWA are unavoidable.

Under this Policy, which has not discarded the definition of rectify, ''onsite compensation'' has a narrower meaning. Onsite compensation involves provision of a habitat resource within the action area that was *not* adversely affected by the action, but would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but water availability in dry years is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status over some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. This Policy would identify measures to restore food resources as rectification and measures to increase water availability as onsite compensation.

Comment (74): Five commenters addressed the Policy's reference to habitat credit exchanges among available compensatory mitigation mechanisms. Two commenters expressed support for the inclusion of habitat credit exchanges, but one commenter said that they should be excluded because there are no existing

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

examples that demonstrate the viability of the concept. Three commenters said the Policy should emphasize that equivalent standards apply to habitat credit exchanges as well as all other compensatory mitigation mechanisms. Two commenters said the Policy should further define habitat credit exchanges.

Response: We agree with the majority of the commenters that defining and clarifying the role of habitat credit exchanges as a potential compensatory mechanism is prudent. In section 6, we have added the definition of habitat credit exchange. We confirm that all compensatory mitigation mechanisms, including habitat credit exchanges, must meet equivalent standards. Habitat credit exchanges in concept are not new. They are the species equivalent to the environmental market mechanisms established for carbon and water quality trading. Exchanges are emerging where wide-ranging species cross multiple natural and geo-political boundaries and a mechanism to engage vast numbers of participants is desired. At its core, a habitat credit exchange is a trading platform and, therefore, may encompass other compensatory mitigation mechanisms such as conservation banks.

Comment (75): One commenter expressed concern that ''performance standards'' are included among the 12 considerations for compensatory mitigation mechanisms in section 5.6.3, but are not mentioned in section 5.8 about documenting final Service recommendations. The commenter recommended the Service require performance standards in mitigation plans that address the full range of measures adopted (avoidance, minimization, and compensation), not just compensatory measures.

Response: We agree mitigation plans should include performance standards that address the effectiveness (degree to which objectives are achieved) of any mitigation means and measures (avoid, minimize, compensate) for which the outcome is relatively uncertain. Although such uncertainty is generally greatest for compensatory measures involving future habitat improvements to offset unavoidable impacts, the success of planned avoidance and minimization measures is not always assured and may require monitoring. To handle uncertainty, section 5.8 indicates that Service-recommended/approved mitigation plans should specify measurable objectives, associated effectiveness monitoring, and additional adaptive management (*i.e.,* corrective) actions as indicated by monitoring results. These final plans address the full range of mitigation means and measures that are reasonable and appropriate to ensure the proposed action improves or, at minimum, maintains the current status of affected species and their habitats. We did not use the phrase ''performance standards'' in section 5.8 as we did in section 5.6.3, and it is not necessary to do so. A compensatory mitigation plan that is prepared independently of a general mitigation plan for an impact-causing action (*e.g.,* the instrument for operating a conservation bank or in-lieu fee program) will serve the compensation needs of one or more such actions, and both types of plans require objectives and appropriate effectiveness monitoring (*i.e.,* performance standards).

Comment (76): One commenter recommended the Policy explicitly require an equivalent assessment of impacts and offsets (*i.e.,* the amount of compensation necessary to, at minimum, maintain the current status of the affected species after applying avoidance and minimization measures).

Response: Section 5.3, Assessment, provides general guidance for estimating impacts and benefits. This guidance applies to assessing the effects of actions both with and without mitigation options. Section 5.3 directs Service staff to use best available effects-assessment methodologies that meet various criteria, including the ability to estimate adverse and beneficial effects using ''common'' (*i.e.,* shared or equivalent) metrics. We have revised this language to clarify that ''common'' means ''equivalent,'' and have added an example to illustrate the concept. The example involves assessing effects to a species' food resource. The metric is the density or spatial extent of the food resource. Predicted decreases and increases in this metric represent adverse and beneficial effects, respectively.

Comment (77): One commenter stated that the Service should not require the use of a mitigation or conservation bank over other mitigation mechanisms, and that the Service lacks authority to require financial assurances of action proponents.

Response: We are clarifying the circumstances under which the Service may require the implementation of mitigation under the guidance of this Policy. Such circumstances are limited, and we expect our application of the Policy will most often occur in an advisory capacity to action proponents. The Policy expresses a preference for compensatory mitigation in advance of impacts, but the use of conservation banks or other compensation in advance of impacts is not a firm requirement, even when the Service is funding, approving, or carrying out the proposed action. To the same extent that the Service cannot require mitigation under all of the authorities that apply to a particular action, the Service cannot require financial assurances of action proponents in all cases (*e.g.,* outside the ESA Habitat Conservation Plan context). Nevertheless, we are retaining the reference to financial assurances throughout the Policy as a prudent component of mitigation plans. Such assurances are a reasonable and practicable underpinning for reducing the uncertainty about achieving the objectives associated with mitigation plans, especially with compensatory activities intended to secure future benefits to the affected species.

Comment (78): One commenter believed the Policy preference to compensate for impacts in advance of actions causing impacts would discourage voluntary actions to conserve species in order to avoid the need to list them as endangered or threatened under the ESA. The commenter suggested Service listing decisions would discount any habitat improvements that are identified, or could serve as advance compensation, presumably because the proponents of future actions causing impacts to the species would seek to claim such improvements as compensatory offsets. Over time, advance compensation improves the status of the species only to the extent that its benefits exceed the impacts of those future actions relying upon it; therefore, advance compensation does not necessarily preclude the need to list a species.

Response: This Policy does not address listing decisions under the ESA. This comment addresses the purposes of the Service's proposed ''Policy Regarding Voluntary Prelisting Conservation Actions'' (79 FR 42525–42532, July 22, 2014), which is not yet finalized. The proposed Voluntary Prelisting Conservation Actions policy describes the Service's proposal to give credit to such actions in the event of a subsequent listing of the species. In the context of both section 7 and section 10 of the ESA, the Service proposes to recognize a proponent's previous conservation actions as offsets to the adverse effects of a proposed action within the framework of an established conservation plan for the species in States that participate in the prelisting conservation program. Regardless how the Service finalizes the Voluntary Prelisting Conservation Actions policy, this Policy expresses Service support for compensation in advance of impacts to species, and the Service will account for

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

advance compensation actions in its formulation of mitigation recommendations.

Comment (79): Several commenters recommended the Policy address preferences for ''in-kind'' vs. ''out-of-kind'' compensatory measures. Some urged the Service to explicitly endorse out-of-kind measures, while others advised us to express a strong preference for in-kind measures as in the 2008 Mitigation Policy for CWA section 404 permitting.

Response: We do not use the terminology of ''in-kind'' vs. ''out-of-kind'' compensation in this Policy. Unlike the Mitigation Policy for CWA section 404 permitting, where the subject resources are waters of the United States, the subject resources of this Policy are species. All compensatory mitigation recommended by the Service under this Policy is ''in-kind'' for the affected evaluation species (*i.e.,* it must offset an action's unavoidable impacts to the same species). We do not express a preference for implementing compensatory measures in the same type of habitat(s) affected by the action. Based on a species' conservation needs and applicable plans/strategies to address those needs, Service personnel will determine whether in-kind or out-of-kind habitat compensation will provide the most practicable means of ensuring a proposed action improves or, at minimum, maintains the current status of the affected evaluation species.

Comment (80): Two commenters recommended that the Policy recognize an action proponent's authorities/abilities to implement all mitigation measures onsite only, or to implement compensatory measures only within a particular jurisdiction.

Response: The Service should not provide recommendations that others have no discretion to consider, and this Policy does not direct Service personnel to do so. Measures that avoid and minimize impacts apply within the area affected by the action, and proponents should generally have sufficient discretion to adopt and implement all such measures. The Service will respect the jurisdictional limitations of proponents to implement compensatory measures outside the affected area.

Comment (81): A few commenters expressed concern that early or voluntary mitigation actions would not be recognized or given the appropriate crediting.

Response: The Service supports early and voluntary mitigation actions and is committed to collaborating and coordinating with project proponents to assess the accrual of additional conservation benefits from such actions.

Comment (82): A number of commenters addressed the concept of duration in relation to the durability of mitigation measures. Several commenters questioned the standard to maintain the intended purpose of the mitigation measure ''for as long as the impacts of the action persist on the landscape.'' These commenters suggested the duration of the mitigation site be correlated to the monitoring and maintenance period after which the mitigation sites should be allowed to evolve through natural successional processes rather than be required to maintain a specific condition. Another commenter recommended more objective or established timeframes such as length of the ''planning horizon'' or ''in perpetuity'' to characterize the duration of the mitigation. One commenter suggested the burden of proof be on the project proponent to demonstrate that impacts of a temporary duration have been removed before being released from a mitigation obligation.

Response: The Service will recommend or require that mitigation measures be durable, and at minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service acknowledges site-specific conditions may need to evolve through natural processes. For example, we expect riverine systems to scour and revegetate in cycles, causing species composition to vary at any one point in time but supporting targeted resources in the long term. In other circumstances, active management (*e.g.,* controlled burning, grazing) may be needed to retain the intended purpose of the mitigation site for affected resources. Mitigation measures for permanent impacts will rely on permanent mitigation. When it can be demonstrated that impacts to affected resources are temporary, durability accounts for the time the effects of the action persist.

Comment (83): One commenter noted the definition of ''durability'' only includes the concept of duration and not the implementation assurances needed to ensure the mitigation is durable, while another commenter suggested that reference be made to the elements ''a. thru i.'' as set forth in 81 FR 12380 at 12391 (March 8, 2016) as essential to the definition.

Response: Durability is one of the fundamental principles that will guide Service mitigation recommendations to ensure mitigation measures maintain their intended purpose for affected resources for as long as impacts persist on the landscape. We agree with the commenters that implementation assurances are needed to ensure mitigation is durable. Section 5.6.3 identifies those elements intended to ensure successful implementation and durability of compensatory mitigation measures, including site-protection mechanisms, performance standards, monitoring, long-term and adaptive management, and provisions for financial assurances.

Comment (84): Several commenters supported the approach described in the Policy regarding the limits on use of research or education as compensatory mitigation. Three commenters suggested that use of research/education as compensatory mitigation should be expanded. One commenter suggested we add additional implementation detail. For clarity, one commenter suggested moving the research/education material under a new header or section.

Response: We agree with the commenters who said compensatory mitigation should provide tangible benefits and that research/education should be included in a mitigation package only in those limited circumstances described in the Policy. Exhaustive implementation detail on this topic is beyond the scope of this umbrella policy, which covers all Service mitigation authorities wherever they are carried out. Such detail may be contained in future step-down guidance or will be determined on a case-by-case basis by Service staff. We have reorganized the material into a new section 5.6.3.2.

S. Adaptive Management

Comment (85): In general, commenters appeared to agree with the concept of adaptive management, as discussed in the Background section and other areas of the Policy. Several commenters suggested refinements to the Policy to increase certainty for project proponents. One commenter was concerned with regard to adaptive management's nexus with protections for federally listed species.

Response: We agree the iterative process used during adaptive management serves to facilitate progress toward achieving defensible and transparent objectives. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation, including those related to adaptive management. Nothing in this Policy supersedes statutes and

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

regulations governing treatment of federally listed species.

T. Documentation

Comment (86): Commenters asked that final recommendations include, in writing, all steps and clearly identify party responsibilities regarding implementation and performance of mitigation measures. One commenter requested more consistency between the 12 elements identified in section 5.6.3 and the section on final recommendations. Another commenter requested clarification of whether information provided by the Service through the Policy is a requirement or considered technical assistance.

Response: The Policy indicates that documentation should be commensurate in scope and level of detail with the significance of the potential impacts to resources, in addition to providing an explanation of the basis for Service recommendations. As this Policy is meant to guide the overall approach to mitigation planning while allowing the greatest flexibility for Service program needs, we expect further guidance will document specific requirements on specific elements included in documentation. Section 5.6.3 describes the use of compensatory mitigation, one of the five general types of impact mitigation described under section 5.6, Means and Measures. Section 5.6.3 includes several measures meant to ensure successful implementation and durability, specific to instances where compensatory mitigation is employed. The text in section 5.8, Documentation, has been modified to include the phrase: ''Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.''

U. Monitoring

Comment (87): Many commenters were concerned how this Policy would add predictability, efficiency, and timeliness. Some were particularly concerned about potentially variable interpretation among Service field offices. One recommended actual Policy implementation elements be separated due to complexity and provided as guidance, while two others stated the Policy was not specific enough to evaluate and ensure consistency. Several commenters requested a standardized process or system, with clear guidelines and methods for implementation, be established to determine effectiveness, monitor durability, and track performance to ensure compliance and deliver conservation benefits. One commenter was concerned that wildlife and habitat assessments envisioned by the Policy could entail complex analyses, while others said mitigation should be based on biological conditions and reliable, repeatable, and quantitative science-based methods to measure benefits and outcomes and inform adaptive management. Others suggested use of key ecological attributes (KEAs) to measure outcomes. Some were concerned that there was no requirement for monitoring, while others supported standardized self-reporting. One commenter noted the monitoring requirement may conflict within the Policy itself (Appendix B, section C) with regard to the responsibility of the Service to monitor compliance.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such (a) system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. The principle articulated in paragraph (f) of section 4 specifically states: ''The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.'' The principle articulated in paragraph (f) states ''The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape.'' Thus, where appropriate, a process using KEAs may be applied. Regarding requirements for monitoring, the Policy states the Service's final mitigation recommendations should communicate in writing ''c. effectiveness monitoring; d. additional adaptive management actions as may be indicated by monitoring results; and e. reporting requirements.'' Regarding the statement indicating the need or inability to ''require'' monitoring, this Policy serves as an overarching guidance applicable to all actions for which the Service has specific authority to recommend or require the mitigation of impacts to fish, wildlife, plants, and their habitats. The text in the Policy was modified to clarify its intent with regard to monitoring compliance. This includes Appendix B, which now clarifies Service responsibilities for applying the Policy when formulating our own proposed actions under the NEPA decisionmaking process, versus being used as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA.

V. Recommendations and Preferences

Comment (88): One commenter was concerned that certain language in the Policy appeared to devalue proponent-responsible compensatory mitigation and cautioned against conflating preferences with standards. This commenter pointed to the Department of the Interior's Departmental Manual Chapter (600 DM 6) on Implementing Mitigation at the Landscape-scale (October 23, 2015), that lists the high and equivalent standards to which all mechanisms for compensatory mitigation should be held in section 6.7. They noted preferences are not included in that list, so while the ideas of ''equivalent standards'' and a policy's ''preferences'' are both principles, a preference is not an equivalent standard. They said each mitigation measure does not need to adhere to each preference, only to each equivalent standard. They suggested that the following statement be removed from section 5.6.3 of the Policy, as it seemingly asserts all mitigation measures must achieve the preferences: ''As outlined by DM 6.6 C, this means that compensatory mitigation measures will. . .implement and earn credits in advance of impacts . . . .''

Response: We do not intend to devalue proponent-responsible mitigation, and we recognize it is a vital compensatory-mitigation mechanism, whether implemented by private project developers, agencies, or third-party mitigation implementers. We acknowledge flexibility is warranted in recommendations for the compensatory mitigation measures and mechanisms most likely to achieve the Policy's goal, and we established a preference for advance mitigation because it is the compensatory mitigation timing most likely to achieve that goal. We recognize either concurrent mitigation or mitigation occurring after impacts may be necessary in some cases, and may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banks or other compensatory mitigation mechanisms. Conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, but any other compensatory mitigation mechanism that does so is also consistent with the Service's preference. We agree with the

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

suggestion to remove reference of our preference for advance mitigation from the language that precedes the list of equivalent standards, located in the new section 5.6.3.1, Equivalent Standards, and have made that targeted edit to avoid further confusion between preferences and equivalent standards.

Comment (89): One commenter asked for clarification of the following statement on advance compensatory mitigation within section 5.7.1, Preferences: The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Response: The sentence the commenter mentions addresses temporal loss. Temporal loss is the delay between the loss of resource functions caused by an impact and the replacement of resource functions at a compensatory mitigation site. Additional compensatory mitigation may be required to compensate for temporal loss. When the compensatory mitigation project is initiated prior to, or concurrent with, the impacts, additional compensation for temporal loss may not be necessary, unless the resource has a long development time. We have added an additional sentence to clarify the statement.

Comment (90): One commenter said the Policy should use a priority and preference, similar to the Corps' and EPA's joint rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332, and 40 CFR part 230 (EPA), 33 U.S.C. 1344. In that regulation, the agencies establish an explicit preference for mitigation banking, followed by in-lieu fee programs, and finally, proponent-responsible mitigation.

Response: This Policy is an umbrella policy that integrates all of the Service's authorities for engaging in mitigation processes. One reason we have not pursued an outright preference for banks or other mechanisms is that our authorities to recommend mitigation extend beyond the current track record for banks, which is limited to aquatic habitats and listed species. Instead of following the regulatory model from the CWA practice of stating an explicit, hierarchical preference that begins with banks, we establish a preference for advanced mitigation. While conservation or mitigation banks do typically secure resource benefits before impacts occur, and may be more likely to satisfy this preference, any compensatory mitigation mechanism that secures resource benefits before impacts occur may also be consistent with the Service's preference.

We expect additional detail regarding compensatory mitigation mechanisms will be included in future step-down policies that are specific to compensatory mitigation. In this Policy, we use terminology that supports and accommodates future Service policies rather than pre-determines their content. For example, we do not yet know what compensatory mitigation mechanisms will be preferred in future Bald and Golden Eagle Protection Act regulations, so it would be inappropriate to state firm preferences here.

Comment (91): One commenter suggested we revise section 5.7, Recommendations, to indicate that compensatory mitigation should encourage more sustainable contributions of the goods and services provided to the public. This commenter said mitigation can have larger public benefits and services and that the Service should encourage mitigation actions that have additional natural, cultural, historical, or recreational values and benefits.

Response: We agree mitigation actions can provide the benefits the commenter describes. In section 5.1, we describe our support of the development of mitigation plans that identify high-priority resources prior to specific proposed actions. The most effective early mitigation planning is integrated with conservation planning and planning for human infrastructure, including transportation; water and energy development; as well as working lands, recreation, and cultural values. Although such integration is not a requirement of a process under any particular mitigation authority, the Service recognizes the potential power of plans that simultaneously addresses multiple ecological and human needs from broad stakeholder perspectives.

W. Advance Mitigation

Comment (92): Several commenters addressed the Policy's inclusion of a preference for advance mitigation. Several said they strongly endorsed statements throughout the Policy that recognize the value of compensatory mitigation completed in advance of impacts. Others said the preference should be removed or altered, but their reasoning differed. Some opposed a categorical requirement that mitigation be implemented prior to impacts, while others suggested the Policy go further than a preference and make advance mitigation a requirement. Some commenters said a preference was appropriate, but suggested the Policy use consistent language in referring to a preference.

Response: Section 5.7.1 describes a preference for advance mitigation. It is not a requirement. As policy, we prefer that compensatory mitigation be implemented before the impacts of an action occur, making affected resources less vulnerable to temporal impacts and a net loss. Advance mitigation reduces risk and uncertainty. Demonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or following, the impacts of an action. Most of the Service's mitigation authorities provide the ability to specify mitigation recommendations rather than requirements, and the Service would not be able to create a requirement for advance mitigation through policy. Accordingly, when providing mitigation recommendations to another action agency for consideration in their permitting or project decision, this Policy's guidance to Service staff is that they indicate their preference for advance mitigation. We have made minor edits to more consistently refer to this preference.

Comment (93): Several commenters said the Policy's preference for advance mitigation is incompatible with project-planning realities, is not feasible or appropriate for some projects, and is not always possible. They suggested we revise the Policy to allow mitigation to occur concurrent with, and in some circumstances following, impacts to be consistent with the Corps' mitigation framework. Some commenters suggested simultaneous construction of the project and mitigation remain an option.

Other commenters expressed the need for flexibility regarding the preference for conservation reasons. One commenter said overemphasizing the timing of mitigation could limit the Policy's goal of net conservation gain. They suggested the Policy de-emphasize mitigation timing in favor of tailored mitigation that addresses the needs of unique species and habitats. They were also concerned that a preference for advance mitigation would give priority to for-profit conservation/mitigation banks, and may not adequately tailor mitigation for the impacted resources. Another commenter noted that some initial flexibility may be necessary as new mitigation programs are created at the State and local levels.

Response: Because advance mitigation is the Service's preference and not a requirement, the Policy is compatible with circumstances where

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

compensatory mitigation is concurrent with or after project impacts. It is our preference that compensatory mitigation be implemented prior to project impacts, but we recognize that authorities and project planning circumstances might prevent implementation of advance mitigation in some cases. While concurrent mitigation is an option when circumstances allow, proponents may expect advance mitigation to remain the Service's preference in most cases.

We agree that flexibility is necessary in recommendations for compensatory mitigation measures and mechanisms that are most likely to successfully secure resources. Advance mitigation is the Service's preference, as it is the compensatory mitigation timing that is most likely to achieve success in regard to procuring funding. We recognize that concurrent mitigation or mitigation occurring after impacts may be necessary in some cases or may represent the best ecological outcome in others. The Policy does not establish an explicit preference for conservation or mitigation banking or other compensatory mitigation mechanisms. Conservation or mitigation banking typically secures resources before impacts occur, but any compensatory mitigation mechanism that does so may also be considered consistent with the Service's preference.

Comment (94): One commenter wrote that it is possible for in-lieu fee programs to implement advanced mitigation, although they have not done so historically. This commenter also said a preference for advanced mitigation applied to in-lieu fee programs would increase their likelihood of success.

Response: The Policy's preference for advance mitigation applies to all compensatory mitigation mechanisms. Although conservation or mitigation banking secures resources before impacts occur, any compensatory mitigation mechanism implemented before impacts occur may also satisfy this preference. In-lieu fee programs can implement a ''jump-start'' that establishes and maintains a supply of credits that offer mitigation in advance of impacts.

X. Public and Private Lands

Comment (95): Several commenters focused on the way the Policy addresses siting of compensatory mitigation relative to land ownership status in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. Several expressed support for the Policy's statement that mitigation will generally be required on lands with the same ownership classification as those where impacts occur. Some commenters believe the Policy should establish even stronger controls on public land mitigation, saying that impacts on private lands should not be mitigated on public lands. These commenters reasoned that mitigation on public lands has limited value and should not be allowed. One commenter said the Policy should recognize that when any compensatory mitigation is sited on Federal lands, unless a full-cost compensation is made for the fair market value (at a minimum) of the land utilized, then the public is subsidizing the development that caused the resource impacts. One commenter said no policy should create unfair competition with private industry, or create a disincentive to private investment in compensatory mitigation. They felt this could occur if there were no restrictions on siting compensatory mitigation for private-land impacts on public land locations. One commenter noted that some land managers would like to use compensatory mitigation funds to resolve preexisting problems on public lands, usually unrelated to the action and resources under active analysis. The commenter said this view is understandable but contrary to the mitigation hierarchy.

Several commenters suggested fewer barriers or checks on mitigating private-land impacts on public lands, and the removal of the statement that compensatory mitigation should generally occur on lands with the same ownership classification as at the location of impacts. These commenters said requiring mitigation on lands with the same ownership classification is unnecessarily restrictive, adding that, when implemented, the standards for compensatory mitigation will force a positive result regardless of land ownership. One commenter said public land managers do not and will not have the funding necessary to stabilize and recover some resources, and it is, therefore, imperative that private conservation investments, including mitigation for adverse activities, be applied on public lands if it will provide maximum conservation benefit for the affected resource.

Response: Compensatory mitigation can occur on public lands, and in some cases, such siting may lead to the best ecological outcome. Compensatory mitigation for impacts on public lands can be sited on both public and private lands. Also, compensatory mitigation for impacts on private lands can be located on public lands, but it is that combination, or that particular change in ownership classification, where Service staff should be attentive to additional considerations before confidently making such a recommendation. Section 5.7.2 describes factors Service staff should consider. This cautious approach is warranted within the Policy's instruction to Service staff, for the reasons described below.

We recognize that funds to properly manage or restore public lands are often insufficiently available today, absent infusion of mitigation dollars. This argument may have merit in some cases, but we remain concerned about consequences. It is possible that funding availability is reduced and opportunities to restore or protect at-risk habitats on private lands are precluded when compensatory mitigation is sited on public lands. If passed, those opportunities on private lands are often permanently gone. Given the irregular footprint of public lands across much of the United States, we are also concerned about strategic conservation of wildlife if the aggregation of mitigation onto public lands is further streamlined without articulating at least some test or application of criteria prior to making such recommendations. If we remove all checks on locating compensatory mitigation for private land impacts on public lands, we may risk making the ''export'' of habitats from private to public lands a routine practice, as it may often be the lower cost option. This outcome would counter the Service's intent that the Policy be applied using a landscape-level approach.

We agree with the commenters who said there is potential for the public to subsidize the development that causes resource impacts if access to public lands for compensatory mitigation is streamlined to an inappropriate extent. This could potentially facilitate impacts or de-incentivize avoidance on private lands by artificially reducing the costs of compensatory mitigation for project proponents.

We are also concerned about the unintended consequence of reducing private conservation investment. Streamlined access to public lands for proponents needing to provide mitigation for impacts on private lands could undermine private conservation investment and banking opportunities, or weaken the economic conditions necessary for bank establishment by artificially reducing proponents' mitigation costs (*e.g.,* land acquisition costs might not be fully incorporated).

Comment (96): Several commenters discussed conditions or means for ensuring compensatory mitigation on public lands is durable and held to the

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

same standards as when conducted on private lands.

One commenter said the Policy should require the public land agency include the compensatory mitigation requirements as specific conditions in the special use permit or other required authorizations. This commenter also said a long-term management plan should be included in the use authorization, permit, or other legally binding document. They said that in order to ensure long-term management plans are binding, they should be established through a contractual agreement between the public land management agency and a third party with a conservation mission.

One commenter said compensatory mitigation on Federal lands for impacts on private lands must include full-cost compensation for the use of public lands, either through monetary compensation or implementation of additional projects to further the purposes of the Federal lands.

One commenter said land managers must demonstrate that actions taken in already-protected areas meet mitigation objectives and are not used solely for the benefit of existing protected area management goals. They added that when compensatory mitigation is sited within protected areas, land managers must uphold accountability by maintaining a ledger of mitigation actions undertaken and completed in addition to existing conservation obligations.

One commenter said the Policy, at minimum, should give preference to private lands with high conservation potential yet currently lacking conservation assurances (*i.e.,* legal and financial assurances in place to achieve protection in perpetuity) before considering the use of public lands for mitigation.

Two commenters said the Policy should require public land managers commit to long-term protection and management, and that they implement and fully fund alternative compensatory mitigation in the event of a change in law that allows incompatible uses to occur on mitigation lands. They said this would provide better certainty to project proponents when mitigating on public lands.

Response: We agree that the identification of mechanisms for ensuring the durability and additionality of compensatory mitigation on public lands is both important and challenging. As an umbrella policy, this Policy integrates all of the Service's authorities for engaging in all aspects of mitigation, and is not specifically a compensatory mitigation policy. It is beyond the scope of the Policy to provide detailed procedural information for all compensatory mitigation scenarios. Also, as many of our mitigation authorities are advisory, it would be inappropriate to present detailed compensatory mitigation procedures in this Policy for such advisory authorities, when that information may already be presented in the existing regulations or guidance of other agencies. We agree that compensatory mitigation on Federal lands for impacts occurring on private lands must incorporate accounting for the difference between the cost of using public lands compared to private lands. Otherwise, agencies will not be able to maintain a level playing field for both public and private lands and for all types of compensatory mitigation mechanisms. Detailed specification of measures to ensure such accounting is beyond the scope of this Policy.

Public lands that are proposed for siting compensatory mitigation may include Federal, State, county, and municipal lands. The existence and nature of mechanisms to ensure durability and additionality varies widely across land management agencies. Given this variation, it is prudent for this Policy to provide general guidelines for Service staff to examine before recommending mitigation of private land impacts on public lands. As described in section 5.7.2, these include additionality, durability, legal consistency, and whether the proposal would lead to the best possible conservation outcome.

Comment (97): One commenter addressed the Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999). They said siting compensatory mitigation for impacts permitted under the CWA on National Wildlife Refuge System lands is not appropriate and that those lands were not established for fulfilling private wetland impact mitigation requirements. They added that the Service must fulfill its responsibility for fully functioning Federal lands and should in no instances lower its standards when contemplating compensatory mitigation; to do otherwise would subsidize private mitigation. This commenter was concerned that section 5.7.2 undermined the 1999 Policy.

Response: We appreciate the commenter's observations and share their concerns regarding compensatory wetland mitigation on National Wildlife Refuge System lands. Those concerns led to, and were addressed by the 1999 Policy. Section 5.7.2 does not undermine the 1999 Policy. Regardless of the content of section 5.7.2, when the public land proposed for siting compensatory mitigation for permitted impacts under the CWA is a National Wildlife Refuge, that proposal is specifically covered by, and must comply with, the 1999 Policy. Our revisions of the 1981 Policy do not modify or supersede the 1999 Policy.

Y. Implementation

Comment (98): One commenter recommended an economic analysis because they believed there would be additional burdens and cost of implementing the Policy.

Response: We understand that confusion regarding whether the Service's comments are requirements or merely recommendations may have led some to believe the scope of the Policy has been substantially expanded. The burdens and costs associated with this Policy will remain largely the same as under the 1981 Policy and under existing agency practice.

Comment (99): Commenters requested the Service articulate a clear timeline in which the Policy will be implemented across the agency. A 2-year timeline was recommended, as it would allow enough time to sufficiently (a) adopt the Policy, (b) train and educate staff, and (c) apply the Policy in the field. Others questioned the undue burden to staff and availability of funding to implement the Policy. Similarly, commenters requested information on how the Service plans to implement the Policy, given staffing and budget constraints.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Regarding the request that a ''standardized process'' or ''system'' be established, where such a system(s) would be of benefit, it would be more practicable to establish it at a regional or programmatic scale, and would be handled through step-down guidance. During development of such guidance, the Service will facilitate discussions and training with staff to ensure consistency and reduce workload.

Comment (100): Many expressed concern with how the Policy may be inconsistent or conflict with regulations or policies from States, and other Federal agencies responding to the Presidential Memorandum on Mitigation (National Marine Fisheries Service, Corps, National Atmospheric and Oceanic Administration, Federal Energy Regulatory Commission, etc.), given the need to promulgate joint regulations. Some urged the Service to

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

coordinate this Policy internally, particularly with policies promulgated under the Endangered Species Act and CERCLA, OPA, and the CWA during natural resource damage assessment. One commenter requested clarity where more than one statute applies, others suggested the Service provide training internally and externally to other agencies, and some recommended examples and templates be constructed.

Response: The Policy is consistent with the Presidential Memorandum on Mitigation. The guidance development referenced in the Presidential Memorandum on Mitigation is under consideration within the Department of Interior at the time this Policy is being finalized and the Service will continue to seek consistency in future guidance. We have made edits to Appendix A to clarify the relationship of this Policy with natural resource damage assessment and the Presidential Memorandum on Mitigation.

Comment (101): One commenter questioned the use of ''reasonably foreseeable,'' requesting clarification of what impacts would be considered such and what criteria would be applied to make that determination.

Response: The Service will implement use of the phrase ''reasonably foreseeable,'' similar to that used in NEPA. Under this scenario, actions that are likely to occur or are probable, rather than those that are merely possible, would be considered reasonably foreseeable. See CEQ guidance at 46 FR 18026 (March 23, 1981).

Comment (102): Several commenters were concerned that the Policy lacks clear mitigation protocol, resulting in moving targets for land users interested in developing and executing projects in good faith. Some commenters stated that the Policy will substantially increase uncertainty, without providing additional environmental benefits, especially given the broad range of regulatory protections already in place.

Response: The Service, being national in scope of operations, has written the proposed Policy in a manner that allows for further clarification on a regional scale. Thus, site differences could be considered during impact evaluation, for example, circumstances such as differences in productivity of habitat prior to the project, expected duration and severity of impact, or other local conditions. A less flexible policy could cause rigid adherence to a protocol, which may be more suitable in one region than another.

Comment (103): One commenter suggested the Service did not comply with procedural requirements to finalize the Policy, in particular the Administrative Procedure Act (APA) and the Regulatory Flexibility Act (RFA).

Response: The Service complied with all necessary regulatory requirements in publishing the final Policy. The Policy does not require compliance with the APA or the RFA because it is not regulatory. The Policy simply revises and replaces the 1981 Policy that guided the Service's mitigation recommendations for 35 years. This Policy is advisory in nature and outlines the Service's recommended approach to addressing accelerating loss of habitats, effects of climate change, and a strategic approach to conservation at appropriate landscape scales. It addresses all resources for which the Service has legal authorities to recommend mitigation for impacts to resources and provides an updated framework for mitigation measures that will maximize their effectiveness at multiple geographic scales.

Comment (104): Several commenters suggested we allow the public to comment on a complete portfolio of policies, handbooks, and guidance documents that implement the Policy at one time.

Response: Many of the Service's guidance products are completed, while others are either in development or have yet to be drafted, making it logistically impossible to complete such a filing. This Policy is intended to be an umbrella policy under which more detailed policies or guidance documents covering specific activities may be developed in the future.

Z. Editorial and Organizational Comments

Comment (105): Many commenters provided specific technical, editorial, and organizational suggestions or corrections, including suggestions for new or modified definitions.

Response: We have addressed technical, editorial, and organizational suggestions and corrections as appropriate throughout the document.

Comment (106): Many commenters questioned the specifics of multiple definitions, requested clarification or refinement, or mentioned the need for additional or narrowed definitions (*e.g.,* baseline, additionality, equivalent standards, preferences and credits, emerging mechanisms, conservation objective, net conservation gain, impacts or effects, landscape, ecologically relevant scales, broad ecological functions, ecologically functioning landscapes).

Response: With regard to refining the definitions, the Service is consistent with the Departmental Manual and Presidential Memorandum. As with many of the decisions made during analyses of impacts, definitions of many terms may take on the nuances of the project and/or authority under which the mitigation is being discussed. We have preserved the flexibility and look forward to using existing means of engagement at the local and State level, when working with the States, tribes, and other partners through existing authorities while developing programs and additional guidance to seek mutual goals and avoid inconsistency, including newly emerging mechanisms for analyses, mitigation, and monitoring.

Comment (107): One commenter was concerned the definition of ''compensatory mitigation'' insinuates there will always be ''remaining unavoidable impacts'' that must be compensated, and suggests revisions. The same commenter states that the definition of mitigation hierarchy should include where departure from the sequential approach may achieve a better conservation income.

Response: If there are no residual impacts after ''all appropriate and practicable avoidance and minimization measures have been applied,'' no compensatory mitigation would be required. Departure from the mitigation hierarchy is detailed in section 5.5, where we describe how relative emphasis will be given to mitigation types within the mitigation hierarchy depending on the landscape context and action-specific circumstances that influence the effectiveness of available mitigation. No change was made to these definitions.

AA. Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

Comment (108): Five commenters suggested or requested clarifications regarding Appendix C, which addresses the limited role that specific types of mitigation can play in financial assistance programs. Two commenters said they supported limiting the use of public conservation funds to meet regulatory mitigation requirements, as the use of such funding to also generate credits undermines the effectiveness of both conservation and mitigation programs. They said that funding from any public entity that is specifically dedicated to conservation should not be used to generate credits, and suggested those funds be used to achieve baseline conditions. They suggested the Policy clarify that public conservation funds can be used to meet baseline.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Response: The commenters propose that, if funds from a public entity are specifically dedicated to conservation, they could be used to achieve baseline conditions, which they define as ''the level of resource function above which mitigation credits may be sold.'' However, even if baseline were defined as recommended, the achievement of baseline would still be an essential part of the process leading to the generation of mitigation credits.

This Policy prohibits the use of the Federal share or the required minimum match of a financial assistance project to satisfy Federal mitigation requirements, except in exceptional situations described in the Policy. This prohibition is consistent with the basic principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. The regulations were published in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the EPA, resulting in regulations at 40 CFR part 230. Sections 332.3(j)(2) and 230.93(j)(2) state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, *cannot be used for the purpose of generating compensatory mitigation credits* for activities authorized by [Department of the Army] permits. *However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, but supplemental to, such programs* in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.*]

The preamble of the final rule for these regulations clarifies the intent of §§ 230.93(j)(2) and 332.3(j)(2) by stating that, for example, if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for Federal funding could be used as compensatory mitigation credits.

The Policy acknowledges these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation of the Policy for mitigation required by authorities other than the CWA. Restricting the role of financial assistance funds for mitigation purposes is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (109): Two commenters said limiting the use of funds counted as matching funds toward Federal grants as mitigation is inconsistent with several existing State and Federal policy statements. They noted that in 2008, seven agencies including the Service, other Federal agencies, and several Oregon State agencies issued joint recommendations limiting the use of public conservation dollars to generate credits for mitigation. The recommendations state, ''The agencies believe that funds from programs identified as Public Resource Protection and Restoration Programs should not be used to finance mitigation projects undertaken to satisfy regulatory requirements. To do so would be inconsistent with the mandated and/or intended purposes and limitations of these programs.'' The recommendations further state ''. . . multisource funded projects should include accounting that is detailed and transparent enough to accurately measure the relative habitat and conservation values derived through each funding source.'' They also stated that Metropolitan Regional Governments and other sources of public conservation funds have consistently limited the use of pubic conservation funds to support mitigation, but allow mitigation funds to be used as match.

Response: The Policy allows matching funds to be used to generate credits only if: (a) The match used for the credits is over and above the required minimum; (b) funding for the award has been statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects; or (c) the project funded by the Federal financial assistance award requires mitigation as a condition of a permit. These restrictions are based on the premise that neither Federal funds nor any required contribution for obtaining Federal funds should subsidize those who are legally obligated to compensate for the environmental impacts of the projects they propose. This was an underlying principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation.

The regulations on compensatory mitigation under the CWA were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. For excerpts from these regulations that are relevant to this comment, please see our response to comment #108 above.

Consistent with the DOD and EPA regulations, the Appendix C, section (C)(1)(a) of the Policy allows the match in a Federal financially assisted project to be used to generate mitigation credits if: The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the restoration or conservation project.

Comment (110): Five commenters said they want to encourage collective action to achieve conservation outcomes, and leveraging multiple funding sources will lead to bigger projects with greater environmental benefits. They said the Policy seems to support a scenario where the EPA could fund $1 million of a project, a city could fund $2 million, but the city could not take any mitigation credits if it claimed those funds as match for the Federal grant. The commenters said this scenario could limit opportunities to create greater conservation or environmental benefit at a landscape scale.

Response: Under the commenters' scenario, if a city provided match above the required minimum, the Policy would not present a barrier for this ''surplus'' match to generate mitigation credits as long as the program's establishing authority(ies) or regulations do not prohibit it. However, if a program requires a minimum match, that required minimum has effectively already been dedicated to conservation by the rules of the program. In those programs where a minimum match is required, the Federal funds and the minimum match are essential components of the financial assistance. The award would not be possible without that minimum match, so the Policy does not allow either of these

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

essential components to generate mitigation credits.

This was a basic principle in the regulations that implement the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on compensatory mitigation. The Service's revised Policy is based on the same principle. If we were to allow the match required as a prerequisite for an award to generate mitigation credits, it would effectively subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Comment (111): Two commenters suggested the following text to reflect the importance of leveraging multiple funding sources in achieving landscape-scale outcomes: Public conservation funds cannot be used to meet regulatory compliance obligations. Where multiple sources of funding are used in conjunction with credit-generating activities, it is the permittee's responsibility to demonstrate compliance with this requirement. Public conservation funds can be used to meet baseline conditions.

Response: The Policy authorizes the use of specific funding sources that are, or could be interpreted as ''public conservation funds.'' The references to such funding in the Policy are:

(a) Federal funding statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects (Appendix C, section E(1)(b)).

(b) Federal funds needed to mitigate environmental damage caused by a federally funded project (Appendix C, section E(1)(c)).

(c) Revenue from a Natural Resource Damage Assessment and Restoration Fund settlement as long as the financial assistance program does not prohibit its use (Appendix C, section F).

The Policy also affirms that States, tribes, and local governments are free to use Federal financial assistance (*i.e.,* public conservation funds) to satisfy the mitigation requirements of State laws or regulations as long as that use is not contrary to any law, regulation, or policy of the State, tribal, or local government (Appendix C, section G(2)).

We did not accept the commenter's recommended language because it could lead to incorrect interpretations of the Policy.

The commenter also recommended ''public conservation funds'' be used to meet baseline conditions under the commenter's definition of ''baseline.'' We addressed this issue in a previous response.

Comment (112): One commenter said it is not workable to prohibit a site that has received Federal funds to generate credits. They suggested the Policy encourage the pooling of resources and the investment of mitigation dollars in the most valuable sites regardless of whether Federal funds have been invested on the site, especially for those uses not directly related to restoring greater sage-grouse habitat. The commenter said they believe thoughtful discussions and pertinent accounting will ensure Federal funds are not used to generate credits to offset the impacts of the private sector or create a conflict with the rules of additionality.

Response: The authority for most funds spent on mitigation is the CWA. The regulations that implement the CWA's compensatory mitigation requirements were published jointly in the **Federal Register** on April 10, 2008 (73 FR 19594), by: (a) The Department of Defense, resulting in regulations at 33 CFR parts 325 and 332; and (b) the Environmental Protection Agency, resulting in regulations at 40 CFR part 230. Sections 332.3(a)(3) and 230.93(a)(3) indicate that compensatory mitigation projects may be sited on public or private lands. Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, *over and above* those provided by public programs already in place. [*Emphasis added.*]

Sections 332.3(j)(2) and 230.93(j)(2) of 40 CFR part 230 state that, except for projects undertaken by Federal agencies, or where Federal funding is specifically authorized to provide compensatory mitigation, federally funded aquatic resource restoration or conservation projects undertaken for purposes other than compensatory mitigation, such as the Wetlands Reserve Program, Conservation Reserve Program, and Partners for Wildlife Program activities, cannot be used for the purpose of generating compensatory mitigation credits for activities authorized by [Department of the Army] permits. However, compensatory mitigation credits may be generated by activities undertaken in conjunction with, *but supplemental to,* such programs in order to maximize the overall ecological benefits of the restoration or conservation project. [*Emphasis added.]*

The CWA may have a limited effect on the habitat of the greater sage-grouse, but the underlying principles of its regulations are reasonable and appropriate for applicability to other statutory authorities for mitigation. Limiting any credits from projects on public lands to those based on resource functions provided *over and above* those already in place, avoids a government subsidy to those already legally obligated to compensate for impacts of their projects. The Policy adopts the basic principles of the CWA's compensatory mitigation regulations as the foundation for all sources of compensatory mitigation.

Comment (113): One commenter noted Appendix C includes information on the use of Service funds relative to the need to obtain permits from the Corps' regulatory program. To avoid confusing these requirements with the Corps' Civil Works requirements, they suggested adding a statement that Appendix C does not affect policies on cost-sharing or non-Federal contributions for the Corps' Civil Works Program.

Response: The Policy directly affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications. It also affects real property or equipment either acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for that purpose. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect: (a) Restrictions in this Policy on the use of Service-administered financial assistance awards for generating compensatory mitigation credits, and (b) the Service's responsibilities as identified in Federal statutes or their implementing regulations. The Policy does not take precedence over the requirements of any Federal statute or regulation, whether that statute or regulation applies to a Service program or a program of another Federal agency. We added a new section I to Appendix C to clarify these issues.

Comment (114): One commenter said the Service's proposed revised Policy is inconsistent on in-lieu fee mitigation in the context of financial assistance programs. They sought further explanation of the rationale of allowing Federal funds to satisfy mitigation requirements of State, tribal, or local governments.

Response: The revised Policy prohibits the use of proceeds from the purchase of credits in an in-lieu fee program as match unless both of the following apply:

(a) The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

funds and the required minimum match to maximize the overall ecological benefits of the project.

(b) The statutory authority(ies) for the financial-assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

This prohibition is consistent with the underlying principles of the regulations implementing the compensatory mitigation requirements of the CWA, which is the authority for most funds spent on mitigation. Please see relevant excerpts from the regulations published jointly by The Department of Defense and the EPA within our response to comment #108 above.

The Service's revised Policy defers to these regulations for mitigation required by the CWA (Dept. of the Army permits). It also adopts the underlying principles of these regulations as the foundation for mitigation required by authorities other than the CWA. Restricting the ability of financial assistance programs to generate compensatory mitigation credits is a reasonable requirement to avoid the equivalent of a Federal subsidy to those who are legally obligated to compensate for the environmental impacts of their proposed projects.

The rationale of allowing the use of Federal funds to satisfy mitigation requirements of State, tribal, or local governments is based on 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1), which have the force and effect of law only for the compensatory mitigation requirements of the CWA. However, the basic approach of these regulations is reasonable and appropriate for use as the foundation of a Service policy on mitigation in the context of financial assistance when the authority for mitigation is in a statute other than the CWA.

The regulations at 33 CFR 332.3(j)(1) and 40 CFR 230.93(j)(1) read:

(j) *Relationship to other Federal, State, tribal, and local programs.* (1) Compensatory mitigation projects for DA [Department of the Army] permits may also be used to satisfy the environmental requirements of other programs, such as State, tribal, or local wetlands regulatory programs, other Federal programs such as the Surface Mining Control and Reclamation Act, Corps civil works projects, and Department of Defense military construction projects, consistent with the terms and requirements of these programs and subject to the following considerations: (i) The compensatory mitigation project must include appropriate compensation required by the DA permit for unavoidable impacts to aquatic resources authorized by that permit. (ii) Under no circumstances may the same credits be used to provide mitigation for more than one permitted activity. However, where appropriate, compensatory mitigation projects including mitigation banks and in-lieu fee projects, may be designed to holistically address requirements under multiple programs and authorities for the same activity.

The wording of Appendix C, section G may have led the commenter to incorrectly conclude that Service-administered financial assistance may be awarded explicitly for the purpose of satisfying the mitigation requirements of a State, tribal, or local government. We changed the wording of section G to avoid any misunderstanding on this issue.

Comment (115): One commenter asked what, if any, impacts might be considered for administration of the Service's Wildlife and Sport Fish Restoration Program (WSFR) and State fish and wildlife agency obligations related to that program. They requested potential programmatic impacts be noted in the Policy, and the existing Joint Federal/State Task Force on Federal Assistance Policy (JTF) be engaged. This commenter appreciated the Policy's emphasis on collaboration and coordination, but suggested we also cite 43 CFR part 24, *Department of the Interior Fish and Wildlife Policy: State-Federal Relationships.* They also said the Service should consult with the States and other affected governments before selecting plans to guide mitigation, and that great deference should be given to State-prepared plans.

Response: It is difficult to assess the impact of the Policy on WSFR because the Service has never had any comprehensive national policy on the role of mitigation in its financial assistance programs. The CWA is the authority for most funds spent on mitigation, and it is the only Federal statutory authority for mitigation that addresses mitigation in the context of financial assistance. The Policy does not (and cannot) change the CWA regulations on compensatory mitigation, which have been in effect since 2008. The Policy will give grants managers in the Service and in recipient agencies a better awareness and understanding of these regulations.

In addition to the 2008 CWA regulations, an element of continuity in this Policy is its treatment of the Natural Resource Damage Assessment and Restoration Fund. This Policy incorporates the findings of a 1999 Solicitor's Opinion determining that revenue from this fund was eligible as match.

As for the commenter's recommendation that we consult with the States and other affected governments before selecting plans to guide mitigation, on March 8, 2016, we published the proposed revised Policy in the **Federal Register**, and invited all interested parties to comment during a 60-day comment period. On May 12, 2016, we extended the comment period for an additional 30 days. We are pleased to have received the recommendations of the Association of Fish and Wildlife Agencies, which represents State fish and wildlife agencies.

As for the comment that we engage the Joint Federal/State Task Force on Federal Assistance Policy on the potential impacts to the WSFR program, we welcome any JTF engagement on the implementation of Appendix C. We are also open to future input that: (a) Clearly improves implementation of Appendix C; (b) fully complies with existing statutes and regulations; (c) carries out the general policy and principles stated in section 4 of the Policy, with special attention to the goal of a net conservation gain; (d) maintains a consistent approach in satisfying the requirements of all statutory authorities for mitigation to the extent possible; (e) ensures *additionality* (see section 6) for any proposed change in locating compensatory mitigation on public or private lands already designated for the conservation of natural resources; and (f) does not subsidize those who are legally obligated to compensate for the environmental impacts of their proposed projects.

Section G of Appendix C of the revised Policy may be of special interest to the Association of Fish and Wildlife Agencies, as it affirms the rights of States, tribes, and local governments to structure the mitigation requirements of their own laws and regulations however they choose. The Service's revised Policy does not affect mitigation required by State, tribal, or local law.

We added the 43 CFR part 24 reference to Appendix A, section C per the comment.

To address the comment that we give great deference to State-prepared plans that guide mitigation, we will convert the existing section H in Appendix C to section I, and add the following to the new section H: When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

as long as the plans are consistent with Federal law, regulation, and this Policy.

Comment (116): One commenter noted that the way financial assistance programs addressed in Appendix A are described in section 3.5 may become outdated. The number of financial assistance programs recently increased to 61. Instead of using a number that will change frequently, they suggested revising the first sentence to read:

The Service has more than 60 financial assistance programs, which collectively disburse. . . .

Response: We made the suggested revision.

Comment (117): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C with section 4, General Policy and Principles. The commenter was concerned that the following concept in paragraph (g) would be applied inconsistently unless additional guidance was provided: ''The Service will recommend or require that compensatory mitigation be . . . additional to any *existing or foreseeably expected* conservation efforts planned for the future.'' The commenter said the following scenarios need clarification:

(1) A master plan for a land-management unit has an objective that calls for a specific conservation action to be accomplished in the next 15 years. If funding has not yet been appropriated or allocated to accomplish the conservation action, would the master-plan objective qualify as a ''foreseeably expected'' conservation effort planned for the future?

(2) The establishing statutory authority of a land-management agency makes that agency responsible for specific management actions, but the agency does not have enough funds to carry out these management actions? Would those management actions for which the agency is statutorily responsible qualify as an ''existing or foreseeably expected'' conservation effort?

(3) The partners in a grant-funded land-acquisition project have committed to use non-Federal and non-match funds to complete specific types of restoration or enhancement on the project area. These commitments contributed to the project being recommended for funding by the grant program's ranking panel. Would these commitments qualify as an ''existing or foreseeably expected'' conservation effort?

Response: The regulations implementing the compensatory mitigation requirements of the CWA at 33 CFR 332.7(a) and 40 CFR 230.97(a) state that:

Long-term protection may be provided through real estate instruments such as conservation easements held by entities such as Federal, State, tribal, or local resource agencies, nonprofit conservation organizations, or private land manager; the transfer of title to such entities; or by restrictive covenants. For government property, long-term protection may be provided through Federal facility management plans or integrated natural resources management plans.

These regulations regard facility-management plans and integrated natural-resources management plans as providing long-term protection. We used this as part of the basis for clarifying what would qualify as ''existing or foreseeably expected conservation efforts planned for the future.'' We addressed the issues and scenarios raised by the commenter in Appendix C, section H.

Comment (118): One commenter addressed the interaction between the Service's financial assistance programs described in Appendix C and provisions of section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands. They asked for clarification on whether the following would be considered public land:

(a) Real property owned by ''instrumentalities'' of government, such as a regional water management district?

(b) An interest in real property that is less than full fee title, such as a conservation easement or a leasehold estate?

(c) Real property owned by tribal governments?

(d) Real property held by nongovernmental entities, but acquired with Federal financial assistance. In such cases, the Federal awarding agency does not have an ownership interest in the property, but it does have the following legal rights defined in regulation:

(1) Approving encumbrances to the title,

(2) Approving or giving instructions for disposition of real property no longer needed for its originally authorized purpose, and

(3) Receiving a share of the proceeds resulting from disposition of real property when the Federal awarding agency authorizes sale on the open market or transfer to the grant recipient.

Response: Examples (a), (b), and (c) would be public land for purposes of the Policy. However, if the government or public agency owns a fee with exceptions to title as in example (b), the Policy applies only to the interest owned by a government or public agency. It has no effect on interests not owned by a government or public agency. Example (d) would be considered public land only if the interest in real property is owned by the Federal Government; a State, tribal, or local government; or an agency or instrumentality of one of these governments. We have provided clarification in Appendix C, section H.

Comment (119): One commenter said terms in section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, had implications for the material in Appendix C and were unclear. Specifically, they asked for an explanation of the difference between the proposed language of this Policy in section 5.7.2: ''measures the public agency is foreseeably expected to implement absent the mitigation'' and the language of the regulations jointly issued by the EPA at 40 CFR 230.93(a)(3) and the Corps at 33 CFR 332.3(a)(3): ''Credits for compensatory mitigation projects on *public* land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above *those provided by public programs already planned or in place.*''

Response: The language in section 5.7.2 and in the EPA/Corps regulation has different purposes, but both are applications of the principle of *additionality,* which this Policy defines as: A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

The measures described in section 5.7.2 are effectively those described in the regulatory language as: Those provided by public programs already planned.

Appendix C, section H explains how to determine what qualifies as ''baseline conditions . . . that a public land management agency is foreseeably expected to implement absent the mitigation.''

Comment (120): One commenter addressed Appendix C, section H, Can a mitigation proposal be located on land acquired under a Federal financial assistance award? They said despite this section title, section 5.7.2, Recommendations for Locating Mitigation on Public or Private Lands, seems to apply to everything covered by the Policy, including financial assistance awards. They suggested that if section 5.7.2 applies to financial

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

assistance awards, we clarify that Appendix C, section H supplements section 5.7.2.

Response: Most lands acquired under Service-approved or administered financial assistance awards are dedicated to conservation, but not all are public land. We have revised section H to acknowledge the applicability of section 5.7.2 to land already designated for conservation.

Comment (121): One commenter said the Authorities and Direction for Service Mitigation Recommendations listed in Appendix A needed additional references related to the financial assistance programs described in Appendix C. They suggested the following authorities for the two Service grant programs that have an authorizing statute or regulation prohibiting the use mitigation in the program be added to Appendix A:

North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*

National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84.

Response: We added the North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.* to Appendix A, section B, Additional Legislative Authorities. We added the National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84 to Appendix A, section C, Implementing Regulations.

Comment (122): One commenter addressed the ineligibility of the use of mitigation in the National Coastal Wetlands Conservation program. They suggested that inserting the following as the ninth sentence in the introductory paragraph would avoid any potential misunderstandings: Consistent with the Service's Mitigation Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program.

Response: We added the sentence as recommended.

Comment (123): For further clarity, one commenter recommended editing in Appendix C, section B, Where do most mitigation issues occur in financial assistance? Specifically, they suggested the first sentence in the answer to Question B be replaced with: Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) the use as match of mitigation funds and in-kind contributions derived from mitigation funds.

Response: We replaced the first sentence as recommended by the commenter.

Comment (124): One commenter noted that in a recent mitigation project proposed for siting on land acquired with Federal financial assistance, the landowner asserted that the mitigation project should be acceptable to the Service because it was acceptable to the Corps. To address such implementation questions, the commenter suggested adding a new section that examines the responsibilities of the Corps and the Service for approving specific decisions related to the limited role of mitigation in financial assistance programs. They said, where appropriate, the new section would give the legal basis of their respective roles.

Response: The District Engineer of the Corps has the authority to impose conditions on a Department of the Army (DA) permit under the CWA, including conditions on the type and location of compensatory mitigation. However, no mitigation project, whether it is under the authority of the CWA or any other Federal statute, can interfere with the purposes of a financially assisted project. If the conditions in a DA permit will affect a financially assisted project for which the Service is responsible, those conditions must be acceptable to the Service before the permitted activity is initiated.

Even if a mitigation project under the CWA will not affect one of its financially assisted projects, the Service may be a member of the Interagency Review Team that reviews documentation for the establishment of mitigation banks and in-lieu fee programs. The respective roles of the Corps and the Service in carrying out the compensatory mitigation requirements of the CWA are described in more detail in 33 CFR parts 325 and 332, and 40 CFR part 230.

For mitigation projects that will affect a financially assisted project in a program where it approves or administers awards, the Service is responsible for the following decisions:

(a) Can real property and equipment acquired under a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.311(b) and 2 CFR 200.313(a–c), which addresses real property and equipment (respectively), with special reference to the Service's authority to approve encumbrances and its right to receive a share of proceeds from a disposition when property is no longer needed for the purposes of the original award. 50 CFR 80.132–135 also apply to real property acquired under the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs, and will guide mitigation in financial assistance programs.

(b) Can real property that includes a capital improvement funded by a Service-administered financial assistance award be used for purposes of compensatory mitigation during the useful life of the capital improvement?

The Service makes this decision based on 2 CFR 200.311(b). Regulations at 50 CFR 80.132–135 may also be applicable to a capital improvement funded by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs. ''Capital improvement'' means (a) a structure that costs at least $25,000 to build; or (b) the alteration, renovation, or repair of a structure that increases the structure's useful life by at least 10 years or its market value by at least $25,000. A financial assistance program may have its own definitions of capital improvement for purposes of compensatory mitigation as long as it includes all capital improvements as defined here.

(c) Can real property managed, maintained, or operated with funding from a Service-administered financial assistance award be used for purposes of compensatory mitigation?

The Service makes this decision based on 2 CFR 200.300.311(a) and (b). Regulations at 50 CFR 80.134 also apply to real property managed, maintained, or operated by an award from the Wildlife Restoration program, Sport Fish Restoration program, and Enhanced Hunter Education and Safety programs.

(d) Are funds or in-kind contributions that have been used or will be used to satisfy compensatory-mitigation requirements eligible as match in a Service-administered financial assistance program?

The Service makes this decision based on 2 CFR 200.300; 2 CFR 200.403(a); and 2 CFR 200.404(a), (b), and (d). For compensatory mitigation required by the CWA, the Service makes this decision in compliance with 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). The final rule for these regulations was published in the **Federal Register** on April 10, 2008 (73 FR 19594). Its preamble clarifies the intent of §§ 332.3(j)(2) and 230.93(j)(2) in the following example: . . . if a Federal program has a 50 percent landowner match requirement, neither the federally funded portion of the project, nor the landowner's 50 percent match, which is part of the requirements for obtaining

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Federal funding, may be used for compensatory mitigation credits. However, if the landowner provides a greater than 50 percent match, any improvements provided by the landowner over and above those required for federal funding could be used as compensatory mitigation credits.

National Environmental Policy Act (NEPA)

We have analyzed this Policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's Regulations for Implementing the Procedural Provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). Based on comments received, we determined that a categorical exclusion can apply to this Policy, but nevertheless, the Service chose to prepare an environmental assessment (EA) to inform decision makers and the public regarding the possible effects of the policy revisions. We announced our intent to prepare an EA pursuant to NEPA when we published the proposed revised policy. We requested comments on the scope of the NEPA review, information regarding important environmental issues that should be addressed, the alternatives to be analyzed, and issues that should be addressed at the programmatic stage in order to inform the site-specific stage during the comment period on the proposed revised policy. Comments from the public were considered in the drafting of the final EA. The final EA is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0126.

Authority

The multiple authorities for this action include the: Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*); Fish and Wildlife Coordination Act, as amended, (16 U.S.C. 661–667(e)); National Environmental Policy Act (42 U.S.C. 4371 *et seq.*); and others identified in section 2 and Appendix A of this Policy.

Mitigation Policy of the U.S. Fish and Wildlife Service

1. Purpose

This Policy applies to all actions for which the U.S. Fish and Wildlife Service (Service) has specific authority to either recommend or to require the mitigation of impacts to fish, wildlife, plants, and their habitats. Most applications of this Policy are advisory. The purpose of this Policy is to provide guidance to Service personnel in formulating and delivering recommendations and requirements to action agencies and project proponents so that they may avoid, minimize, and compensate for action-caused impacts to species and their habitats.

The guidance of this Policy:

- Provides a framework for formulating measures to maintain or improve the status of affected species through an application of the mitigation hierarchy informed by a valuation of their affected habitats;
- will help align Service-recommended mitigation with conservation objectives for affected resources and the strategies for achieving those objectives at ecologically relevant scales;
- will allow action agencies and proponents to anticipate Service recommendations and plan for mitigation measures early, thus avoiding delays and assuring equal consideration of fish and wildlife conservation with other action purposes; and
- allows for variations appropriate to action- and resource-specific circumstances.

This Policy supersedes the Fish and Wildlife Service Mitigation Policy (46 FR 7644–7663) published in the **Federal Register** on January 23, 1981. Definitions for terms used throughout this Policy are provided in section 6.

2. Authority

The Service has jurisdiction over a broad range of fish and wildlife resources. Service authorities are codified under multiple statutes that address management and conservation of natural resources from many perspectives, including, but not limited to, the effects of land, water, and energy development on fish, wildlife, plants, and their habitats. We list below the statutes that provide the Service, directly or indirectly through delegation from the Secretary of the Interior, specific authority for conservation of these resources and that give the Service a role in mitigation planning for actions affecting them. We further discuss the Service's mitigation planning role under each statute and list additional authorities in Appendix A.

- Bald and Golden Eagle Protection Act, 16 U.S.C. 668 *et seq.* (Eagle Act)
- Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.* (ESA)
- Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.* (FLPMA)
- Federal Power Act, 16 U.S.C. 791–828c (FPA)
- Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. 1251 *et seq.* (CWA)
- Fish and Wildlife Conservation Act, 16 U.S.C. 2901–2912
- Fish and Wildlife Coordination Act, as amended, 16 U.S.C 661–667(e) (FWCA)
- Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361 *et seq.* (MMPA)
- Migratory Bird Treaty Act, 16 U.S.C. 703–712 (MBTA)
- National Environmental Policy Act, 42 U.S.C. 4371 *et seq.* (NEPA)
- National Wildlife Refuge System Administration Act, 16 U.S.C. 668dd *et seq.*

While all of the statutes listed above give the Service an advisory role in fish and wildlife mitigation, not all of them give the Service authority to require others to implement the mitigation measures we identify. Circumstances under which the Service has specific authority to require, consistent with applicable laws and regulations, one or more forms of mitigation for impacts to fish and wildlife resources include:

- Actions that the Service carries out, *i.e.,* the Service is the action proponent;
- actions that the Service funds;
- actions to restore damages to fish and wildlife resources caused by spills of oil and other hazardous materials under the Oil Pollution Act and the Comprehensive Environmental Response, Compensation, and Liability Act;
- actions of other Federal agencies that require an incidental take statement under section 7 of the ESA (measures to minimize the impact of the incidental taking on the species);
- actions of non-Federal entities that require an incidental take permit under section 10 of the ESA (measures to minimize and mitigate the impacts of the taking on the species to the maximum extent practicable);
- fishway prescriptions under section 18 of the FPA, which minimize, rectify, or reduce over time through management, the impacts of non-Federal hydropower facilities on fish passage;
- license conditions under section 4(e) of the FPA for non-Federal hydropower facilities affecting Service properties (*e.g.,* a National Wildlife Refuge) for the protection and utilization of the Federal reservation consistent with the purpose for which such reservation was created or acquired;
- actions that require a ''Letter of Authorization'' or ''Incidental

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Harassment Authorization'' under the MMPA; and

- actions that require a permit for non-purposeful (incidental) take of eagles under the Eagle Act.

Our aim with this Policy is to provide a common framework for Service discretion across the full range of our authorities, including those listed above for which the Service may require mitigation, but the Policy does not alter or substitute for the regulations implementing any of these authorities.

3. Scope

3.1. Actions

This Policy applies to all Service activities related to evaluating the effects of proposed actions and subsequent recommendations or requirements to mitigate impacts to resources, defined in section 3.2. For purposes of this Policy, actions include: (a) Activities conducted, authorized, licensed, or funded by Federal agencies (including Service-proposed activities); (b) non-Federal activities to which one or more of the Service's statutory authorities apply to make mitigation recommendations or specify mitigation requirements; and (c) the Service's provision of technical assistance to partners in collaborative mitigation planning processes that occur outside of individual action review.

3.2. Resources

This Policy may apply to specific resources based on any Federal authority or combination of authorities, such as treaties, statutes, regulations, or Executive Orders, that empower the Federal Government to manage, control, or protect fish, wildlife, plants, and their habitats that are affected by proposed actions. Such Federal authority need not be exclusive, comprehensive, or primary, and in many cases, may overlap with that of States or tribes or both.

This Policy applies to those resources identified in statute or implementing regulations that provide the Service authority to make mitigation recommendations or specify mitigation requirements for the actions described in section 3.1. The scope of resources addressed by this Policy is inclusive of, but not limited to, the Federal trust fish and wildlife resources concept.

The Service has traditionally described its trust resources as migratory birds, federally listed endangered and threatened species, certain marine mammals, and inter-jurisdictional fish. Some authorities narrowly define or specifically identify covered taxa, such as threatened and endangered species, marine mammals, or the species protected by the Migratory Bird Treaty Act. This Policy applies to trust resources; however, Service Regions and field stations retain discretion to recommend mitigation for other resources under appropriate authorities.

The types of resources for which the Service is authorized to recommend mitigation also include those that contribute broadly to ecological functions that sustain species. The definitions of the terms ''wildlife'' and ''wildlife resources'' in the Fish and Wildlife Coordination Act include birds, fishes, mammals, and all other classes of wild animals, and all types of aquatic and land vegetation upon which wildlife is dependent. Section 404 of the Clean Water Act (33 CFR 320.4) codifies the significance of wetlands and other waters of the United States as important public resources for their habitat value, among other functions.

The Endangered Species Act envisions a broad consideration when describing its purposes as providing a means whereby the ecosystems upon which endangered and threatened species depend may be conserved and when directing Federal agencies at section 7(a)(1) to utilize their authorities in furtherance of the purposes of the ESA by carrying out programs for the conservation of listed species. The purpose of the National Environmental Policy Act (NEPA) also establishes an expansive focus in promoting efforts that will prevent or eliminate damage to the environment while stimulating human health and welfare. In NEPA, Congress recognized the profound impact of human activity on the natural environment, particularly through population growth, urbanization, industrial expansion, resource exploitation, and new technologies. NEPA further recognized the critical importance of restoring and maintaining environmental quality, and declared a Federal policy of using all practicable means and measures to create and maintain conditions under which humans and nature can exist in productive harmony. These statutes address systemic concerns and provide authority for protecting habitats and landscapes.

3.3. Exclusions

This Policy does not apply retroactively to completed actions or to actions specifically exempted under statute from Service review. It does not apply where the Service has already agreed to a mitigation plan for pending actions, except where: (a) New activities or changes in current activities would result in new impacts; (b) a law enforcement action occurs after the Service agrees to a mitigation plan; (c) an after-the-fact permit is issued; or (d) where new authorities or failure to implement agreed-upon recommendations, warrant new mitigation planning. Service personnel may elect to apply this Policy to actions that are under review as of the date of its final publication.

3.4. Applicability to Service Actions

This Policy applies to actions that the Service proposes, including those for which the Service is the lead or co-lead Federal agency for compliance with NEPA. However, it applies only to the mitigation of impacts to fish, wildlife, plants, and their habitats that are reasonably foreseeable from such proposed actions. When it is the Service that proposes an action, the Service acknowledges its responsibility, during early planning for design of the action, to consult with Tribes, and to consider the effects to, and mitigation for, impacts to resources besides fish, wildlife, plants, and their habitats (*e.g.,* cultural and historic resources, traditional practices, environmental justice, public health, recreation, other socio-economic resources, etc.). Consistent with NEPA (42 U.S.C. 4332(A)) (40 CFR 1500.2 and 1501.2) and the CEQ and the Advisory Council on Historic Preservation (ACHP), *NEPA NHPA Section 106 Handbook,* these reviews will be integrated into the decisionmaking process at the earliest possible point in planning for the action. This Policy neither provides guidance nor supersedes existing guidance for mitigating impacts to resources besides those defined in section 3.2, Resources.

NEPA requires the action agency to evaluate the environmental effects of alternative proposals for agency action, including the environmental effects of proposed mitigation (*e.g.,* effects on historic properties resulting from habitat restoration). Considering impacts to resources besides fish and wildlife requires the Service to coordinate with entities having jurisdiction by law, special expertise, or other applicable authority. Appendix B further discusses the Service's consultation responsibilities with tribes related to fish and wildlife impact mitigation, *e.g.,* statutes that commonly compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources. It also supplements existing Service NEPA guidance by describing how this Policy integrates with the Service's decisionmaking process under NEPA.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

3.5. Financial Assistance Programs and Mitigation

The Service has more than 60 financial assistance programs, which collectively disburse more than $1 billion annually to non-Federal recipients through grants and cooperative agreements. Most programs leverage Federal funds by requiring or encouraging the commitment of matching cash or in-kind contributions. Recipients have acquired approximately 10 million acres in fee title, conservation easements, or leases through these programs. To foster consistent application of financial assistance programs with respect to mitigation processes, Appendix C addresses the limited role that specific types of mitigation can play in financial assistance programs.

4. General Policy and Principles

The mission of the Service is working with others to conserve, protect, and enhance fish, wildlife, plants, and their habitats for the continuing benefit of the American people. In furtherance of this mission, the Service has a responsibility to ensure that impacts to fish, wildlife, plants, and their habitats in the United States, its territories, and possessions are considered when actions are planned, and that such impacts are mitigated so that these resources may provide a continuing benefit to the American people. Consistent with Congressional direction through the statutes listed in the ''Authority'' section of this Policy, the Service will provide timely and effective recommendations to conserve, protect, and enhance fish, wildlife, plants, and their habitats when proposed actions may reduce the benefits thereof to the public.

Fish and wildlife and their habitats are resources that provide commercial, recreational, social, and ecological value to the Nation. For Tribal Nations, specific fish and wildlife resources and associated landscapes have traditional cultural and religious significance. Fish and wildlife are conserved and managed for the people by State, Federal, and tribal governments. If reasonably foreseeable impacts of proposed actions are likely to reduce or eliminate the public benefits that are provided by such resources, these governments have shared responsibility or interest in recommending means and measures to mitigate such losses. Accordingly, in the interest of serving the public, it is the policy of the U.S. Fish and Wildlife Service to seek to mitigate losses of fish, wildlife, plants, their habitats, and uses thereof resulting from proposed actions.

The following fundamental principles will guide Service-recommended mitigation, as defined in this Policy, across all Service programs.

a. *The goal is a net conservation gain.* The Service's mitigation planning goal is to improve (*i.e.,* a net gain) or, at minimum, to maintain (*i.e.,* no net loss) the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority. As informed by established conservation objectives and strategies, Service mitigation recommendations will focus primarily on important, scarce, or sensitive resources, and will specify the means and measures that achieve the planning goal.

b. *Observe an appropriate mitigation sequence.* The Service recognizes it is generally preferable to take all appropriate and practicable measures to avoid and minimize adverse effects to resources, in that order, before compensating for remaining impacts. However, to achieve the best possible conservation outcomes, the Service recognizes that some limited circumstances may warrant a departure from this preferred sequence. The Service will prioritize the applicable mitigation types based on a valuation of the affected resources as described in this Policy in a landscape conservation context.

c. *Avoid high-value habitats.* The Service will seek avoidance of all impacts to high-value habitats. High-value habitats make an exceptional contribution to the conservation of species. Preventing impacts to these habitats is the most effective means of maintaining the current status of a species, which is the minimum goal of this Policy.

d. *A landscape approach will inform mitigation.* The Service will integrate mitigation into a broader ecological context with applicable landscape-level conservation plans, where available, when developing, approving, and implementing plans, and by steering mitigation efforts in a manner that will best contribute to achieving conservation objectives. The Service will consider climate change and other stressors that may affect ecosystem integrity and the resilience of fish and wildlife populations, which will inform the scale, nature, and location of mitigation measures necessary to achieve the best possible conservation outcome. The Service will foster partnerships with Federal and State partners, tribes, local governments, and other stakeholders to design mitigation strategies that will prevent fragmented landscapes and restore core areas and connectivity necessary to sustain species.

e. *Ensure consistency and transparency.* The Service will use timely and transparent processes that provide predictability and uniformity through the consistent application of standards and protocols as may be developed to achieve effective mitigation.

f. *Science-based mitigation.* The Service will use the best available science in formulating and monitoring the long-term effectiveness of its mitigation recommendations and decisions, consistent with all applicable Service science policy.

g. *Durability.* The Service will recommend or require that mitigation measures are durable, and at a minimum, maintain their intended purpose for as long as impacts of the action persist on the landscape. The Service will recommend or require that action proponents provide assurances of durability, including financial assurances, to support the development, maintenance, and long-term effectiveness of the mitigation measures.

h. *Effective compensatory mitigation.* The Service will recommend implementing compensatory mitigation before the impacts of an action occur. The Service will recommend compensatory mitigation that provides benefits to the affected species that are additional to the benefits of existing conservation efforts or those planned for the reasonably foreseeable future. To ensure consistent implementation of compensatory mitigation, the Service will support the application of equivalent standards, regardless of the mechanism used to provide compensatory mitigation.

5. Mitigation Framework

This section of the Policy provides the conceptual framework and guidance for implementing the general policy and principles declared in section 4 in an action- and landscape-specific mitigation context. Implementation of the general policy and principles as well as the direction provided in 600 DM 6 occurs by integrating landscape scale decisionmaking within the Service's existing process for assessing effects of an action and formulating mitigation measures. The key terms used in describing this framework are defined in section 6, Definitions.

The Service recommends or requires mitigation under one or more Federal authorities (section 2) when necessary and appropriate to avoid, minimize, and/or compensate for impacts to resources (section 3.2) resulting from

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

proposed actions (section 3.1). Our goal for mitigation is to achieve a net conservation gain or, at minimum, no net loss of the affected resources (section 4). Sections 5.1 through 5.9, summarized below, provide an overview of the mitigation framework and describe how the Service will engage actions as part of its process of assessing the effects of an action and formulating mitigation measures that would achieve this goal. Variations appropriate to action-specific circumstances are permitted; however, the Service will provide action proponents with the reasons for such variations.

Synopsis of the Service Mitigation Framework

5.1. Integrating Mitigation Planning with Conservation Planning. The Service will utilize landscape-scale approaches and landscape conservation planning to inform mitigation, including identifying areas for mitigation that are most important for avoiding and minimizing impacts, improving habitat suitability, and compensating for unavoidable impacts to species. Proactive mitigation plans can achieve efficiencies for attaining conservation objectives while streamlining the planning and regulatory processes for specific landscapes and/or classes of actions within a landscape.

5.2. Collaboration and Coordination. At both the action and landscape scales, the Service will collaborate and coordinate with action proponents and with our State, Federal, and tribal conservation partners in mitigation.

5.3. Assessment. Assessing the effects of proposed actions and proposed mitigation measures is the basis for formulating a plan to meet the mitigation policy goal. This Policy does not endorse specific methodologies, but does describe several principles of effects assessment and general characteristics of methodologies that the Service will use in implementing this Policy.

5.4. Evaluation Species. The Service will identify the species evaluated for mitigation purposes. The Service should select the smallest set of evaluation species necessary, but include all species for which the Service is required to issue biological opinions, permits, or regulatory determinations. When actions would affect multiple resources of conservation interest, evaluation species should serve to best represent other affected species or aspects of the environment. This section describes characteristics of evaluation species that are useful in planning mitigation.

5.5. Habitat Valuation. The Service will assess the value of affected habitats to evaluation species based on their scarcity, suitability, and importance to achieving conservation objectives. This valuation will determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

5.6. Means and Measures. The means and measures that the Service recommends for achieving the mitigation policy goal are action- and resource-specific applications of the three general types of impact mitigation (avoid, minimize, and compensate). This section provides an expanded definition of each type, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations and requirements.

5.7. Recommendations. This section describes general standards for Service recommendations, and declares specific preferences for various characteristics of compensatory mitigation measures, *e.g.,* timing, location.

5.8. Documentation. Service involvement in planning and implementing mitigation requires documentation that is commensurate in scope and level of detail with the significance of the potential impacts to resources. This section provides an outline of documentation elements that are applicable at three different stages of the mitigation planning process: Early planning, effects assessment, and final recommendations.

5.9. Followup. Determining whether Service mitigation recommendations were adopted and effective requires monitoring, and when necessary, corrective action.

5.1. Integrating Mitigation With Conservation Planning

The Service's mitigation goal is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority (see section 4). This Policy provides a framework for formulating mitigation means and measures (see section 5.6) intended to efficiently achieve the mitigation planning goal based upon best available science. This framework seeks to integrate mitigation recommendations and requirements into conservation planning to better protect or enhance populations and those features on a landscape that are necessary for the long-term persistence of biodiversity and ecological functions. Functional ecosystems enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change, invasive species, and the continuing degradation and loss of habitat through human alteration of the landscape. Achieving the mitigation goal of this Policy involves:

- Avoiding and minimizing those impacts that most seriously compromise resource sustainability;
- rectifying and reducing over time those impacts where restoring or maintaining conditions in the affected area most efficiently contributes to resource sustainability; and
- strategically compensating for impacts so that actions result in an improvement in the affected resources, or at a minimum, result in a no net loss of those resources.

The Service recognizes that we will engage in mitigation planning for actions affecting resources in landscapes for which conservation objectives and strategies to achieve those objectives are not yet available, well developed, or formally adopted. The landscape-level approach to resource decisionmaking described in this Policy and in the Departmental Manual (600 DM 6.6D) applies in contexts with or without established conservation plans, but it will achieve its greatest effectiveness when integrated with such planning.

When appropriate, the Service will seek a net gain in the conservation outcome of actions we engage for purposes of this Policy. It is consistent with the Service's mission to identify and promote opportunities for resource enhancement during action planning, *i.e.,* to decrease the gap between the current and desired status of a resource. Mitigation planning often presents practicable opportunities to implement mitigation measures in a manner that outweighs impacts to affected resources. When resource enhancement is also consistent with the mission, authorities, and/or responsibilities of action proponents, the Service will encourage proponents to develop measures that result in a net gain toward achieving conservation objectives for the resources affected by their actions. Such proponents include, but are not limited to, Federal agencies when responsibilities such as the following apply to their actions:

- Carry out programs for the conservation of endangered and threatened species (Endangered Species Act, section 7(a)(1));
- consult with the Service regarding both mitigation and enhancement in water resources development (Fish and Wildlife Coordination Act, section 2);

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

• enhance the quality of renewable resources (National Environmental Policy Act, section 101(b)(6)); and/or

• restore and enhance bird habitat (Executive Order 13186, section 3(e)(2)).

To serve the public interest in fish and wildlife resources, the Service works under various authorities (see section 2) with partners to establish conservation objectives for species, and to develop and implement plans for achieving such objectives in various landscapes. We define a landscape as an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by common management concerns (see section 6, Definitions). Relative to this Policy, such management concerns relate to conserving species. The geographic scale of a landscape is variable, depending on the interacting elements that are meaningful to particular conservation objectives and may range in size from large regions to a single watershed or habitat type. When proposed actions may affect species in a landscape addressed in one or more established conservation plans, such plans will provide the basis for Service recommendations to avoid and minimize particular impacts, rectify and reduce over time others, and compensate for others. The criteria in this Policy for selecting evaluation species (section 5.4) and assessing the value of their affected habitats (section 5.5) are designed to place mitigation planning in a landscape conservation context by applying the various types of mitigation where they are most effective at achieving the mitigation policy goal.

The Service recognizes the inefficiency of automatically applying under all circumstances each mitigation type in the traditional mitigation sequence. As DM 6 also recognizes, in limited situations, specific circumstances may exist that warrant an alternative from this sequence, such as when seeking to achieve the maximum benefit to affected resources and their values, services, and functions. For example, the cost and effort involved in avoiding impacts to a habitat that is likely to become isolated or otherwise unsuitable for evaluation species in the foreseeable future may result in less conservation when compared to actions that achieve a greater conservation benefit if used to implement offsite compensatory mitigation in area(s) that are more important in the long term to achieving conservation objectives for the affected resource(s). Conversely, onsite avoidance is the priority where impacts would substantially impair progress toward achieving conservation objectives.

The Service will rely upon existing conservation plans that are based upon the best available scientific information, consider climate-change adaptation, and contain specific objectives aimed at the biological needs of the affected resources. Where existing conservation plans are not available that incorporate all of these elements or are not updated with the best available scientific information, Service personnel will otherwise incorporate the best available science into mitigation decisions and recommendations and continually seek better information in areas of greatest uncertainty. Service personnel will use a landscape approach based on analysis of information regarding resource needs, including priorities for impact avoidance and potential compensatory mitigation sites. Such information includes development trends and projected habitat loss or conversion, cumulative impacts of past development activities, the presence and needs of species, and restoration potential. Service personnel may access this information in existing mapping products, survey data, reports, studies, or other sources.

Proactive Mitigation Planning at Larger Scales

The Service supports the planning and implementation of proactive mitigation plans in a landscape conservation context, *i.e.,* mitigation developed before actions are proposed, particularly in areas where multiple similar actions are expected to adversely affect a similar suite of species. Proactive mitigation plans should complement or tier from existing conservation plans relevant to the affected resources (*e.g.,* recovery plans, habitat conservation plans, or nongovernmental plans). Effective and efficient proactive mitigation identifies high-priority resources and areas on a regional or landscape scale, prior to and without regard to specific proposed actions, in which to focus: (a) Resource protection for avoiding impacts; (b) resource enhancement or protection for compensating unavoidable impacts; and (c) measures to improve the resilience of resources in the face of climate change or otherwise increase the ability to adapt to climate and other landscape change factors. In many cases, the Service can take advantage of available Federal, State, tribal, local, or nongovernmental plans that identify such priorities.

Developing proactive mitigation should involve stakeholders in a transparent process for defining objectives and the means to achieving those objectives. Planning for proactive mitigation should establish standards for determining the appropriate scale, type, and location of mitigation for impacts to specific resources within a specified area. Adopted plans that incorporate these features are likely to substantially shorten the time needed for regulatory review and approval as actions are subsequently proposed. Proactive mitigation plans, not limited to those developed under a programmatic NEPA decisionmaking process or a Habitat Conservation Plan process, will provide efficiencies for project-level Federal actions and will also better address potential cumulative impacts.

Procedurally, proactive mitigation should draw upon existing land-use plans and databases associated with human infrastructure, including transportation, and water and energy development, as well as ecological data and conservation plans for floodplains, water quality, high-value habitats, and key species. Stakeholders and Service personnel process these inputs to design a conservation network that considers needed community infrastructure and clearly prioritizes the role of mitigation in conserving natural features that are necessary for long-term maintenance of ecological functions on the landscape. As development actions are proposed, an effective proactive regional mitigation plan will provide a transparent process for identifying appropriate mitigation opportunities within the regional framework and selecting the mitigation projects with the greatest aggregated conservation benefits.

5.2. Collaboration and Coordination

The Service shares responsibility for conserving fish and wildlife with State, local, and tribal governments and other Federal agencies and stakeholders. Our role in mitigation may involve Service biological opinions, permits, or other regulatory determinations as well as providing technical assistance. The Service must work in collaboration and coordination with other governments, agencies, organizations, and action proponents to implement this Policy. Whenever appropriate, the Service will:

a. Coordinate activities with the appropriate Federal, State, tribal, and local agencies and other stakeholders who have responsibilities for fish and wildlife resources when developing mitigation recommendations for resources of concern to those entities;

b. consider resources and plans made available by State, local, and tribal governments and other Federal agencies;

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

c. seek to apply compatible approaches and avoid duplication of efforts with those same entities;

d. collaborate with Federal and State agencies, tribes, local agencies and other stakeholders in the formulation of landscape-level mitigation plans; and

e. cooperate with partners to develop, maintain, and disseminate tools and conduct training in mitigation methodologies and technologies.

The Service should engage agencies and applicants during the early planning and design stage of actions. The Service is encouraged to engage in early coordination during the NEPA Federal decisionmaking process to resolve issues in a timely manner (516 DM 8.3). Coordination during early planning, including participation as a cooperating agency or on interdisciplinary teams, can lead to better conservation outcomes. For example, the Federal Highway Administration (FHWA) is most likely to adopt alternatives that avoid or minimize impacts when the Service provides early comments under section 4(f) of the Transportation Act of 1966 relative to impacts to refuges or other Service-supported properties. When we identify potential impacts to tribal interests, the Service, in coordination with affected tribes, may recommend mitigation measures to address those impacts. Recommendations will carry more weight when the Service and tribe have overlapping authority for the resources in question and when coordinated through government-to-government consultation.

Coordination and collaboration with stakeholders allows the Service to confirm that the persons conducting mitigation activities, including contractors and other non-Federal persons, have the appropriate experience and training in mitigation best practices, and where appropriate, include measures in employee performance appraisal plans or other personnel or contract documents, as necessary. Similarly, this allows for the development of rigorous, clear, and consistent guidance, suitable for field staff to implement mitigation or to deny authorizations when impacts to resources and their values, services, and functions are not acceptable. Collaboratively working across Department of the Interior bureaus and offices allows the Service to conduct periodic reviews of the execution of mitigation activities to confirm consistent implementation of the principles of this Policy.

When collaborating with stakeholders, Service staff should utilize the principles and recommendations set forth in the Council on Environmental Quality handbook, *Collaboration in NEPA—a Handbook for NEPA Practitioners* (2007).

5.3. Assessment

Effects are changes in environmental conditions caused by an action that are relevant to the resources (fish, wildlife, plants, and their habitats) covered by this Policy. This Policy addresses mitigation for impacts to these resources. We define impacts as adverse effects relative to the affected resources. Impacts may be direct, indirect, or cumulative. Indirect effects are often major drivers in ecological systems. Because indirect impacts from an action occur later in time or farther removed in distance, they may have landscape-scale implications. Mitigation is the general label for all measures implemented to avoid, minimize, and/or compensate for its predicted impacts.

The Service should design mitigation measures to achieve the mitigation goal, when appropriate, of net gain, or a minimum of no net loss for affected resources. This design should take into account the degree of risk and uncertainty associated with both predicted project effects and predicted outcomes of the mitigation measures. The following principles shall guide the Service's assessment of anticipated effects and the expected effectiveness of mitigation measures.

1. The Service will consider action effects and mitigation outcomes within planning horizons commensurate with the expected duration of the action's impacts. In predicting whether mitigation measures will achieve the mitigation policy goal for the affected resources during the planning horizon, the Service will recognize that predictions about the more-distant future are more uncertain and adjust the mitigation recommendations accordingly.

2. Action proponents should provide reasonable predictions about environmental conditions relevant to the affected area both with and without the action over the course of the planning horizon (*i.e.,* baseline condition). If such predictions are not provided, the Service will assess the effects of a proposed action over the planning horizon considering: (a) The full spatial and temporal extent of resource-relevant direct and indirect effects caused by the action, including resource losses that will occur during the period between implementation of the action and the mitigation measures; and (b) any cumulative effects to the affected resources resulting from existing concurrent or reasonably foreseeable future activities in the landscape context. When assessing the affected area without the action, the Service will also evaluate: (a) Expected natural species succession; (b) implementation of approved restoration/improvement plans; and (c) reasonably foreseeable conditions resulting directly or indirectly from any other factors that may affect the evaluation of the project including, but not limited to, climate change.

3. The Service will use the best available effect assessment methodologies that:

a. Display assessment results in a manner that allows decisionmakers, action proponents, and the public to compare present and predicted future conditions for affected resources;

b. measure adverse and beneficial effects using equivalent metrics to determine mitigation measures necessary to achieve the mitigation policy goal for the affected resources (*e.g.,* measure both adverse and beneficial effects to a species' food resources via changes to the density or spatial extent of the food resource);

c. predict effects over time, including changes to affected resources that would occur with and without the action, changes induced by climate change, and changes resulting from reasonably foreseeable actions;

d. are practical, cost-effective, and commensurate with the scope and scale of impacts to affected resources;

e. are sufficiently sensitive to estimate the type and relative magnitude of effects across the full spectrum of anticipated beneficial and adverse effects;

f. may integrate predicted effects with data from other disciplines such as cost or socioeconomic analysis; and

g. allow for incorporation of new data or knowledge as action planning progresses.

4. Where appropriate effects assessment methods or technologies useful in valuation of mitigation are not available, Service employees will apply best professional judgment supported by best available science to assess impacts and to develop mitigation recommendations.

5.4. Evaluation Species

Section 3.2 identifies the resources to which this Policy applies. Depending on the authorities under which the Service is engaging an action for mitigation purposes, these resources may include: Particular species; fish, wildlife, and plants more generally; and their habitats, including those contributing to ecological functions that sustain species. However, one or more species

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

of conservation interest to the Service is always necessary to initiate mitigation planning, and under this Policy, the Service will explicitly identify evaluation species for mitigation purposes. In instances where the Service is required to issue a biological opinion, permit, or regulatory determination for specific species, the Service will identify such species, at minimum, as evaluation species.

Selecting evaluation species in addition to those for which the Service must provide a regulatory determination varies according to action-specific circumstances. In practice, an initial examination of the habitats affected and review of typically associated species of conservation interest are usually the first steps in identifying evaluation species. The purpose of Service mitigation planning is to develop a set of recommendations that would improve or, at minimum, maintain the current status of the affected resources. When available, conservation planning objectives (*i.e.,* the desired status of the affected resources) will inform mitigation planning (see section 5.1). Therefore, following those species for which we must provide a regulatory determination, species for which action effects would cause the greatest increase in the gap between their current and desired status are the principal choices for selection as evaluation species.

An evaluation species must occur within the affected area for at least one stage of its life history, but as other authorities permit, the Service may consider evaluation species that are not currently present in the affected area if the species is:

a. Identified in approved State or Federal fish and wildlife conservation, restoration, or improvement plans that include the affected area; or

b. likely to occur in the affected area during the reasonably foreseeable future with or without the proposed action due to natural species succession.

Evaluation species may or may not occupy the affected area year-round or when direct effects of the action would occur.

The Service should select the smallest set of evaluation species necessary to relate the effects of an action to the full suite of affected resources and applicable authorities, including all species for which the Service is required to issue opinions, permits, or regulatory determinations. When an action affects multiple resources, evaluation species should represent other affected species or aspects of the environment so that the mitigation measures formulated for the evaluation species will mitigate impacts to other similarly affected resources to the greatest extent possible. Characteristics of evaluation species that are useful in mitigation planning may include, but are not limited to, the following:

a. Species that are addressed in conservation plans relevant to the affected area and for which habitat objectives are articulated;

b. species strongly associated with an affected habitat type;

c. species for which habitat limiting factors are well understood;

d. species that perform a key role in ecological processes (*e.g.,* nutrient cycling, pollination, seed dispersal, predator-prey relations), which may, therefore, serve as indicators of ecosystem health;

e. species that require large areas of contiguous habitat, connectivity between disjunct habitats, or a distribution of suitable habitats along migration/movement corridors, which may, therefore, serve as indicators of ecosystem functions;

f. species that belong to a group of species (a guild) that uses a common environmental resource;

g. species for which sensitivity to one or more anticipated effects of the proposed action is documented;

h. species with special status (*e.g.,* species of concern in E.O. 13186, Birds of Conservation Concern);

i. species of cultural or religious significance to tribes;

j. species that provide monetary and non-monetary benefits to people from consumptive and non-consumptive uses including, but not limited to, fishing, hunting, bird watching, and educational, aesthetic, scientific, or subsistence uses;

k. species with characteristics such as those above that are also easily monitored to evaluate the effectiveness of mitigation actions; and/or

l. species that would be subject to direct mortality as a result of an action (*e.g.,* wind turbine).

5.5. Habitat Valuation

Species conservation relies on functional ecosystems, and habitat conservation is generally the best means of achieving species population objectives. Section 5.4 provides the guidance for selecting evaluation species to represent these habitat resources. The value of specific habitats to evaluation species varies widely, such that the loss or degradation of higher value habitats has a greater impact on achieving conservation objectives than the loss or degradation of an equivalent area of lower value habitats. To maintain landscape capacity to support species, our mitigation policy goal (Section 4) applies to all affected habitats of evaluation species, regardless of their value in a conservation context. However, the Service will recognize variable habitat value in formulating appropriate means and measures to mitigate the impacts of proposed actions, as described in this section. The primary purpose of habitat valuation is to determine the relative emphasis the Service will place on avoiding, minimizing, and compensating for impacts to habitats of evaluation species.

The Service will assess the overall value of affected habitats by considering their: (a) Scarcity; (b) suitability for evaluation species; and (c) importance to the conservation of evaluation species.

- *Scarcity* is the relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.
- *Suitability* is the relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.
- *Importance* is the relative significance of the affected habitat, compared to other similar habitats in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

The Service has flexibility in applying appropriate methodologies and best available science when assessing the overall value of affected habitats, but also has a responsibility to communicate the rationale applied, as described in section 5.8 (Documentation Standards). These three parameters are the considerations that will inform Service determinations of the relative value of an affected habitat that will then be used to guide application of the mitigation hierarchy under this Policy.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

For all habitats, the Service will apply appropriate and practicable measures to avoid and minimize impacts over time, generally in that order, before applying compensation as mitigation for remaining impacts. For habitats we determine to be of high-value (*i.e.,* scarce and of high suitability and high importance) however, the Service will seek avoidance of all impacts. For habitats the Service determines to be of lower value, we will consider whether compensation is more effective than other components of the mitigation hierarchy to maintain the current status of evaluation species, and if so, may seek compensation for most or all such impacts.

The relative emphasis given to mitigation types within the mitigation hierarchy depends on the landscape context and action-specific circumstances that influence the efficacy and efficiency of available mitigation means and measures. For example, it is generally more effective and efficient to achieve the mitigation policy goal by maximizing avoidance and minimization of impacts to habitats that are either rare, of high suitability, or of high importance, than to rely on other measures, because these qualities are typically not easily repaired, enhanced through onsite management, or replaced through compensatory actions. Similarly, compensatory measures may receive greater emphasis when strategic application of such measures (*i.e.,* to further the objectives of relevant conservation plans) would more effectively and efficiently achieve the policy goal for mitigating impacts to habitats that are either abundant, of low suitability, or of low importance.

When more than one evaluation species uses an affected habitat, the highest valuation will govern the Service's mitigation recommendations or requirements. Regardless of the habitat valuation, Service mitigation recommendations or requirements will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum, maintains the current status of the affected resources.

5.6. Means and Measures

The means and measures that the Service recommends for achieving the goal of this Policy (see section 4) are action- and resource-specific applications of the five general types of impact mitigation: Avoid, minimize, rectify, reduce over time, and compensate. The third and fourth mitigation types, rectify and reduce over time, are combined under the minimization label (*e.g.,* in mitigation planning for permitting actions under the Clean Water Act, in the Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment, and in 600 DM 6.4), which we adopt for this Policy and for the structure of this section, while also providing specific examples for rectify and reduce. When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish, as needed, between minimizing, rectifying, and reducing or eliminating the impact over time, as described in Appendix B: Service Mitigation Policy and NEPA.

The emphasis that the Service gives to each mitigation type depends on the evaluation species selected (section 5.4) and the value of their affected habitats (section 5.5). Habitat valuation aligns mitigation with conservation planning for the evaluation species by identifying where it is critical to avoid habitat impacts altogether and where compensation measures may more effectively advance conservation objectives. All appropriate mitigation measures have a clear connection with the anticipated effects of the action and are commensurate with the scale and nature of those effects.

Nothing in this Policy supersedes the statutes and regulations governing prohibited ''take'' of wildlife (*e.g.,* ESA-listed species, migratory birds, eagles); however, the Policy applies to mitigating the impacts to habitats and ecological functions that support populations of evaluation species, including federally protected species. Attaining the goal of improving or, at a minimum, maintaining the current status of evaluation species will often involve applying a combination of mitigation types. For each of the mitigation types, the following subsections begin with a quote of the regulatory language at 40 CFR 1508.20, then provides an expanded definition, explains its place in this Policy, and lists generalized examples of its intended use in Service mitigation recommendations. Ensuring that Service-recommended mitigation measures are implemented and effective is addressed in sections 5.8, Documentation, and 5.9, Followup.

5.6.1. Avoid—Avoid the impact altogether by not taking a certain action or parts of an action.

Avoiding impacts is the first tier of the mitigation hierarchy. Avoidance ensures that an action or a portion of the action has no direct or indirect effects during the planning horizon on fish, wildlife, plants, and their habitats. Actions may avoid direct effects to a resource (*e.g.,* by shifting the location of the construction footprint), but unless the action also avoids indirect effects caused by the action (*e.g.,* loss of habitat suitability through isolation from other habitats, accelerated invasive species colonization, degraded water quality, etc.), the Service will not consider that impacts to a resource are fully avoided. In some cases, indirect effects may cumulatively result in population and habitat losses that negate any conservation benefit from avoiding direct effects. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is unavailable. The Service will recommend avoiding all impacts to high-value habitats. Generalized examples follow:

a. Design the timing, location, and/or operations of the action so that specific resource impacts would not occur.

b. Add structural features to the action, where such action is sustainable (*e.g.,* fish and wildlife passage structures, water treatment facilities, erosion control measures) that would eliminate specific losses to affected resources.

c. Adopt a non-structural alternative to the action that is sustainable and that would not cause resource losses (*e.g.,* stream channel restoration with appropriate grading and vegetation in lieu of rip-rap).

d. Adopt the no-action alternative.

5.6.2. Minimize (includes Rectify and Reduce Over Time)—Minimize the impact by limiting the degree or magnitude of the action and its implementation.

Minimizing impacts, together with rectifying and reducing over time, is the second tier of the mitigation hierarchy. Minimizing is reducing the intensity of the impact (*e.g.,* population loss, habitat loss, reduced habitat suitability, reduced habitat connectivity, etc.) to the maximum extent appropriate and practicable. Generalized examples of types of measures to minimize impacts follow:

a. Reduce the overall spatial extent and/or duration of the action.

b. Adjust the daily or seasonal timing of the action.

c. Retain key habitat features within the affected area that would continue to support life-history processes for the evaluation species.

d. Adjust the spatial configuration of the action to retain corridors for species movement between functional habitats.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

e. Apply best management practices to reduce water quality degradation.

f. Adjust the magnitude, timing, frequency, duration, and/or rate-of-change of water flow diversions and flow releases to minimize the alteration of flow regime features that support life-history processes of evaluation species.

g. Install screens and other measures necessary to reduce aquatic life entrainment/impingement at water intake structures.

h. Install fences, signs, markers, and other measures necessary to protect resources from impacts (*e.g.,* fencing riparian areas to exclude livestock, marking a heavy-equipment exclusion zone around burrows, nest trees, and other sensitive areas).

Rectify — This subset of the second tier of the mitigation hierarchy involves ''repairing, rehabilitating, or restoring the affected environment.''

Rectifying impacts may possibly improve, relative to no-action conditions, a loss in habitat availability and/or suitability for evaluation species within the affected area and contribute to a net conservation gain. Rectifying impacts may also involve directly restoring a loss in populations through stocking. Generalized examples follow:

a. Repair physical alterations of the affected areas to restore pre-action conditions or improve habitat suitability for the evaluation species (*e.g.,* re-grade staging areas to appropriate contours, loosen compacted soils, restore altered stream channels to stable dimensions).

b. Plant and ensure the survival of appropriate vegetation where necessary in the affected areas to restore or improve habitat conditions (quantity and suitability) for the evaluation species and to stabilize soils and stream channels.

c. Provide for fish and wildlife passage through or around action-imposed barriers to movement.

d. Consistent with all applicable laws, regulations, policies, and conservation plans, stock species that experienced losses in affected areas when habitat conditions are able to support them in affected areas.

Reduce Over Time—This subset of the second tier of the mitigation hierarchy is to ''reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action.''

Reducing impacts over time is preserving, enhancing, and maintaining the populations, habitats, and ecological functions that remain in an affected area following the impacts of the action, including areas that are successfully restored or improved through rectifying mitigation measures. Preservation, enhancement, and maintenance operations may improve upon conditions that would occur without the action and contribute to a net conservation gain (*e.g.,* when such operations would prevent habitat degradation expected through lack of management needed for an evaluation species). Reducing impacts over time is an appropriate means to achieving the mitigation goal after applying all appropriate and practicable avoidance, minimization, and rectification measures. Generalized examples follow:

a. Control land uses and limit disturbances to portions of the affected area that may continue to support the evaluation species.

b. Control invasive species in the affected areas.

c. Manage fire-adapted habitats in the affected areas with an appropriate timing and frequency of prescribed fire, consistent with applicable laws, regulations, policies, and conservation plans.

d. Maintain or replace equipment and structures in affected areas to prevent losses of fish and wildlife resources due to equipment failure (*e.g.,* cleaning and replacing trash racks and water intake screens, maintaining fences that limit access to environmentally sensitive areas).

e. Ensure proper training of personnel in operations necessary to preserve existing or restored fish and wildlife resources in the affected area.

5.6.3. Compensate—Compensate for the impact by replacing or providing substitute resources or environments.

Compensating for impacts is the third and final tier of the mitigation hierarchy. Compensation is protecting, maintaining, enhancing, and/or restoring habitats and ecological functions for an evaluation species, generally in an area outside the action's affected area. Mitigating some percentage of unavoidable impacts through measures that minimize, rectify, and reduce losses over time is often appropriate and practicable, but the costs or difficulties of mitigation may rise rapidly thereafter to achieve the mitigation planning goal entirely within the action's affected area. In such cases, a lesser or equivalent effort applied in another area may achieve greater benefits for the evaluation species. Likewise, the effort necessary to mitigate the impacts to a habitat of low suitability and low importance of a type that is relatively abundant in the landscape context (low-value habitat) will more likely achieve sustainable benefits for an evaluation species if invested in enhancing a habitat of moderate suitability and high importance. This Policy is designed to apply the various types of mitigation where they may achieve the greatest efficiency toward accomplishing the mitigation planning goal.

Onsite restoration of an affected resource meets the definition of rectify and is not considered compensation under this Policy. Although compensation is usually accomplished outside the affected area, onsite compensation under the definitions of this Policy involves provision of a habitat resource within the affected area that was not adversely affected by the action, but that would effectively address the action's effect on the conservation of the evaluation species. For example, an action reduces food resources for an evaluation species, but in dry years, water availability is a more limiting factor to the species' status in the affected area. Increasing the reliability of water resources onsite may represent a practicable measure that will more effectively maintain or improve the species' status than some degree of rectifying the loss of food resources alone, even though the action did not affect water availability. In this example, measures to restore food resources are rectification, and measures to increase water availability are onsite compensation.

Multiple mechanisms may accomplish compensatory mitigation, including habitat credit exchanges and other emerging mechanisms. Proponent-responsible mitigation, mitigation/conservation banks, and in-lieu fee funds are the three most common mechanisms. Descriptions of their general characteristics follow:

a. *Proponent-Responsible Mitigation.* A proponent-responsible mitigation site provides ecological functions and services in accordance with Service-defined or approved standards to offset the habitat impacts of a proposed action on particular species. As its name implies, the action proponent is solely responsible for ensuring that the compensatory mitigation activities are completed and successful. Proponent-responsible mitigation may occur onsite or offsite relative to action impacts. Like all compensatory mitigation measures, proponent-responsible mitigation should: (a) Maximize the benefit to impacted resources and their values, services, and functions; (b) implement and earn credits in advance of project impacts; and (c) reduce risk to achieving effectiveness.

b. *Mitigation/Conservation Banks.* A conservation bank is a site or suite of sites that provides ecological functions and services expressed as credits that are conserved and managed in

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

perpetuity for particular species and are used expressly to offset impacts occurring elsewhere to the same species. A mitigation bank is established to offset impacts to wetland habitats under section 404 of the Clean Water Act. Some mitigation banks may also serve the species-specific purposes of a conservation bank. Mitigation and conservation banks are typically for-profit enterprises that apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on their banking properties. The establishment, operation, and use of a conservation bank requires a conservation bank agreement between the Service and the bank sponsor, and aquatic resource mitigation banks require a banking instrument approved by the U.S. Army Corps of Engineers. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the bank sponsor at the time of the sale/transfer of credits. Mitigation and conservation banks generally provide mitigation in advance of impacts.

c. *In-Lieu Fee.* An in-lieu fee site provides ecological functions and services expressed as credits that are conserved and managed for particular species or habitats, and are used expressly to offset impacts occurring elsewhere to the same species or habitats. In-lieu fee programs are sponsored by governmental or nonprofit entities that collect funds used to establish in-lieu fee sites. In-lieu fee program operators apply habitat restoration, creation, enhancement, and/or preservation techniques to generate credits on in-lieu fee sites. The establishment, operation, and use of an in-lieu fee program may require an agreement between regulatory agencies of applicable authority, including the Service, and the in-lieu fee program operator. Responsibility for ensuring that compensatory mitigation activities are successfully completed is transferred from the action proponent to the in-lieu fee program operator at the time of sale/transfer of credits. Unlike mitigation or conservation banks, in-lieu fee programs generally provide compensatory mitigation after impacts have occurred. See section 5.7.1 for discussion of the Service's preference for compensatory mitigation that occurs prior to impacts.

The Service's preference is that proponents offset unavoidable resource losses in advance of their actions. Further, the Service considers the banking of habitat value for the express purpose of compensating for future unavoidable losses to be a legitimate form of mitigation, provided that withdrawals from a mitigation/conservation bank are commensurate with losses of habitat value (considering suitability and importance) for the evaluation species and not based solely upon the affected habitat acreage or the cost of land purchase and management. Resource losses compensated through purchase of conservation or mitigation bank credits may include, but are not limited to, habitat impacts to species covered by one or more Service authorities.

5.6.3.1 Equivalent Standards

The mechanisms for delivering compensatory mitigation differ according to: (1) Who is ultimately responsible for the success of the mitigation (the action proponent or a third party); (2) whether the mitigation site is within or adjacent to the impact site (onsite) or at another location that provides either equivalent or additional resource value (offsite); and (3) when resource benefits are secured (before or after resource impacts occur).

Regardless of the delivery mechanism, species conservation strategies and other landscape-level conservation plans that are based on the best scientific information available are expected to provide the basis for establishing and operating compensatory mitigation sites and programs. Such strategies and plans should also inform the assessment of species-specific impacts and benefits within a defined geography.

Service recommendations or requirements will apply equivalent ecological, procedural, and administrative standards for all compensatory mitigation mechanisms. Departmental guidance at DM 6.6 C declares a preference for compensatory mitigation measures that will maximize the benefit to affected resources, reduce risk to achieving effectiveness, and use transparent methodologies. Mitigation that the Service recommends or approves through any compensatory mitigation mechanism should incorporate, address, or identify the following that are intended to ensure successful implementation and durability:

a. Type of resource(s) and/or its value(s), service(s), and function(s), and amount(s) of such resources to be provided (usually expressed in acres or some other physical measure), the method of compensation (restoration, establishment, preservation, etc.), and the manner in which a landscape-scale approach has been considered;

b. factors considered during the site selection process;

c. site protection instruments to ensure the durability of the measure;

d. baseline information;

e. the mitigation value of such resources (usually expressed as a number of credits or other units of value), including a rationale for such a determination;

f. a mitigation work plan including the geographic boundaries of the measure, construction methods, timing, and other considerations;

g. a maintenance plan;

h. performance standards to determine whether the measure has achieved its intended outcome;

i. monitoring requirements;

j. long-term management commitments;

k. adaptive management commitments; and

l. financial assurance provisions that are sufficient to ensure, with a high degree of confidence, that the measure will achieve and maintain its intended outcome, in accordance with the measure's performance standards.

Third parties may assume the responsibilities for implementing proponent-responsible compensation. The third party accepting responsibility for the compensatory actions would assume all of the proponent's obligations for ensuring their success and durability.

5.6.3.2 Research and Education

Research and education, although important to the conservation of many resources, are not typically considered compensatory mitigation, because they do not directly offset adverse effects to species or their habitats. In rare circumstances, research or education that is directly linked to reducing threats, or that provides a quantifiable benefit to the species, may be included as part of a mitigation package. These circumstances may exist when: (a) The major threat to a resource is something other than habitat loss; (b) the Service can reasonably expect the outcome of research or education to more than offset the impacts; (c) the proponent commits to using the results/recommendations of the research to mitigate action impacts; or (d) no other reasonable options for mitigation are available.

5.7. Recommendations

Consistent with applicable authorities, the Policy's fundamental principles, and the mitigation planning principles described herein, the Service will provide recommendations to mitigate the impacts of proposed actions at the earliest practicable stage of planning to ensure maximum

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

consideration. The Service will develop mitigation recommendations in cooperation with the action proponent and/or the applicable authorizing agency, considering the cost estimates and other information that the proponent/agency provides about the action and its effects, and relying on the best scientific information available. Service recommendations will represent our best judgment as to the most practicable means of ensuring that a proposed action improves or, at minimum maintains, the current status of the affected resources. The Service will provide mitigation recommendations under an explicit expectation that the action proponent or the applicable authorizing agency is fully responsible for implementing or enforcing the recommendations.

The Service will strive to provide mitigation recommendations, including reasonable alternatives to the proposed action, which, if fully and properly implemented, would achieve the best possible outcome for affected resources while also achieving the stated purpose of the proposed action. However, on a case-by-case basis, the Service may recommend the ''no action'' alternative. For example, when appropriate and practicable means of avoiding significant impacts to high-value habitats and associated species are not available, the Service may recommend the ''no action'' alternative.

5.7.1. Preferences for Compensatory Mitigation

Unless action-specific circumstances warrant otherwise, the Service will observe the following preferences in providing compensatory mitigation recommendations:

Advance compensatory mitigation. When compensatory mitigation is necessary, the Service prefers compensatory mitigation measures that are implemented and earn credits in advance of project impacts. Even though compensatory mitigation may be initiated in advance of project impacts, there may still be temporal losses that need to be addressed. The extent of the compensatory measures that are not completed until after action impacts occur will account for the interim loss of resources consistent with the assessment principles (section 5.3).

Compensatory mitigation in relation to landscape strategies and plans. The preferred location for Service-recommended or required compensatory mitigation measures is within the boundaries of an existing strategically planned, interconnected conservation network that serves the conservation objectives for the affected resources in the relevant landscape context. Compensatory measures should enhance habitat connectivity or contiguity, or strategically improve targeted ecological functions important to the affected resources (*e.g.,* enhance the resilience of fish and wildlife populations challenged by the widespread stressors of climate change).

Similarly, Service-recommended or required mitigation should emphasize avoiding impacts to habitats located within a planned conservation network, consistent with the Habitat Valuation guidance (section 5.5).

Where existing conservation networks or landscape conservation plans are not available for the affected resources, Service personnel should develop mitigation recommendations based on best available scientific information and professional judgment that would maximize the effectiveness of the mitigation measures for the affected resources, consistent with this Policy's guidance on Integrating Mitigation Planning with Conservation Planning (section 5.1).

5.7.2. Recommendations for Locating Compensatory Mitigation on Public or Private Lands

When appropriate as specified in this Policy, the Service may recommend establishing compensatory mitigation at locations on private, public, or tribal lands that provide the maximum conservation benefit for the affected resources. The Service will generally, but not always, recommend compensatory mitigation on lands with the same ownership classification as the lands where impacts occurred, *e.g.,* impacts to evaluation species on private lands are generally mitigated on private lands and impacts to evaluation species on public lands are generally mitigated on public lands. However, most private lands are not permanently dedicated to conservation purposes, and are generally the most vulnerable to impacts resulting from land and water resources development actions; therefore, mitigating impacts to any type of land ownership on private lands is usually acceptable as long as they are durable. Locating compensatory mitigation on public lands for impacts to evaluation species on private lands is also possible, and in some circumstances may best serve the conservation objectives for evaluation species. Such compensatory mitigation options require careful consideration and justification relative to the Service's mitigation planning goal, as described below.

The Service generally only supports locating compensatory mitigation on (public or private) lands that are already designated for the conservation of natural resources if additionality (see section 6, Definitions) is clearly demonstrated and is legally attainable. In particular, the Service usually does not support offsetting impacts to private lands by locating compensatory mitigation on public lands designated for conservation purposes because this practice risks a long-term net loss in landscape capacity to sustain species by relying increasingly on public lands to serve conservation purposes. However, the Service acknowledges that public ownership does not automatically confer long-term protection and/or management for evaluation species in all cases, which may justify locating compensatory mitigation measures on public lands, including compensation for impacts to evaluation species on public or private lands. The Service may recommend compensating for private-land impacts to evaluation species on public lands (whether designated for conservation of natural resources or not) when:

a. Compensation is an appropriate means of achieving the mitigation planning goal, as specified in this Policy;

b. the compensatory mitigation would provide additional conservation benefits above and beyond measures the public agency is foreseeably expected to implement absent the mitigation (only such additional benefits are counted towards achieving the mitigation planning goal);

c. the additional conservation benefits are durable, *i.e.,* lasting as long as the impacts that prompted the compensatory mitigation;

d. consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies; and

e. the public land location would provide the best possible conservation outcome, such as when private lands suitable for compensatory mitigation are unavailable or are available but do not provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the evaluation species.

Ensuring the durability of compensatory mitigation on public lands may require multiple tools beyond land use plan designations, including right-of-way grants, withdrawals, disposal or lease of land for conservation, conservation easements, cooperative agreements, and agreements with third parties. Mechanisms to ensure durability of land protection for compensatory mitigation on public and private lands vary among agencies, but should preclude conflicting uses and ensure that protection and management

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

of the mitigation land is commensurate with the magnitude and duration of impacts.

When the public lands under consideration for use as compensatory mitigation for impacts on private lands are National Wildlife Refuge System (NWRS) lands, additional considerations covered in the Service's Final Policy on the NWRS and Compensatory Mitigation Under the Section 10/404 Program (64 FR 49229–49234, September 10, 1999) may apply. Under that policy, the Regional Director will recommend the mitigation plan proposing to site compensatory mitigation on NWRS lands to the Director for approval.

5.7.3. Recommendations Related to Recreation

Mitigation for impacts to recreational uses of wildlife and habitat. The Service will generally not recommend measures intended to increase recreational value as mitigation for habitat losses. The Service may address impacts to recreational uses that are not otherwise addressed through habitat mitigation, but will do so with separate and distinct recreational use mitigation recommendations.

Recreational use of mitigation lands. Consistent with applicable statutes, the Service supports those recreational uses on mitigation lands that are compatible with the conservation goals of those mitigation lands. If certain uses are incompatible with the conservation goals for the mitigation lands, for example, off-road vehicle use in an area conserved for wildlife intolerant to disturbance, the Service will recommend against such uses.

5.8. Documentation

The Service should advise action proponents and decisionmaking agencies at timely stages of the planning process. To ensure effective consideration of Service recommendations, it is generally possible to communicate key concerns that will inform our recommendations early in the mitigation planning process, communicate additional components during and following an initial assessment of effects, and provide final written recommendations toward the end of the process, but in advance of a final decision for the action. The following outline lists the components applicable to these three planning stages. Because actions vary substantially in scope and complexity, these stages may extend over a period of years or occur almost simultaneously, which may necessitate consolidating some of the components listed below. For all actions, the level of the Service's analysis and documentation should be commensurate with the scope and severity of the potential impacts to resources. Where compensation is used to address impacts, additional information outlined in section 5.6.3 may be necessary.

A. Early Planning

1. Inform the proponent of the Service's goal to improve or, at minimum, maintain the status of affected resources, and that the Service will identify opportunities for a net conservation gain if appropriate.

2. Coordinate key data collection and planning decisions with the proponent, relevant tribes, and Federal and State resource agencies; including, but not limited to:

a. Delineate the affected area;

b. define the planning horizon;

c. identify species that may occur in the affected area that the Service is likely to consider as evaluation species for mitigation planning;

d. identify landscape-scale strategies and conservation plans and objectives that pertain to these species and the affected area;

e. define surveys, studies, and preferred methods necessary to inform effects analyses; and

f. as necessary, identify reasonable alternatives to the proposed action that may achieve the proponent's purpose and the Service's no-net-loss goal for resources.

3. As early as possible, inform the proponent of the presence of probable high-value habitats in the affected area (see section 5.5), and advise the proponent of Service policy to avoid all impacts to such habitats.

B. Effects Assessment

1. Coordinate selection of evaluation species with relevant tribes, Federal and State resource agencies, and action proponents.

2. Communicate the Service's assessment of the value of affected habitats to evaluation species.

3. If high-value habitats are affected, advise the proponent of the Service's policy to avoid all impacts to such habitats.

4. Assess action effects to evaluation species and their habitats.

5. Formulate mitigation options that would achieve the mitigation policy goal (an appropriate net conservation gain or, at minimum, no net loss) in coordination with the proponent and relevant tribes, and Federal and State resource agencies.

C. Final Recommendations

The Service's final mitigation recommendations should communicate in writing the following:

1. The authorities under which the Service is providing the mitigation recommendations consistent with this Policy.

2. A description of all mitigation measures that are reasonable and appropriate to ensure that the proposed action improves or, at minimum, maintains the current status of affected fish, wildlife, plants, and their habitats.

3. The following elements should be specified within a mitigation plan or equivalent by either the Service, action proponents, or in collaboration:

a. Measurable objectives;

b. implementation assurances, including financial, as applicable;

c. effectiveness monitoring;

d. additional adaptive management actions as may be indicated by monitoring results; and

e. reporting requirements.

4. An explanation of the basis for the Service recommendations, including, but not limited to:

a. Evaluation species used for mitigation planning;

b. the assessed value of affected habitats to evaluation species;

c. predicted adverse and beneficial effects of the proposed action;

d. predicted adverse and beneficial effects of the recommended mitigation measures; and

e. the rationale for our determination that the proposed action, if implemented with Service recommendations, would achieve the mitigation policy goal.

5. The Service's expectations of the proponent's responsibility to implement the recommendations.

5.9. Followup

The Service encourages, supports, and will initiate, whenever practicable and within our authority, post-action monitoring studies and evaluations to determine the effectiveness of recommendations in achieving the mitigation planning goal. In those instances where Service personnel determine that action proponents have not carried out those agreed-upon mitigation means and measures, the Service will request that the parties responsible for regulating the action initiate corrective measures, or will initiate access to available assurance measures. These provisions also apply when the Service is the action proponent.

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

6. Definitions

Definitions in this section apply to the implementation of this Policy and were developed to provide clarity and consistency within the policy itself, and to ensure broad, general applicability to all mitigation processes in which the Service engages. Some Service authorities define some of the terms in this section differently or more specifically, and the definitions herein do not substitute for statutory or regulatory definitions in the exercise of those authorities.

Action. An activity or program implemented, authorized, or funded by Federal agencies; or a non-Federal activity or program for which one or more of the Service's authorities apply to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning.

Additionality. A compensatory mitigation measure is additional when the benefits of a compensatory mitigation measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure.

Affected area. The spatial extent of all effects, direct and indirect, of a proposed action to fish, wildlife, plants, and their habitats.

Affected resources. Those resources, as defined by this Policy, that are subject to the adverse effects of an action.

Baseline. Current and future environmental conditions (relevant to the resources covered by this Policy) that are expected without implementation of the proposed action under review. Predictions about future environmental conditions without the action should account for natural species succession, implementation of approved land and resource management plans, and any other reasonably foreseeable factors that influence these conditions.

Compensatory mitigation. Compensatory mitigation means to compensate for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20.) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions. Impacts are authorized pursuant to a regulatory or resource management program that issues permits, licenses, or otherwise approves activities. In this Policy, ''mitigation'' is a deliberate expression of the full mitigation hierarchy, and ''compensatory mitigation'' describes only the last phase of that sequence.

Conservation. In the context of this Policy, the noun ''conservation'' is a general label for the collective practices, plans, policies, and science that are used to protect and manage species and their habitats to achieve desired outcomes.

Conservation objective. A measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain species.

Conservation planning. The identification of strategies for achieving conservation objectives. Conservation plans include, but are not limited to, recovery plans, habitat conservation plans, watershed plans, green infrastructure plans, and others developed by Federal, State, tribal or local government agencies or non-governmental organizations. This Policy emphasizes the use of landscape-scale approaches to conservation planning.

Durability. A mitigation measure is durable when the effectiveness of the measure is sustained for the duration of the associated impacts of the action, including direct and indirect impacts.

Effects. Changes in environmental conditions that are relevant to the resources covered by this Policy.

Direct effects are caused by the action and occur at the same time and place.

Indirect effects are caused by the action, but occur at a later time and/or another place.

Cumulative effects are caused by other actions and processes, but may refer also to the collective effects on a resource, including direct and indirect effects of the action. The causal agents and spatial/temporal extent for considering cumulative effects varies according to the authority(ies) under which the Service is engaged in mitigation planning (*e.g.,* refer to the definitions of cumulative effects and cumulative impacts in ESA regulations and NEPA, respectively), and the Service will apply statute-specific definitions in the application of this Policy.

Evaluation species. Fish, wildlife, and plant resources in the affected area that are selected for effects analysis and mitigation planning.

Habitat. An area with spatially identifiable physical, chemical, and biological attributes that supports one or more life-history processes for evaluation species. Mitigation planning should delineate habitat types in the affected area using a classification system that is applicable to both the region(s) of the affected area and the selected evaluation species in order to facilitate determinations of habitat scarcity, suitability, and importance.

Habitat Credit Exchange. An environmental market that operates as a clearinghouse in which an exchange administrator, operating as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and project permittees. This is in contrast to the direct transactions between compensatory mitigation providers and permittees that generally occur through conservation banking and in-lieu fee programs. Exchanges provide ecological functions and services expressed as credits that are permanently conserved and managed for specified species and are used to compensate for adverse impacts occurring elsewhere to the same species.

Habitat value. An assessment of an affected habitat with respect to an evaluation species based on three attributes—scarcity, suitability, and importance—which define its conservation value to the evaluation species in the context of this Policy. The three parameters are assessed independently but are sometimes correlated. For example, rare or unique habitat types of high suitability for evaluation species are also very likely of high importance in achieving conservation objectives.

Impacts. In the context of this Policy, impacts are adverse effects relative to the affected resources.

Importance. The relative significance of the affected habitat, compared to other examples of a similar habitat type in the landscape context, to achieving conservation objectives for the evaluation species. Habitats of high importance are irreplaceable or difficult to replace, or are critical to evaluation species by virtue of their role in achieving conservation objectives within the landscape (*e.g.,* sustain core habitat areas, linkages, ecological functions). Areas containing habitats of high importance are generally, but not always, identified in conservation plans addressing resources under Service authorities (*e.g.,* in recovery plans) or when appropriate, under authorities of

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

partnering entities (*e.g.,* in State wildlife action plans, Landscape Conservation Cooperative conservation ''blueprints,'' etc.).

Landscape. An area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The most relevant concerns to the Service and this Policy are those associated with the conservation of species and their habitats. The landscape is not defined by the size of the area, but rather the interacting elements that are meaningful to the conservation objectives for the resources under consideration.

Landscape-scale approach. For the purposes of this Policy, the landscape-scale approach applies the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however narrow or broad, necessary to sustain, or otherwise achieve, established goals for those resources and their values, services, and functions. A landscape-scale approach should be used when developing and approving strategies or plans, reviewing projects, or issuing permits. The approach identifies the needs and baseline conditions of targeted resources and their values, services, and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources and their values, services, and functions, with full consideration of the conditions of additionality and durability.

Landscape-scale strategies and plans. For the purposes of this Policy, landscape-scale strategies and plans identify clear management objectives for targeted resources and their values, services, and functions at landscape-scales, as necessary, including across administrative boundaries, and employ the landscape-scale approach to identify, evaluate, and communicate how mitigation can best achieve those management objectives. Strategies serve to assist project applicants, stakeholders, and land managers in pre-planning as well as to inform NEPA analysis and decisionmaking, including decisions to develop and approve plans, review projects, and issue permits. Land use planning processes provide opportunities for identifying, evaluating, and communicating mitigation in advance of anticipated land use activities. Consistent with their statutory authorities, land management agencies may develop landscape-scale strategies through the land use planning process, or incorporate relevant aspects of applicable and existing landscape-scale strategies into land use plans through the land use planning process.

Mitigation. In the context of this Policy, the noun ''mitigation'' is a label for all types of measures (see Mitigation Types) that a proponent would implement toward achieving the Service's mitigation goal.

Mitigation hierarchy. The elements of mitigation, summarized as avoidance, minimization, and compensation, provide a sequenced approach to addressing the foreseeable impacts to resources and their values, services, and functions. First, impacts should be avoided by altering project design and/or location or declining to authorize the project; then minimized through project modifications and permit conditions; and, generally, only then compensated for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied.

Mitigation planning. The process of assessing the effects of an action and formulating mitigation measures that would achieve the mitigation planning goal.

Mitigation goal. The Service's goal for mitigation is to improve or, at minimum, maintain the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority.

Mitigation types. General classes of methods for mitigating the impacts of an action (Council on Environmental Quality, 40 CFR 1508.20(a–e)), including:

(a) Avoid the impact altogether by not taking the action or parts of the action;

(b) minimize the impact by limiting the degree or magnitude of the action and its implementation;

(c) rectify the impact by repairing, rehabilitating, or restoring the affected environment;

(d) reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; and

(e) compensate for the impact by replacing or providing substitute resources or environments.

These five mitigation types, as enumerated by CEQ, are compatible with this Policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensation for remaining unavoidable (also known as residual) impacts. Section 5.6 (Mitigation Means and Measures) of this Policy provides expanded definitions and examples for each of the mitigation types.

Practicable. Available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale.

Proponent. The agency(ies) proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action.

Resources. Fish, wildlife, plants, and their habitats for which the Service has authority to recommend or require the mitigation of impacts resulting from proposed actions.

Scarcity. The relative spatial extent (*e.g.,* rare, common, or abundant) of the habitat type in the landscape context.

Suitability. The relative ability of the affected habitat to support one or more elements of the evaluation species' life history (reproduction, rearing, feeding, dispersal, migration, hibernation, or resting protected from disturbance, etc.) compared to other similar habitats in the landscape context. A habitat's ability to support an evaluation species may vary over time.

Unavoidable. An impact is unavoidable when an appropriate and practicable alternative to the proposed action that would not cause the impact is not available.

Appendix A. Authorities and Direction for Service Mitigation Recommendations

A. Relationship of Service Mitigation Policy to Other Policies, Regulations

This section is intended to describe the interaction of existing policies and regulations with this Policy in agency processes. Descriptions regarding the application of mitigation concepts generally, and elements of this Policy specifically, for each of the listed authorities follow:

1. The Bald and Golden Eagle Protection Act (16 U.S.C. 668–668d) (Eagle Act)

The Eagle Act prohibits take of bald eagles and golden eagles except pursuant to Federal regulations. The Eagle Act regulations at title 50, part 22 of the Code of Federal Regulations (CFR), define the ''take'' of an eagle to include the following actions: ''pursue, shoot, shoot at, poison, wound, kill, capture, trap, collect, destroy, molest, or disturb'' (§ 22.3).

Except for protecting eagle nests, the Eagle Act does not directly protect eagle habitat. However, because disturbing eagles is a violation of the Act, some activities within

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

eagle habitat, including some habitat modification, can result in illegal take in the form of disturbance. ''Disturb'' is defined as ''to agitate or bother a bald or golden eagle to a degree that causes, or is likely to cause, based on the best scientific information available, (1) injury to an eagle, (2) a decrease in its productivity, by substantially interfering with normal breeding, feeding, or sheltering behavior, or (3) nest abandonment, by substantially interfering with normal breeding, feeding, or sheltering behavior.''

The Eagle Act allows the Secretary of the Interior to authorize certain otherwise prohibited activities through regulations. The Service is authorized to prescribe regulations permitting the taking, possession, and transportation of bald and golden eagles provided such permits are ''compatible with the preservation of the bald eagle or the golden eagle'' (16 U.S.C. 668a). Permits are issued for scientific and exhibition purposes; religious purposes of Native American tribes; falconry (golden eagles only); depredation; protection of health and safety; golden eagle nest take for resource development and recovery; nonpurposeful (incidental) take; and removal or destruction of eagle nests.

The Eagle Act provides for mitigation in the form of avoidance and minimization by restricting permitted take to circumstances where take is ''necessary.'' While not expressly addressed, compensatory mitigation can also be used as a tool for ensuring that authorized take is consistent with the preservation standard of the Eagle Act. The regulations for eagle nest take permits and eagle non-purposeful incidental take permits explicitly provide for compensatory mitigation. Although eagle habitat (beyond nest structures) is not directly protected by the Eagle Act, the statute and implementing regulations do not preclude the use of habitat restoration, enhancement, and protection as compensatory mitigation.

At the time of development of this Appendix A, the threshold for authorized take of golden eagles is set at zero throughout the United States because golden eagle populations appear to be stable and potentially declining, and may not be able to absorb additional take while still maintaining current numbers of breeding pairs over time. Accordingly, all permits for golden eagle take must incorporate compensatory mitigation. Because golden eagle populations are currently primarily constrained by a high level of unauthorized human-caused mortality, rather than habitat loss, permits for golden eagle take require mitigation to be in the form of a reduction of a source of mortality; however, habitat restoration and enhancement could potentially offset permitted take in some situations, once reliable standards and metrics are developed to support the application of habitat-based mitigation to offset permitted take.

2. Clean Water Act (33 U.S.C. 1251 *et seq.*)

Several locations within the statute under section 404 describe the responsibilities and roles of the Service. The authority at section 404(m) is most directly relevant to the Service's engagement of Clean Water Act permitting processes to recommend mitigation for impacts to aquatic resources nationwide and is routinely used by Ecological Services Field Offices. At section 404(m), the Secretary of the Army is required to notify the Secretary of the Interior, through the Service Director, that an individual permit application has been received or that the Secretary proposes to issue a general permit. The Service will submit any comments in writing to the Secretary of the Army (Corps of Engineers) within 90 days. The Service has the opportunity to engage several thousand Corps permit actions affecting aquatic habitats and wildlife annually and to assist the Corps of Engineers in developing permit terms that avoid, minimize, or compensate for permitted impacts. The Department of the Army has also entered into a Memorandum of Agreement with the Department of the Interior under section 404(q) of the Clean Water Act. The current Memorandum of Agreement, signed in 1992, provides procedures for elevating national or regional issues relating to resources, policy, procedures, or regulation interpretation.

3. Endangered Species Act of 1973, as Amended (16 U.S.C. 1531 *et seq.*)

A primary purpose of the Endangered Species Act (ESA) of 1973 as amended (16 U.S.C. 1531 *et seq.*) is to conserve the ecosystems upon which species listed as endangered and threatened depend. Conserving listed species involves the use of all methods and procedures that are necessary for their recovery, which includes mitigating the impacts of actions to listed species and their habitats. All actions must comply with the applicable prohibitions against taking endangered animal species under ESA section 9 and taking threatened animal species under regulations promulgated through ESA section 4(d). Under ESA section 7(a)(2), Federal agencies must consult with the Service(s) to ensure that any actions they fund, authorize, or carry out are not likely to jeopardize the continued existence of listed species or adversely modify designated critical habitat. Federal agencies, and any permit or license applicants, may be exempted from the prohibitions against incidental taking for actions that are not likely to jeopardize the continued existence of the species or result in the destruction or adverse modification of designated critical habitat, if the terms and conditions of the incidental take statement are implemented.

The Service may permit incidental taking resulting from a non-Federal action under ESA section 10(a)(1)(B) after approving the proponent's habitat conservation plan (HCP) under section 10(a)(2)(A). The HCP must specify the steps the permit applicant will take to minimize and mitigate such impacts, and the funding that will be available to implement such steps. The basis for issuing a section 10 permit includes a finding that the applicant will, to the maximum extent practicable, minimize and mitigate the impacts of incidental taking, and a finding that the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild.

This Policy applies to all actions that may affect ESA-protected resources except for conservation/recovery permits under section 10(a)(1)(A). The Service will recommend mitigation for impacts to listed species, designated critical habitat, and other species for which the Service has authorized mitigation responsibilities consistent with the guidance of this Policy, which proponents may adopt as conservation measures to be added to the project descriptions of proposed actions. Such adoption may ensure that actions are not likely to jeopardize species or adversely modify designated critical habitat; however, such adoption alone does not constitute compliance with the ESA. Federal agencies must complete consultation per the requirements of section 7 to receive Service concurrence with ''may affect, not likely to adversely affect'' determinations, biological opinions for ''likely to adversely affect'' determinations, and incidental take statement terms and conditions. Proponents of actions that do not require Federal authorization or funding must complete the requirements under section 10(a)(2) to receive an incidental take permit. Mitigation planning under this Policy applies to all species and their habitats for which the Service has authorities to recommend mitigation on a particular action, including listed species and critical habitat. Although this Policy is intended, in part, to clarify the role of mitigation in endangered species conservation, nothing herein replaces, supersedes, or substitutes for the ESA implementing regulations.

All forms of mitigation are potential conservation measures of a proposed Federal action in the context of section 7 consultation and are factored into Service analyses of the effects of the action, including any voluntary mitigation measures proposed by a project proponent that are above and beyond those required by an action agency. Service regulations at 50 CFR 402.14(g)(8) affirm the need to consider ''any beneficial actions'' in formulating a biological opinion, including those ''taken prior to the initiation of consultation.'' Because jeopardy and adverse modification analyses weigh effects in the action area relative to the status of the species throughout its listed range and to the status of all designated critical habitat units, respectively, ''beneficial actions'' may also include proposed conservation measures for the affected species within its range but outside of the area of adverse effects (*e.g.,* compensation).

Mitigation measures included in proposed actions that avoid and minimize the likelihood of adverse effects and incidental take are also relevant to the Service's concurrence with ''may affect, not likely to adversely affect'' determinations through informal consultation. All mitigation measures included in proposed actions that benefit listed species and/or designated critical habitat, including compensatory measures, are relevant to jeopardy and adverse modification conclusions in Service biological opinions.

Likewise, the Service may apply all forms of mitigation, consistent with the guidance of this Policy, in formulating a reasonable and prudent alternative that would avoid jeopardy/adverse modification, provided that it is also consistent with the regulatory

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

definition of a reasonable and prudent alternative at 50 CFR 402.02. It is preferable to avoid or minimize impacts to listed species or critical habitat before rectifying, reducing over time, or compensating for such impacts. Under some limited circumstances, however, the latter forms of mitigation may provide all or part of the means to achieving the best possible conservation outcome for listed species consistent with the purpose, authority, and feasibility requirements of a reasonable and prudent alternative.

For Federal actions that are not likely to jeopardize the continued existence of listed species or result in the destruction or adverse modification of habitat, the Service may provide a statement specifying those reasonable and prudent measures that are necessary or appropriate to minimize the impacts of taking incidental to such actions on the affected listed species. That incidental take statement must comply with all applicable regulations. No proposed mitigation measures relieve an action proponent of the obligation to obtain incidental take exemption through an incidental take statement (Federal actions) or authorization through an incidental take permit (non-Federal actions), as appropriate, for unavoidable incidental take that may result from a proposed action.

4. Executive Order 13186 (E.O. 13186), Responsibilities of Federal Agencies To Protect Migratory Birds

E.O. 13186 directs Federal departments and agencies to avoid or minimize adverse impacts on ''migratory bird resources,'' defined as ''migratory birds and the habitats upon which they depend.'' These acts of avian protection and conservation are implemented under the auspices of the MBTA, the Eagle Act, the Fish and Wildlife Coordination Act (16 U.S.C. 661–666c), the ESA, the National Environmental Policy Act, and ''other established environmental review process'' (section 3(e)(6)). Additionally, E.O. 13186 directs Federal agencies whose activities will likely result in measurable negative effects on migratory bird populations to collaboratively develop and implement an MOU with the Service that promotes the conservation of migratory bird populations. These MOUs can clarify how an agency can mitigate the effects of impacts and monitor implemented conservation measures. MOUs can also define how appropriate corrective measures can be implemented when needed, as well as what proactive conservation actions or partnerships can be formed to advance bird conservation, given the agency's existing mission and mandate.

The Service policy regarding its responsibility to E.O. 13186 (720 FW 2) states ''all Service employees should: A. Implement their mission-related activities and responsibilities in a way that furthers the conservation of migratory birds and minimizes and avoids the potential adverse effects of migratory bird take, with the goal of eliminating take'' (2.2 A). The policy also stipulates that the Service will support the conservation intent of the migratory bird conventions by integrating migratory bird conservation measures into our activities, including measures to avoid or minimize adverse impacts on migratory bird resources; restoring and enhancing the habitat of migratory birds; and preventing or abating the pollution or detrimental alteration of the environment for the benefit of migratory birds.

5. Executive Order 13653 (E.O. 13653), Preparing the United States for the Impacts of Climate Change

E.O. 13653 directs Federal agencies to improve the Nation's preparedness and resilience to climate change impacts. The agencies are to promote: (1) Engaged and strong partnerships and information sharing at all levels of government; (2) risk-informed decisionmaking and the tools to facilitate it; (3) adaptive learning, in which experiences serve as opportunities to inform and adjust future actions; and (4) preparedness planning.

Among the provisions under section 3, *Managing Lands and Waters for Climate Preparedness and Resilience,* is this: ''agencies shall, where possible, focus on program and policy adjustments that promote the dual goals of greater climate resilience and carbon sequestration, or other reductions to the sources of climate change . . . [a]gencies shall build on efforts already completed or underway . . . as well as recent interagency climate adaptation strategies.'' Section 5 specifies that agencies shall develop or continue to develop, implement, and update comprehensive plans that integrate consideration of climate change into agency operations and overall mission objectives.

The *Priority Agenda: Enhancing The Climate Resilience of America's Natural Resources* (October 2014), called for in E.O. 13653, includes provisions to develop and provide decision support tools for ''climate-smart natural resource management'' that will improve the ability of agencies and landowners to manage for resilience to climate change impacts.

The Service policy on climate change adaptation (056 FW 1) states that the Service will ''effectively and efficiently incorporate and implement climate change adaptation measures into the Service's mission, programs, and operations.'' This includes using the best available science to coordinate an appropriate adaptive response to impacts on fish, wildlife, plants, and their habitats. The policy also specifically calls for delivering landscape conservation actions that build resilience or support the ability of fish, wildlife, and plants to adapt to climate change.

6. Federal Power Act (16 U.S.C. 791–828c) (FPA)

The Federal Energy Regulatory Commission (FERC) authorizes non-Federal hydropower projects pursuant to the FPA. The Service's roles in hydropower project review are primarily defined by the FPA, as amended in 1986 by the Electric Consumers Protection Act, which explicitly ascribes those roles to the Service. The Service has mandatory conditioning authority for projects on National Wildlife Refuge System lands under section 4(e) and to prescribe fish passage to enhance and protect native fish runs under section 18. Under section 10(j), FERC is required to include license conditions that are based on recommendations made pursuant to the Fish and Wildlife Coordination Act by States, NOAA, and the Service for the adequate and equitable protection, mitigation, and enhancement of fish, wildlife, and their habitats.

7. Fish and Wildlife Conservation Act (16 U.S.C. 2901–2912)

Specifically, Federal Conservation of Migratory Nongame Birds (16 U.S.C. 2912) requires the Service to ''identify the effects of environmental changes and human activities on species, subspecies, and populations of all migratory nongame birds'' (section 2912(2)); ''identify conservation actions to assure that species, subspecies, and populations of migratory nongame birds . . . do not reach the point at which the measures provided pursuant to the Endangered Species Act of 1973, as amended (16 U.S.C. 1531–1543), become necessary'' (section 2912(4)); and ''identify lands and waters in the United States and other nations in the Western Hemisphere whose protection, management, or acquisition will foster the conservation of species, subspecies, and populations of migratory nongame birds. . . .'' (section 2912(5)).

8. Fish and Wildlife Coordination Act (16 U.S.C. 661–667e) (FWCA)

The FWCA requires Federal agencies developing water-related projects to consult with the Service, NOAA, and the States regarding fish and wildlife impacts. The FWCA establishes fish and wildlife conservation as a coequal objective of all federally funded, permitted, or licensed water-related development projects. Federal action agencies are to include justifiable means and measures for fish and wildlife, and the Service's mitigation and enhancement recommendations are to be given full and equal consideration with other project purposes. The Service's mitigation recommendations may include measures addressing a broad set of habitats beyond the aquatic impacts triggering the FWCA and taxa beyond those covered by other resource laws. Action agencies are not bound by the FWCA to implement Service conservation recommendations in their entirety.

9. Marine Mammal Protection Act of 1972, as Amended (16 U.S.C. 1361 *et seq.*) (MMPA)

The MMPA prohibits the take (*i.e.,* hunting, killing, capture, and/or harassment) of marine mammals and enacts a moratorium on the import, export, and sale of marine mammal parts and products. There are exemptions and exceptions to the prohibitions. For example, under section 101(b), Alaskan Natives may hunt marine mammals for subsistence purposes and may possess, transport, and sell marine mammal parts and products. However, this section focuses on incidental take authorizations for non-commercial fishing activities.

Section 101(a)(5) allows for the authorization of incidental, but not intentional, take of small numbers of marine mammals by U.S. citizens while engaged in a specified activity (other than commercial fishing) within a specified geographical

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

region, provided certain findings are made. Specifically, the Service must make a finding that the total of such taking will have a negligible impact on the marine mammal species and will not have an unmitigable adverse impact on the availability of these species for subsistence uses. Negligible impact is defined at 50 CFR 18.27(c) as ''an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.'' Unmitigable adverse impact, which is also defined at 50 CFR 18.27(c), means ''an impact resulting from the specified activity that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.''

Section 101(a)(5)(A) of the MMPA provides for the promulgation of Incidental Take Regulations (ITRs), which can be issued for a period of up to 5 years. The ITRs set forth permissible methods of taking pursuant to the activity and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses. In addition, ITRs include requirements pertaining to the monitoring and reporting of such takings.

Under the ITRs, a U.S. citizen may request a Letter of Authorization (LOA) for activities proposed in accordance with the ITRs. The Service evaluates each LOA request based on the specific activity and geographic location, and determines whether the level of taking is consistent with the findings made for the total taking allowable under the applicable ITRs. If so, the Service may issue an LOA for the project and will specify the period of validity and any additional terms and conditions appropriate to the request, including mitigation measures designed to minimize interactions with, and impacts to, marine mammals. The LOA will also specify monitoring and reporting requirements to evaluate the level and impact of any taking. Depending on the nature, location, and timing of a proposed activity, the Service may require applicants to consult with potentially affected subsistence communities in Alaska and develop additional mitigation measures to address potential impacts to subsistence users. Regulations specific to LOAs are codified at 50 CFR 18.27(f).

Section 101(a)(5)(D) established an expedited process to request authorization for the incidental, but not intentional, take of small numbers of marine mammals for a period of not more than one year if the taking will be limited to harassment, *i.e.,* Incidental Harassment Authorizations (IHAs). Harassment is defined in section 3 of the MMPA (16 U.S.C. 1362). For activities other than military readiness activities or scientific research conducted by or on behalf of the Federal Government, harassment means ''any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild'' (the MMPA calls this Level A harassment) ''or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to migration, breathing, nursing, breeding, feeding, or sheltering'' (the MMPA calls this Level B harassment). There is a separate definition of harassment applied in the case of a military readiness activity or a scientific research activity conducted by or on behalf of the Federal Government. In addition, ''small numbers'' and ''specified geographical region'' requirements do not apply to military readiness activities.

The IHA prescribes permissible methods of taking by harassment and includes other means of effecting the least practicable impact on marine mammal species or stocks and their habitats, paying particular attention to rookeries, mating grounds, and areas of similar significance. In addition, as appropriate, the IHA will include measures that are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for subsistence purposes in Alaska. IHAs also specify monitoring and reporting requirements pertaining to the taking by harassment.

ITRs and IHAs can provide considerable conservation and management benefits to covered marine mammals. The Service shall recommend mitigation for impacts to species covered by the MMPA that are under its jurisdiction consistent with the guidance of this Policy and to the extent compatible with the authorities of the MMPA. Proponents may adopt these recommendations as components of proposed actions. However, such adoption itself does not constitute compliance with the MMPA. In addition, IHAs or LOAs issued under ITRs specify the permissible methods of taking and other means of effecting the least practicable adverse impact on the species or stock and its habitat, and on the availability for subsistence purposes. Those authorizations also outline required monitoring and reporting of takes.

10. Migratory Bird Treaty Act (16 U.S.C. 703–712) (MBTA)

The MBTA does not allow the take of migratory birds without a permit or other regulatory authorization (*e.g.,* rule, depredation order). The Service has express authority to issue permits for purposeful take and currently issues several types of permits for purposeful take of individuals (*e.g.,* hunting, depredation, scientific collection). Hunting permits do not require the mitigation hierarchy be enacted; rather, the Service sets annual regulations that limit harvest to ensure levels harvested do not diminish waterfowl breeding populations. For purposeful take permits that are not covered in these annual regulations (*e.g.,* depredation, scientific collection), there is an expectation that take be avoided and minimized to the maximum extent practicable as a condition of the take authorization process. Compensation and offsets are not required under these purposeful take permits, but can be accepted.

The Service has implied authority to permit incidental take of migratory birds, though incidental take has only been authorized in limited situations (*e.g.,* Department of Defense Readiness Rule and the NOAA Fisheries Special Purpose Permit). In all situations, permitted or unpermitted, there is an expectation that take be avoided and minimized to the maximum extent practicable, and voluntary offsets can be employed to this end. However, the Service cannot legally require or accept compensatory mitigation for unpermitted, and thus illegal, take of individuals. While action proponents are expected to reduce impacts to migratory bird habitat, such impacts are not regulated under the MBTA. As a result, action proponents are allowed to use the full mitigation hierarchy to manage impacts to their habitats, regardless of whether or not a permit for take of individuals is in place. Assessments of action effects should examine direct, indirect, and cumulative impacts to migratory bird habitats, as habitat losses have been identified as a critical factor in the decline of many migratory bird species.

11. National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) (NEPA)

NEPA requires Federal agencies to integrate environmental values into decisionmaking processes by considering impacts of their proposed actions and reasonable alternatives. Agencies disclose findings through an environmental assessment or a detailed environmental impact statement and are required to identify and include all relevant and reasonable mitigation measures that could improve the action. The Council on Environmental Quality's implementing regulations under NEPA define mitigation as a sequence, where mitigation begins with avoidance of impacts; followed by minimization of the degree or magnitude of impacts; rectification of impacts through repair, restoration, or rehabilitation; reducing impacts over time during the life of the action; and lastly, compensation for impacts by providing replacement resources. Effective mitigation through this ordered approach starts at the beginning of the NEPA process, not at the end. Implementing regulations require that the Service be notified of all major Federal actions affecting fish and wildlife and our recommendations solicited. Engaging this process allows the Service to provide comments and recommendations for mitigation of fish and wildlife impacts.

12. National Wildlife Refuge Mitigation Policy (64 FR 49229–49234, September 10, 1999) (Refuge Mitigation Policy)

The Service's Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the section 10/404 Program establishes guidelines for the use of Refuge lands for siting compensatory mitigation for impacts permitted through section 404 of the Clean Water Act (CWA) and section 10 of the Rivers and Harbors Act (RHA). The Refuge Mitigation Policy clarifies that siting mitigation for off-Refuge impacts on Refuge lands is appropriate only in limited and

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

exceptional circumstances. Mitigation banks may not be sited on Refuge lands, but the Service may add closed banks to the Refuge system if specific criteria are met. The Refuge Mitigation Policy, which explicitly addresses only compensatory mitigation under the CWA and RHA, remains in effect and is unaltered by this Policy. However, the Service will evaluate all proposals for using Refuge lands as sites for other compensatory mitigation purposes using the criteria and procedures established for aquatic resources in the Refuge Mitigation Policy (*e.g.,* to locate compensatory mitigation on Refuge property for off-Refuge impacts to endangered or threatened species).

13. Natural Resource Damage Assessment and Restoration (NRDAR)

Under the Oil Pollution Act (33 U.S.C. 2701 *et seq.*) (OPA) and the Comprehensive Environmental Response, Compensation and Liability Act (42 U.S.C. 9601) (CERCLA), as amended by Public Law 99–499, when a release of hazardous materials or an oil spill injures natural resources under the jurisdiction of State, tribal, and Federal agencies, these governments quantify injuries to determine appropriate restoration necessary to compensate the public for losses of those resources or their services. Nothing in this Policy supersedes the statutes and regulations governing the natural resource damage provisions of CERCLA, OPA, and the CWA.

The Service is often a participating bureau, supporting the Department of the Interior, during NRDAR. A restoration settlement, in the form of damages provided through a settlement document, is usually determined by quantifying the type and amount of restoration necessary to offset the injury caused by the spill or release. The type of restoration conducted depends on the resources injured by the release (*e.g.,* marine habitats, ground water, or biological resources (fish, birds)).

In the *Presidential Memorandum on Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment* (November 3, 2015), DOI is charged with developing guidance describing considerations for evaluating whether, where, and when tools and techniques used in mitigation—including restoration banking or advance restoration projects—would be appropriate as components of a restoration plan resolving natural resource damage claims. Pending promulgation of that guidance, the tools provided in section 5 maintain the flexibility to implement the appropriate restoration to restore injured resources under the jurisdiction of multiple governments, by providing support for weighing or modifying project elements to reach Service goals.

B. Additional Legislative Authorities

1. Clean Air Act; 42 U.S.C. 7401 *et seq.,* as amended (See *http://www.fws.gov/refuges/airquality/permits.html*)
2. Marine Protection, Research, and Sanctuaries Act; 16 U.S.C. 1431 *et seq.* and 33 U.S.C. 1401 *et seq.*
3. Resource Conservation and Recovery Act; 42 U.S.C. 6901 *et seq.*
4. Shore Protection Act; 33 U.S.C. 2601 *et seq.*
5. Coastal Zone Management Act; 16 U.S.C. 1451 *et seq.*
6. Coastal Barrier Resources Act; 16 U.S.C. 3501
7. Surface Mining Control and Reclamation Act; 30 U.S.C. 1201 *et seq.*
8. National Wildlife Refuge System Administration Act; 16 U.S.C. 668dd, as amended
9. National Historic Preservation Act; 16 U.S.C. 470f
10. North American Wetlands Conservation Act, 16 U.S.C. 4401 *et seq.*
11. Pittman-Roberts Wildlife Restoration Act; 16. U.S.C. 669–669k
12. Dingell-Johnson Sport Fish Restoration Act; 16 U.S.C. 777–777n, except 777e–1 and g–1
13. Federal Land and Policy Management Act, 43 U.S.C. 1701 *et seq.*

C. Implementing Regulations

1. National Environmental Policy Act (NEPA), 40 CFR part 1508, 42 U.S.C. 55
2. Marine Mammal Protection Act (MMPA), 50 CFR part 18, 16 U.S.C. 1361 *et seq.*
3. Migratory Bird Treaty Act (MBTA), 50 CFR part 21, 16 U.S.C. 703 *et seq.*
4. Bald and Golden Eagle Protection Act (Eagle Act), 50 CFR part 22, 16 U.S.C. 668 *et seq.*
5. Guidelines for Wetlands Protection, 33 CFR parts 320 and 332, 40 CFR part 230
6. Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR parts 325 and 332 (USACE) and 40 CFR part 230 (EPA), 33 U.S.C. 1344
7. National Coastal Wetlands Conservation Grants, 16 U.S.C. 3954, 50 CFR part 84
8. Natural Resource Damage Assessments (OPA), 15 CFR part 990, 33 U.S.C. 2701 *et seq.*
9. Natural Resource Damage Assessments (CERCLA), 43 CFR part 11, 42 U.S.C. 9601
10. Endangered Species Act of 1973, as amended; 50 CFR parts 13, 17 (specifically §§ 17.22, 17.32, 17.50), part 402; 16 U.S.C. 1531 *et seq.*
11. Powers of the Secretary (43 U.S.C. 1201), 43 CFR part 24

D. Executive Orders

1. Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds, January 10, 2001
2. Executive Order 12114, Environmental Effects Abroad of Major Federal Actions, January 4, 1979
3. Executive Order 11988, Floodplain Management, May 24, 1977
4. Executive Order 11990, Protection of Wetlands, May 24, 1977
5. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority and Low-Income Populations, February 11, 1994
6. Executive Order 13514, Federal Leadership in Environmental, Energy, and Economic Performance, October 5, 2009
7. Executive Order 13604, Improving Performance of Federal Permitting and Review of Infrastructure Projects, March 22, 2012

E. Council on Environmental Quality (CEQ) Policy and Guidance

1. Guidance Regarding NEPA Regulations (48 FR 34236, July 28, 1983)
2. Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (40 CFR 1508.5, July 28, 1999)
3. Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act (January 30, 2002)
4. Collaboration in NEPA, a Handbook for NEPA Practitioners (October 2007)
5. Memorandum, ''Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact'' (January 14, 2011)
6. ''Memorandum on Environmental Collaboration and Conflict Resolution'' (September 6, 2012)
7. NEPA and NHPA, a Handbook for Integrating NEPA and Section 106 (March 2013)
8. Memorandum for Heads of Federal Departments and Agencies, ''Effective Use of Programmatic NEPA Reviews'' (December 18, 2014)
9. Memorandum: ''Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews'' (August 1, 2016)

F. Department of the Interior Policy and Guidance

1. Department of the Interior National Environmental Policy Act Procedures, 516 DM 1–7
2. Secretarial Order 3330, Improving Mitigation Policies and Practices of the Department of the Interior (October 31, 2013)
3. Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, and the Endangered Species Act (June 5, 1997)
4. Department of the Interior Climate Change Adaptation Policy, 523 DM 1

G. U.S. Fish and Wildlife Service (USFWS) Policy and Guidance:

1. Service Responsibilities to Protect Migratory Birds, 720 FW 2
2. Final Policy on the National Wildlife Refuge System and Compensatory Mitigation under the Section 10/404 Program, 64 FR 49229–49234, September 10, 1999
3. Habitat Conservation Planning and Incidental Take Permit Processing Handbook, 61 FR 63854, 1996
4. USFWS National Environmental Policy Act Reference Handbook, 505 FW 1.7 and 550 FW 1
5. Endangered Species Act Habitat Conservation Planning Handbook (with NMFS), 1996
6. Endangered Species Act Consultation Handbook (with NMFS), 1998
7. Inter-agency Memorandum of Agreement Regarding Oil Spill Planning and Response Activities Under the Federal

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Water Pollution Control Act's National Oil and Hazardous Substances Pollution Contingency Plan and the Endangered Species Act, 2002
8. Guidance for the Establishment, Use, and Operation of Conservation Banking, 2003
9. Endangered and Threatened Wildlife and Plants; Recovery Crediting Guidance, 2008
10. USFWS Tribal Consultation Handbook, 2011
11. Service Climate Change Adaptation Policy, 056 FW 1
12. USFWS Native American Policy, 510 FW 1

H. Other Agency Policy, Guidance, and Actions Relevant to Service Activities

1. Memorandum of Agreement Between the Department of the Army and the Environmental Protection Agency, The Determination of Mitigation Under the Clean Water Act Section 404(b)(1) Guidelines, 1990
2. Federal Highway Administration, Consideration of Wetlands in the Planning of Federal Aid Highways, 1990
3. Clean Water Act Section 404(q) Memorandum of Agreement Between the Department of the Interior and the Department of the Army, 1992
4. Interagency Agreement between the National Park Service, Fish and Wildlife Service, Bureau of Land Management, and the Federal Aviation Administration Regarding Low-Level Flying Aircraft Over Natural Resource Areas, 1993
5. USFWS Memorandum from Acting Director to Regional Directors, Regarding ''Partners for Fish and Wildlife Program and NEPA Compliance,'' 2002
6. Agreement between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers for Conducting Fish and Wildlife Coordination Act Activities, 2003
7. Memorandum of Agreement Between the U.S. Fish and Wildlife Service and the U.S. Army Corps of Engineers, 2003
8. Partnership Agreement between the U.S. Army Corps of Engineers and the U.S. Fish and Wildlife Service for Water Resources and Fish and Wildlife, 2003
9. Memoranda of understanding with nine Federal agencies, under E.O. 13186, Responsibilities of Federal Agencies to Protect Migratory Birds (*http://www.fws.gov/migratorybirds/PartnershipsAndIniatives.html*)

Appendix B. Service Mitigation Policy and NEPA

This appendix addresses Service responsibilities for applying this Policy when we are formulating our own proposed actions under the NEPA decision making process. Service personnel may also use this appendix as guidance for providing mitigation recommendations when reviewing the proposed actions of other Federal agencies under NEPA. However, comments that we provide are advisory to other Federal agencies in the NEPA context as an agency with special expertise regarding mitigating impacts to fish and wildlife resources. Consistent with their authorities, action agencies choose whether to adopt, in whole or in part, mitigation recommendations received from other agencies and the public, including the Service. Any requirements of other Federal agencies to mitigate impacts to fish and wildlife resources are governed by applicable statutes and regulations.

A. Mitigation in Environmental Review Processes

NEPA was enacted to promote efforts to prevent or eliminate damage to the environment and biosphere (42 U.S.C. 4321). The NEPA process is intended to help officials make decisions based on an understanding of environmental consequences and take actions that protect, restore, and enhance the environment (40 CFR part 1501). At the earliest stage possible in the planning process, and prior to making any detailed environmental review, the Service will ''consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved.'' (42 U.S.C. 4332(C)) Early coordination avoids delays, reduces potential conflicts, and helps ensure compliance with other statutes and regulations. When scoping the issues for the review, the Service will ''invite the participation of affected Federal, State, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might not be in accord with the action on environmental grounds).'' (40 CFR 1501.7(a)(1))

NEPA requires consideration of the impacts from connected, cumulative, and similar actions, and their relationship to the maintenance and enhancement of long-term productivity (42 U.S.C. 4332). Mitigation measures should be developed that effectively and efficiently address the predicted and actual impacts, relative to the ability to maintain and enhance long-term productivity. The consideration of mitigation (type, timing, degree, etc.) should be consistent with and based upon the evaluation of direct, indirect, and cumulative impacts. The Service should also consider and encourage public involvement in development of mitigation planning, including components such as compliance and effectiveness monitoring, and adaptive management processes.

Consistent with the January 14, 2011, CEQ Memorandum: Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impacts, Service-proposed actions should incorporate measures to avoid, minimize, rectify, reduce, and compensate for impacts into initial proposal designs and described as part of the action. Measures to achieve net gain or no-net-loss outcomes have the greatest potential to achieve environmentally preferred outcomes that are encouraged by the memorandum, and measures to achieve net gain outcomes have the greatest potential to enhance long-term productivity. We should analyze mitigation measures considered, but not incorporated into the proposed action, as one or more alternatives. For illustrative purposes, our NEPA documents may address mitigation alternatives or consider mitigation measures that the Service does not have legal authority to implement. However, the Service should not commit to mitigation alternatives or measures considered or analyzed without sufficient legal authorities or sufficient resources to perform or ensure the effectiveness of the mitigation (CEQ 2011). The Service should monitor the compliance and effectiveness of our mitigation commitments. For applicant-driven actions, some or most of the responsibility for mitigation monitoring may lie with the applicant; however, the Service retains the ultimate responsibility to ensure that monitoring is occurring when needed and that the results of monitoring are properly considered in an adaptive management framework.

When carrying out its responsibilities under NEPA, the Service will apply the mitigation meanings and sequence in the NEPA regulations (40 CFR 1508.20). In particular, the Service will retain the ability to distinguish between:

- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- rectifying the impact by repairing, rehabilitating, or restoring the affected environment; and
- reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

Minimizing impacts under NEPA is commonly applied at the planning design stage, prior to the action (and impacts) occurring. Rectification and reduction over time are measures applied after the action is implemented (even though they may be included in the plan). Therefore, under NEPA, there are often very different temporal scopes between minimization measures and those for rectification and reduction over time. These temporal differences can be important for developing and evaluating alternatives, analyzing indirect and cumulative impacts, and for designing and implementing effectiveness and compliance monitoring. Therefore, the Service will retain the ability to distinguish between these three mitigation types when doing so will improve the ability to take the requisite NEPA ''hard look'' at potential environmental impacts and reasonable alternatives to proposed actions.

Other statutes besides NEPA that compel the Service to address the possible environmental impacts of mitigation activities for fish and wildlife resources commonly include the National Historic Preservation Act of 1996 (NHPA) (16 U.S.C 470 *et seq.*), as amended in 1992, the Federal Water Pollution Control Act (Clean Water Act) (33 U.S.C. 1251–1376), Fish and Wildlife Coordination Act (16 U.S.C 661–667(e)), as amended (FWCA), and the Clean Air Act (42 U.S.C. 7401–7661). Service mitigation decisions should also comply with all applicable Executive Orders, including E.O. 13514, Federal Leadership in Environmental, Energy, and Economic Performance (October 5, 2009); E.O. 13653, Preparing the United States for the Impacts of Climate Change (November 1, 2013); and E.O. 12898, Federal Actions To Address Environmental Justice in Minority

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Populations and Low-Income Populations. DOI Environmental Compliance Memorandum (ECM) 95–3 provides additional direction regarding responsibilities for addressing environmental justice under NEPA, including the equity of benefits and risks distribution.

B. Efficient Mitigation Planning

The CEQ Regulations Implementing NEPA include provisions to reduce paperwork (§ 1500.4), delay (§ 1505.5), and duplication with State and local procedures (§ 1506.2) and combine documents in compliance with NEPA. A key component of the provisions to reduce paperwork directs Federal agencies to use environmental impact statements for programs, policies, or plans, and to tier from statements of broad scope to those of narrower scope, in order to eliminate repetitive discussions of the same issues (§§ 1501.1(i), 1502.4, and 1502.20). To the fullest extent possible, the Service should coordinate with State, tribal, local, and other Federal entities to conduct joint mitigation planning, research, and environmental review processes. Mitigation planning can also provide efficiencies when it is used to reduce the impacts of a proposed project to the degree it eliminates significant impacts and avoids the need for an environmental impact statement. When using this approach, employing a mitigated Finding of No Significant Impact (FONSI), the Service should ensure consistency with the aforementioned January 14, 2011, CEQ memorandum.

Use of this Policy will help focus our NEPA discussion on issues for fish, wildlife, plants, and their habitats, and will avoid unnecessarily lengthy background information. When appropriate, the Service should use the process for establishing evaluation species and resource categories to concentrate our environmental analyses on relevant and significant issues.

Programmatic NEPA reviews can establish standards for consideration and implementation of mitigation, and can more effectively address cumulative impacts. The programmatic NEPA reviews can facilitate decisions on agency actions that precede site- or project-specific decisions and actions, such as mitigation alternatives or commitments for subsequent actions, or narrowing of future alternatives. To ensure that landscape-scale mitigation planning is effectively implemented and meets conservation goals, as appropriate, the Service should seek and consider collaborative opportunities to conduct programmatic NEPA decisionmaking processes on Service actions that are similar in timing, impacts, alternatives, resources, and mitigation. The Service should consider developing standard mitigation protocols or objectives in a programmatic NEPA review in order to provide a framework and scope for the subsequent tiered analysis of environmental impacts. Existing landscape-scale conservation and mitigation plans that have already undergone a NEPA process will provide efficiencies for Federal actions taken on a project-specific basis and will also better address potential cumulative impacts. However, the Service may incorporate plans or components of plans by reference (40 CFR 1502.21), while addressing impacts from plans or components within the NEPA process on the Service action. When considering programmatic NEPA reviews, the Service should adopt approaches consistent with the December 18, 2014, CEQ Memorandum: Effective Use of Programmatic NEPA Reviews.

Appropriate treatment of climate change in NEPA reviews is essential to development of meaningful mitigation. The Service approach should be consistent with the August 1, 2016, CEQ Memorandum: Final Guidance for Federal Departments and Agencies on Consideration of Greenhouse Gas Emissions and the Effects of Climate Change in National Environmental Policy Act Reviews, which guides the consideration of reasonable alternatives and recommends agencies consider the short- and long-term effects and benefits in the alternatives and mitigation analysis.

C. Collaboration

Collaboration is an important component of mitigation planning, especially at the landscape or programmatic level. A collaborative NEPA process can offer the Service many benefits regarding development and implementation of mitigation, including, but not limited to: Better information regarding mitigation options by accessing relevant scientific and technical expertise and knowledge relating to local resources; a fairer process by involving most or all interests involved in determining mitigation; conflict prevention by dealing with issues related to mitigation as they arise; and easier implementation because all the stakeholders feel vested in the implementation of mitigation. Therefore, when considering and engaging in collaboration, the Service should, to the extent applicable, utilize the principles and recommendations set forth in the Office of Management and Budget and CEQ Memorandum on Environmental Collaboration and Conflict Resolution (2012) and the CEQ handbook, *Collaboration in NEPA–a Handbook for NEPA Practitioners* (2007).

D. NEPA and Tribal Trust Responsibilities

NEPA also provides a process through which all Tribal Trust responsibilities can be addressed simultaneous to consultation, but care should be taken to ensure that culturally sensitive information is not disclosed. Resources that may be impacted by Service actions or mitigation measures include culturally significant or sacred landscapes, species associated with those landscapes, or species that are separately considered culturally significant or sacred. The Service should coordinate or consult with affected tribes to develop methods for evaluating impacts, significance criteria, and meaningful mitigation to sacred or culturally significant species and their locales. Because climate change has been identified as an Environmental Justice (EJ) issue for tribes, adverse climate change-related effects to culturally significant or sacred landscapes or species may be cumulatively greater, and may indicate the need for a separate EJ analysis. Affected tribes can be those for which the locale of the action or landscape mitigation planning lies within traditional homelands and can include traditional migration areas. The final determination of whether a tribe is affected is made by the tribe, and should be ascertained during consultation or a coordination process. When government-to-government consultation takes place, the consultation process will be guided by the Service Tribal Consultation Handbook.

The Service has overarching Tribal Trust Doctrine responsibilities under the Eagle Act, the National Historic Preservation Act (NHPA), the American Indian Religious Freedom Act (AIRFA) (42 U.S.C. 1996), Religious Freedom Restoration Act of 1993 (RFRA) (42 U.S.C. 2000bb *et seq.*), Secretarial Order 3206, American Indian Tribal Rights, Federal-Tribal Trust Responsibilities, the Endangered Species Act (June 5, 1997), Executive Order 13007, Indian Sacred Sites (61 FR 26771, May 29, 1996), and the USFWS Native American Policy. Government-wide statutes with requirements to consult with tribes include the Archeological Resources Protection Act of 1979 (ARPA) (16 U.S.C. 470aa–mm), the Native American Graves Protection and Repatriation Act (NAGPRA) (25 U.S.C. 3001 *et. seq.*), and AIRFA. Regulations with requirements to consult include NAGPRA, NHPA, and NEPA. As required, the Service will initiate Section 106 consultation with Indian tribes during early planning for FWS proposed actions, to ensure their rights and concerns are incorporated into project design. Consultation will continue throughout all stages of the process, including during consideration of mitigation.

E. Integrating the Mitigation Policy Into the NEPA Process

When the Service is the lead or co-lead Federal agency for NEPA compliance, this Policy may inform several components of the NEPA process and make it more effective and more efficient in conserving the affected Federal trust resources. This section discusses the role of this Policy in Service decisionmaking under NEPA.

Scoping

The Service should use internal and external scoping to help identify appropriate evaluation species, obtain information about the relative scarcity, suitability, and importance of affected habitats for resource category assignments, identify issues associated with these species and habitats, and identify issues associated with other affected resources. Climate change vulnerability assessments can be a valuable tool for identifying or screening new evaluation species. The Service should coordinate external scoping with agencies having special expertise or jurisdiction by law for the affected resources.

Purpose and Need

The purpose and need statement of the NEPA document should incorporate relevant conservation objectives for evaluation species and their habitats, and the need to ensure either a net gain or no-net-loss. Because the statement of purpose and need frames the development of the proposed action and

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

alternatives, including conservation objectives from the beginning, it steers action proposals away from impacts that may otherwise necessitate mitigation. Addressing conservation objectives in the purpose statement initiates a planning process in which the proposed action and all reasonable alternatives evaluated necessarily include appropriate conservation measures, differing in type or degree, and avoids presenting decisionmakers with a choice between a ''conservation alternative'' and a ''no conservation alternative.''

Alternatives

The alternatives should include, as appropriate, an alternative that includes design components or mitigation measures to achieve a net benefit for affected resources and an alternative that includes design components or mitigation measures to achieve no-net-loss of affected resources. Alternatives that include provisions for mitigation based upon different climate change projections will help guide the development of appropriate responses, and will facilitate the ability to change mitigation responses more quickly to ones already analyzed but not previously adopted.

Affected Environment

The affected environment discussion should focus on significant environmental issues associated with evaluation species and their habitats and highlight resource vulnerabilities that may require mitigation features in the project design. This section should document the relative scarcity, suitability, and importance of affected habitats, along with the sensitivity and status of the species and habitats. It should identify relevant temporal and spatial scales for each resource and the appropriate indicators of effects and units of measurement for evaluating mitigation features. This section should also identify habitats for evaluation species that are currently degraded but have a moderate to high potential for restoration or improvement.

Significance Criteria

Explicit significance criteria provide the benchmarks or standards for evaluating effects under NEPA. Potentially significant impacts to resources require decisionmaking supported by an environmental impact statement. Determining significance considers both the context and intensity of effects. For resources covered by this Policy, the sensitivity and status of affected species, and the relative scarcity, suitability, and importance of affected habitats, provide the context component of significance criteria. Measures of the severity of effects (degree, duration, spatial extent, etc.) provide the intensity component of significance criteria. Significance criteria may help identify appropriate levels and types of mitigation; however, the Service should consider mitigation for impacts that do not exceed thresholds for significance as well as those that do.

Analysis of Environmental Consequences

The analysis of environmental consequences should address the relationship of effects to the maintenance and enhancement of long-term productivity (40 CFR 1502.16), and include the timing and duration of direct, indirect, and cumulative effects to resources, short-term versus long-term effects (adverse and beneficial), and how the timing and duration of mitigation would influence net effects over time. The Service's net gain goal for fish and wildlife resources under this Policy applies to the full planning horizon of a proposed action. Guidance under section V.B.3 (Assessment Principles) of this Policy supplements existing Service, Department, and government-wide guidance for the Service's environmental consequences analyses for affected fish and wildlife resources under NEPA.

Cumulative Effects Analyses

The long-term benefits of mitigation measures, whether onsite or offsite relative to the proposed action, often depend on their placement in the landscape relative to other environmental resources and stressors. Therefore, cumulative effects analyses, including the effects of climate change, are especially important to consider in designing mitigation measures for fish and wildlife resources. Cumulative effects analyses should include consideration of direct and indirect effects of climate change and should incorporate mitigation measures to address altered conditions. Cumulative effects are doubly important in actions affecting species in decline, such as ESA-listed or candidate species, marine mammals, and Birds of Conservation Concern, for which the Service should design mitigation that will improve upon existing conditions and offset as much as practicable reasonably foreseeable adverse cumulative effects. Also, to the extent practicable, cumulative effects analyses should address the synergistic effects of multiple foreseeable resource stressors. For example, in parts of some western States, the combination of climate change, invasive grasses, and nitrogen deposition may substantially increase fire frequency and intensity, adversely affecting some resources to a greater degree than the sum of these stressors considered independently.

Analysis of Climate Change

The analyses of climate change effects should address effects to and changes for the evaluation species, resource categories, mitigation measures, and the potential for changes in the effects of mitigation measures. Anticipated changes may result in the need to choose different or additional evaluation species and habitat, at different points in time.

Decision Documents

Mitigation measures should be included as commitments within a Record of Decision (ROD) for an EIS, and within a mitigated FONSI. The decision documents should clearly identify: (a) Measures to achieve outcomes of no net loss or net gain; (b) the types of mitigation measures adopted for each evaluation species or suite of species; (c) the spatial and temporal application and duration of the measures; (d) compliance and effectiveness monitoring; (e) criteria for remedial action; and (f) unmitigable residual effects.

Appendix C. Compensatory Mitigation in Financial Assistance Awards Approved or Administered by the U.S. Fish and Wildlife Service

The basic authority for Federal financial assistance is in the Federal Grant and Cooperative Agreement Act of 1977 (31 U.S.C. 6301 *et seq.*). It distinguishes financial assistance from procurement, and explains when to use a grant or a cooperative agreement as an instrument of financial assistance. Regulations at 2 CFR part 200 provide Government-wide rules for managing financial assistance awards. Each of the Service's financial assistance programs has at least one statutory authority, which are listed in the Catalog of Federal Domestic Assistance at *http://www.cfda.gov/*. These statutory authorities and their program-specific regulations may supplement or create exceptions to the Government-wide regulations. The authorities and regulations for the vast majority of financial assistance programs do not address mitigation, but there are at least two exceptions. The statutory authority for the North American Wetlands Conservation Fund program (16 U.S.C. 4401 *et seq.*) prohibits the use of program funds for specific types of mitigation. Regulations implementing the National Coastal Wetlands Conservation Grant program (50 CFR part 84) include among the activities ineligible for funding the acquisition, restoration, enhancement, or management of lands to mitigate recent or pending habitat losses. Consistent with this Policy, the regulations at 50 CFR part 84 authorize the use of Natural Resource Damage Assessment funds as match in the National Coastal Wetlands Conservation Program. To foster consistent application of financial assistance programs with respect to mitigation processes, the following provisions describe appropriate circumstances as well as prohibitions for use of financial assistance in developing compensatory mitigation.

A. What is Federal financial assistance?

Federal financial assistance is the transfer of cash or anything of value from a Federal agency to a non-Federal entity to carry out a public purpose authorized by a U.S. law. If the Federal Government will be substantially involved in carrying out the project, the instrument for transfer must be a cooperative agreement. Otherwise, it must be a grant agreement. We use the term *award* interchangeably for a grant or cooperative agreement. This Policy applies only to awards approved or administered by the Service in one of its financial assistance programs. If the Service shares responsibility for approving or administering an award with another entity, this Policy applies only to those decisions that the Service has the authority to make under the terms of the shared responsibility.

B. Where do most mitigation issues occur in financial assistance?

Most mitigation issues in financial assistance relate to: (a) The proposed use of mitigation funds on land acquired with Federal financial assistance, and (b) using either mitigation funds or in-kind

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

contributions derived from mitigation, as match. Match is the share of project costs not paid by Federal funds, unless otherwise authorized by Federal statute. Most Service-approved or -administered financial assistance programs require or encourage applicants to provide match to leverage the Federal funds.

C. Can the Federal or matching share in a financially assisted project be used to generate mitigation credits for activities authorized by Department of the Army (DA) permits?

1. Neither the Federal nor matching share in financially assisted aquatic-resource-restoration projects or aquatic resource conservation projects can be used to generate mitigation credits for DA-authorized activities except as authorized by 33 CFR 332.3(j)(2) and 40 CFR 230.93(j)(2). These exceptional situations are any of the following:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the restoration or conservation project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for the purpose of mitigation.

c. The work funded by the financial assistance award is subject to a DA permit that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to generate mitigation credits under the exceptional situations described in section C(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for compensatory mitigation.

D. Can the Service approve a proposal to use the proceeds from the purchase of credits in an in-lieu-fee program or a mitigation bank as match?

1. In-lieu-fee programs and mitigation banks are mechanisms authorized in 33 CFR part 332 and 40 CFR part 230 to provide mitigation for activities authorized by a DA permit. The Service must not approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match unless both of the following apply:

a. The proceeds are over and above the required minimum match. This surplus match must supplement what will be accomplished by the Federal funds and the required-minimum match to maximize the overall ecological benefits of the project.

b. The statutory authority for the financial assistance program and program-specific regulations (if any) do not prohibit the use of match or program funds for mitigation.

2. The reasons that the Service cannot approve a proposal to use proceeds from the purchase of credits in an in-lieu-fee program or mitigation bank as match except as described in section D(1)(a–b) are:

a. Proceeds from the purchase of credits are legally required compensation for resources or resource functions impacted elsewhere. The sponsor of the in-lieu-fee program or mitigation bank uses these proceeds for the restoration, establishment, enhancement, and/or preservation of the resources impacted. The purchase price of the credits is based on the full cost of providing the compensatory mitigation.

b. When credits are purchased from an in-lieu-fee program sponsor or a mitigation bank to compensate for impacts authorized by a DA permit, the responsibility for providing the compensatory mitigation transfers to the sponsor of the in-lieu-fee program or mitigation bank. The process is not complete until the sponsor provides the compensatory mitigation according to the terms of the in-lieu-fee program instrument or mitigation-banking instrument approved by the District Engineer of the U.S. Army Corps of Engineers.

E. Can the Federal share or matching share in a financially assisted project be used to satisfy a mitigation requirement of a permit or legal authority other than a DA permit?

The limitations on the use of mitigation in a Federal financially assisted project are generally the same regardless of the source of the mitigation requirement, but only the limitations regarding mitigation required by a DA permit are currently established in regulation. Limitations for a permit or authority other than a DA permit are established in this Policy. They are:

1. Neither the Federal nor matching share in a financially assisted project can be used to satisfy Federal mitigation requirements except in any of the following situations:

a. The mitigation credits are solely the result of any match over and above the required minimum. This surplus match must supplement what will be accomplished by the Federal funds and the required minimum match to maximize the overall ecological benefits of the project.

b. The Federal funding for the award is statutorily authorized and/or appropriated for use as compensatory mitigation for specific projects or categories of projects.

c. The project funded by the Federal financial assistance award is subject to a permit or authority that requires mitigation as a condition of the permit. An example is an award that funds a boat ramp that will adversely affect adjacent wetlands and the impact must be mitigated. The recipient may pay the cost of the mitigation with either the Federal funds or the non-Federal match.

2. Match cannot be used to satisfy Federal mitigation requirements under the exceptional situations described in section E(1)(a–c) if the financial assistance program's statutory authority or program-specific regulations prohibit the use of match or program funds for mitigation.

3. If any regulations govern the specific type of mitigation, and if these regulations address the role of mitigation in a Federal financially assisted project, the regulations will prevail in any conflict between those regulations and section E of Appendix C.

F. Can the Service approve a proposal to use revenue from a Natural Resource Damage Assessment and Restoration (NRDAR) Fund settlement as match in a financial assistance award?

1. The Service can approve such a proposal as long as the financial assistance program does not prohibit the use of match or program funds for compensatory mitigation. In certain cases, this revenue qualifies as match because:

a. Federal and non-Federal entities jointly recover the fees, fines, and/or penalties and deposit the fees, fines, and/or penalties as joint and indivisible recoveries into a fiduciary fund for this purpose.

b. The governing body of the NRDAR Fund may include Federal and non-Federal trustees, who must unanimously approve the transfer to a non-Federal trustee for use as non-Federal match.

c. The project is consistent with a negotiated settlement agreement and will carry out the provisions of the Comprehensive Environmental Response Compensation and Liability Act, as amended, Federal Water Pollution Control Act of 1972, and the Oil Pollution Act of 1990 for damage assessment activities.

d. The use of the funds by the non-Federal trustee is subject to binding controls.

G. Can the Service approve financial assistance to satisfy mitigation requirements of State, tribal, or local governments?

1. The Service may approve an award that satisfies a compensatory mitigation requirement of a State, tribal, or local government, if satisfying the mitigation requirement is incidental to a project purpose consistent with the purposes(s) of the program. It is solely the responsibility of the State, tribal, or local government to determine that its mitigation requirement has been satisfied and to submit any required certifications to that effect.

2. Satisfying a State, tribal, or local government mitigation requirement with Federal financial assistance or contributing match originating from such a requirement to a Federal award must not be contrary to any law, regulation, or policy of the State, tribal, or local government, as applicable.

H. Can a project on land already designated for the conservation of natural resources generate credits for compensatory mitigation?

1. A project on public, private, or federally recognized tribal lands already designated for conservation of natural resources can generate credits for compensatory mitigation if it meets the requirements of section 5.7.2. One of these requirements is that the benefits of the mitigation measures must be additional. If the authority for the compensatory mitigation is the Clean Water Act and if public land is proposed as the site of the project, it must also comply with 33 CFR 332.3(a)(3) and 40 CFR 230.93(a)(3), both of which read:

. . . Credits for compensatory mitigation projects on public land must be based solely on aquatic resource functions provided by the compensatory mitigation project, over and above those provided by public programs already planned or in place. . . .

17-01174_017075;17-01174_017075;17-01174_017076;17-01174_017077;17-01174_017078;17-01174_017079;1...

Public land includes only those real property interests owned or held by Federal, State, and local governments, and instrumentalities of any of these governments.

To be either ''additional'' or ''over and above,'' the benefits must improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure. Baseline conditions are: (a) Those that exist, and (b) those that a public land-management agency is foreseeably expected to implement absent the mitigation.

2. Examples of baseline conditions that a land-management agency or organization is foreseeably expected to implement are:

a. Management outcomes or environmental benefits required for a land-management unit by a statute, regulation, covenant in a deed, facility-management plan, or an integrated natural resources management plan, *e.g.,* (a) huntable populations of big game, (b) Class A wild trout populations at Class A densities, and (c) habitat diversity. When evaluating existing plans under sections H.2.a or b, the Service must defer to State and tribal plans to determine which additional benefits to count toward achieving the mitigation planning goal as long as the plans are consistent with Federal law and regulation and this Policy.

b. Management responsibilities assigned to an agency by statute, regulation, facility management plan, or integrated natural resources management plan, *e.g.,* (a) resource protection, (b) habitat management, and (c) fire management.

c. Commitments made under a financial-assistance award by the recipient, a subrecipient, or a partner to achieve certain management outcomes or environmental benefits for a land-management unit. The source of the funding to carry out these commitments may be the awarding agency, a match provider, and/or other contributors.

3. Projects that are not part of annual operations and maintenance are not baseline conditions if they are unfunded and have little prospect of funding, even if these projects are authorized in a statute or called for in a plan. Examples of projects that may be authorized in a statute or called for in a plan, but may have little prospect for funding are: (a) Construction of a high-volume pump station, (b) demolition of a dam, (c) reforestation of 1,000 acres of former agricultural land, and (d) acquisition of real property.

4. If it is unclear whether the proposed mitigation would provide additional conservation benefits after considering the above guidance, financial assistance managers must use judgment in making a decision. The overarching principles in making this decision should be: (a) Consistency with regulations, and (b) avoidance of an unauthorized subsidy to anyone who has a legal obligation to compensate for the environmental impacts of a project.

5. Service staff must be involved in the decision to locate mitigation on real property acquired under a Service-approved or administered financial assistance award for one or both of the following reasons:

a. The Service has a responsibility to ensure that real property acquired under one of its financial assistance awards is used for its authorized purpose as long as it is needed for that purpose.

b. If the proposed legal arrangements or the site-protection instrument to use the land for mitigation would encumber the title, the recipient of the award that funded the acquisition of the real property must obtain the Service's approval. If the proposed legal arrangements would dispose of any real-property rights, the recipient must request disposition instructions from the Service.

I. Does the Service's Mitigation Policy affect financial assistance programs and awards managed by other Federal entities?

1. This Policy affects only those Federal financial assistance programs and awards in which the Service has the authority to approve or disapprove applications for financial assistance or changes in the terms and conditions of an award. It also affects real property or equipment acquired or improved with a Service-administered financial assistance award where the recipient must continue to manage the real property or equipment for its originally authorized purpose as long as it is needed for those purposes.

2. The Policy has no effect on other Federal agencies' policies on match or cost share as long as those policies do not affect:

a. Restrictions in the Policy on the use of Service-approved or administered financial assistance awards for generating compensatory mitigation credits, and

b. the Service's responsibilities as identified in Federal statutes or their implementing regulations.

3. This Policy does not take precedence over the requirements of any Federal statute or regulation whether that statute or regulation applies to a Service program or a program of another Federal agency.

Dated: November 9, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–27751 Filed 11–18–16; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

[Docket No. FWS–HQ–ES–2015–0165; FXES11140900000–178nmdash;FF09E33000]

Endangered and Threatened Wildlife and Plants; Endangered Species Act Compensatory Mitigation Policy

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of final policy.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service or USFWS), announce the final Endangered Species Act (ESA) Compensatory Mitigation Policy. The new policy steps down and implements recent Executive Office, Department of the Interior, and Service mitigation policies that reflect a shift from project-by-project to landscape-scale approaches to planning and implementing compensatory mitigation. The new policy is established to improve consistency and effectiveness in the use of compensatory mitigation as recommended or required under the ESA. The ESA Compensatory Mitigation Policy covers permittee-responsible mitigation, conservation banking, in-lieu fee programs, and other third-party mitigation mechanisms, and stresses the need to hold all compensatory mitigation mechanisms to equivalent and effective standards.

DATES: This policy is effective on December 27, 2016.

ADDRESSES: Comments and materials received, as well as supporting documentation used in the preparation of this policy, including an environmental assessment, are available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0165.

FOR FURTHER INFORMATION CONTACT: Craig Aubrey, U.S. Fish and Wildlife Service, Division of Environmental Review, 5275 Leesburg Pike, Falls Church, VA 22041–3803; telephone 703–358–2442. Persons who use a telecommunications device for the deaf (TDD) may call the Federal Relay Service at 800–877–8339.

SUPPLEMENTARY INFORMATION:

Background

The mission of the U.S. Fish and Wildlife Service (Service or USFWS) is working with others to conserve, protect, and enhance fish, wildlife, and plants and their habitats for the continuing benefit of the American people. As part of our mission, we continually seek opportunities to engage both the public and private sectors to work with us to conserve species and the ecosystems on which they depend. This collaborative effort includes conservation of endangered and threatened (listed) species and their designated critical habitat protected under the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and other species proposed for listing or at-risk of being listed. The purposes of the ESA are to provide a means whereby the ecosystems upon which listed species depend may be conserved, and to provide a program for the conservation of such species. The Service and National Oceanic and Atmospheric Administration's National Marine Fisheries Service share responsibilities for administering the ESA. However, this policy only applies to the Service and species under our jurisdiction.

This policy is the first comprehensive treatment of compensatory mitigation under authority of the ESA to be issued by the Service. Both the 1995 interagency policy on the establishment and operation of wetland mitigation banks (60 FR 58605, November 28, 1995) and the 2000 interagency policy on the use of in-lieu fee arrangements (65 FR 66914, November 7, 2000) are specific to wetland mitigation, but provide guidance that is generally applicable to conservation banking and in-lieu fee programs for species associated with wetlands or uplands. These interagency policies were superseded by the Environmental Protection Agency—U.S. Army Corps of Engineers 2008 Compensatory Mitigation Rule for Losses of Aquatic Resources (73 FR 19594, April 10, 2008). In 2003, the Service issued guidance on the establishment, use, and operation of conservation banks (68 FR 24753, May 8, 2003). In 2008, we issued recovery crediting guidance (73 FR 44761, July 31, 2008). This ESA Compensatory Mitigation Policy clarifies Service expectations regarding all compensatory mitigation mechanisms recommended or supported by the Service when implementing the ESA, including, but not limited to, conservation banks, in-lieu fee programs, habitat credit exchanges, and permittee-responsible mitigation.

Purpose and Importance of the Policy

The primary intent of the policy is to provide Service personnel with direction and guidance in the planning and implementation of compensatory mitigation, primarily through encouraging strategic planning at the landscape level and setting standards that mitigation programs and projects must meet to achieve conservation that is effective and sustainable. Compensatory mitigation is defined in this policy as compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (part 600, chapter 6 of the Departmental Manual (600 DM 6.4C)). While this policy addresses only the role of compensatory mitigation under the ESA, avoidance and minimization of impacts retain their central role in both the section 7 and section 10 processes. Guidance on the application of the mitigation hierarchy is provided in our Mitigation Policy (81 FR 83440, November 21, 2016), regulations implementing the ESA, and other policies and guidance documents specific to various sections of the ESA.

Alignment of the Policy With Existing Directives

By memorandum (80 FR 68743, November 6, 2015), the President directed all Federal agencies that manage natural resources, ''to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities.'' This policy is consistent with the Presidential memorandum (''Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment'') issued November 3, 2015; the Department of the Interior (Department) Secretarial Order 3330 entitled, ''Improving Mitigation Policies and Practices of the Department of the Interior,'' issued October 31, 2013; the new Interior Departmental Manual Chapter on Landscape-Scale Mitigation Policy, 600 DM 6 (October 23, 2015); and is intended to institute the policies and procedures reflected in the guiding principles on mitigation established by the Department through the report to the Secretary entitled, ''A Strategy for Improving the Mitigation Policies and Practices of The Department of the Interior,'' issued in April 2014 (Clement et al. 2014). These directives emphasize a comprehensive landscape-scale approach to planning and implementing mitigation programs, and they also include a mitigation goal to improve

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

(*i.e.,* ''net gain'') or, at a minimum, to maintain (*i.e.,* ''no net loss'') the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority, primarily for important, scarce, or sensitive resources, or as required or appropriate.

The mitigation principles set forth in the above directives, including the landscape scale approach and the goal of ''net gain,'' have been adopted in both the Service's Mitigation Policy (81 FR 83440, November 21, 2016), and in this policy. The landscape-scale approach to mitigation is not a new concept. For example, in 2013, the Service issued mitigation guidance for two listed songbirds in central Texas based on recovery goals for these species. The songbird mitigation guidance sets minimum standards that must be met by mitigation providers and encourages the use of consolidated compensatory mitigation in the form of permanent protection and management of large, contiguous patches of the species' habitat. Proactive approaches, such as this example, provide greater regulatory certainty for project proponents and encourage the establishment of conservation banks and other mitigation opportunities by mitigation sponsors for use by project proponents.

The mitigation goal (*i.e.,* ''net gain'' or, at a minimum, ''no net loss'') is not necessarily based on habitat area, but on numbers of individuals, size and distribution of populations, the quality and carrying capacity of habitat, or the capacity of the landscape to support stable or increasing populations of the affected species after the action (including all proposed conservation measures) is implemented. In other words, it is based on those factors that determine the ability of the species to be conserved.

Benefits of the Policy

This policy sets forth standards for compensatory mitigation that implement the tenets in the directives cited above and reflect the many lessons learned by the Service during our more than 40-year history implementing the ESA, particularly sections 7 and 10 of the ESA. The standards apply to all compensatory mitigation mechanisms (*i.e.,* permittee-responsible mitigation, conservation banks, in-lieu fee programs, habitat exchanges, and other third-party mitigation arrangements), which are instrumental to achieving effective compensatory mitigation on the landscape and encouraging private investment in compensatory mitigation.

Adherence to the mitigation principles and compensatory mitigation standards identified in this policy will achieve greater consistency, predictability, and transparency in implementation of the ESA. Service offices are encouraged to work with Federal agencies and other partners to establish compensatory mitigation programs based on landscape-scale conservation plans, such as more efficient, better coordinated, and expedited regulatory processes, which can provide project applicants with incentives to mitigate their actions. Compensatory mitigation programs and projects designed and implemented in accordance with the standards set forth in this policy are expected to achieve the best conservation outcomes for listed, proposed, and at-risk species through effective management of the risks associated with compensatory mitigation.

This policy encourages the use of market-based compensatory mitigation programs such as conservation banking in conjunction with programmatic approaches to ESA section 7 consultations and habitat conservation plans (HCPs) that can be designed to achieve a ''no net loss'' or a ''net gain'' mitigation goal. Consultations and HCPs that establish a ''program'' to address multiple, similar actions and/or impacts to one or more species operate on a larger landscape scale and expedite regulatory processes. Market-based mitigation programs improve regulatory predictability, provide efficiencies of scale, and incentivize private investment in species conservation (Fox and Nino-Murcia 2005). The benefits provided by these mitigation programs generally encourage Federal agencies and incentivize applicants to develop proposed actions that fully compensate for adverse impacts to affected species anticipated as a result of their actions.

Discussion

''In enacting the ESA, Congress recognized that individual species should not be viewed in isolation, but must be viewed in terms of their relationship to the ecosystem of which they form a constituent element. Although the regulatory mechanisms of the [ESA] focus on species that are formally listed as endangered or threatened, the purposes and policies of the [ESA] are far broader than simply providing for the conservation of individual species or individual members of listed species'' (Conference Report No. 97–835 House of Representatives, September 17, 1982). This comment, made over 30 years ago during reauthorization of the ESA, is a reminder of the challenges still before us.

Incorporating a landscape-scale approach to development and conservation planning, including mitigation, that ensures a ''net gain'' or, at a minimum, ''no net loss'' in the status of affected resources, as directed by the Presidential memorandum (80 FR 68743, November 6, 2015), helps address the additive impacts that lead to significant deterioration of resources over time and has the potential to foster recovery of listed species and avoid listing of additional species.

As discussed later in this document, the Service's authority to require compensatory mitigation under the ESA is limited and differs under sections 7 and 10. However, we can more broadly recommend the use of compensatory mitigation to offset the adverse impacts of actions under certain provisions of the ESA and under other authorities, such as the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*) and the National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*). This policy encourages Service offices to work with Federal agencies and applicants, and to recommend or require, if appropriate, the inclusion of compensatory mitigation for all unavoidable adverse impacts to listed, proposed, and at-risk species and their habitat anticipated as a result of any proposed action. While this practice currently exists for some species, it is not used broadly throughout the Service. Recommending, where applicable, that Federal agencies use their authorities to fully mitigate the adverse effects of their actions (*i.e.,* ensure ''no net loss'' in the status of affected resources) is consistent with the Presidential memorandum (80 FR 68743, November 6, 2015), the Department's and the Service's mitigation planning goals, and the purposes of the ESA. Effective mitigation that fully offsets the impacts of an action prevents that action from causing a decline in the status of affected species (*i.e.,* achieves ''no net loss'').

Compensatory Mitigation Under Sections 7 and 10 of the ESA

The additive effects of impacts adversely affecting listed and at-risk species as a result of many past and current human-caused actions are significant. The number of listed species has increased from slightly more than 300 in 1982 (when the ESA was reauthorized) to more than 1,500 by the end of 2016. While some listed species have been reclassified from endangered to threatened (*i.e.,* ''downlisted'') or

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

removed from either the Federal List of Endangered and Threatened Wildlife or List of Endangered and Threatened Plants (*i.e.,* ''delisted'') within the last 40 years, the projected increase in human population growth, increasing demand on our natural resources associated with this projected population growth, accelerated climate change, continued introductions of invasive species, and other stressors are putting even more species at risk and compromising the essential functions of ecosystems necessary to improve the status and recover these species. We cannot expect to change the status trajectories of these species without a commitment to responsible and implementable standards for accomplishing effective, sustainable compensatory mitigation that fully offsets the adverse impacts of actions to species and other resources of concern.

Compensatory mitigation is a conservation measure that can be used within an appropriate context under section 7 of the ESA to address proposed actions that may result in adverse impacts to listed species that cannot be avoided. For example, under section 7(a)(1) of the ESA, all Federal agencies are required to use their authorities to carry out conservation programs for listed species. Federal agencies may choose to develop and implement section 7(a)(1) conservation programs for listed species in conjunction with section 7(a)(2) consultation through a coordinated program. The Service supports these efforts, and we encourage Federal agencies to coordinate with us on development of such programs.

Compensatory mitigation can be used under section 10(a)(1)(B) of the ESA through HCPs developed to address adverse impacts of non-Federal actions on listed and other covered species that cannot be avoided. Landscape-scale HCPs developed for use by multiple applicants to conserve multiple resources are generally the most efficient and effective approaches. The Service supports these efforts and encourages applicants, particularly local and State agencies and organizations, to coordinate with us on the development of such plans.

Landscape-Level Approaches to Compensatory Mitigation

Taking a landscape-level approach to mitigation will assist the Service to modernize our compensatory mitigation procedures and practices and better meet the challenges posed by the growing human population's demands on our natural resources and changing conditions such as those resulting from climate change. Conservation banking is a market-based compensatory mitigation mechanism based on a landscape approach to mitigation that achieves compensation for listed and other resources of concern in advance of project impacts. In-lieu fee programs also establish compensatory mitigation sites but generally not in advance of impacts and often not through a market-based approach. Habitat credit exchanges are a relatively new market-based compensatory mitigation mechanism based on a clearinghouse model that may or may not accomplish mitigation in advance of project impacts. All three of these mitigation mechanisms use a landscape-level approach to consolidate and locate compensatory mitigation in areas identified as conservation priorities. These programs have designated service areas within which proposed actions that meet certain criteria may be mitigated with Service approval. The functions and services provided for listed, proposed, and at-risk species by these compensatory mitigation programs are represented by credits. Credits are used to offset impacts (often referred to as debits). Most credit transactions involve a permittee purchasing the amount of credits needed to offset the anticipated adverse effects of an action from the mitigation project sponsor. The Service must approve credit transactions as to their conservation value and appropriate application for use related to any authorization or permit issued under the ESA.

The conservation banking model is generally perceived as successful at achieving effective conservation outcomes and, when used in conjunction with section 7 consultations and section 10 HCPs, has achieved notable regulatory efficiencies. Results include ecological performance that usually achieves ''no net loss,'' and often a net benefit, in species conservation; increased regulatory predictability for Federal agencies and applicants; and more efficient and better coordinated permitting processes, especially when multiple agencies with overlapping regulatory jurisdictions are involved.

Permittee-responsible mitigation for many small to moderate impacts often cannot provide adequate compensation because it is often difficult to achieve effective conservation on a small scale. Small mitigation sites are often not ecologically defensible, and it is often difficult to ensure long-term stewardship of these sites. Most individual actions result in small or moderate impacts to species and habitat, yet the additive effects of these actions (often referred to as ''death by a thousand cuts''), when not compensated for, can have substantial adverse effects on these resources by degrading the environmental baseline and impairing the potential for future actions. In general, conservation banking, in-lieu fee programs, and similar mitigation mechanisms that consolidate compensatory mitigation on larger landscapes are designed to serve project proponents with small to moderate impact actions, are ecologically more effective, and provide more economical options to achieve compensation than permittee-responsible mitigation.

Furthermore, larger landscape-scale conservation programs with market-based compensatory mitigation opportunities create an economic incentive for private landowners, investors, and mitigation project sponsors to participate in these programs. The most robust programs generate competition among mitigation sponsors and may provide cost-effective means for complying with natural resource laws such as the ESA. To be successful, these market-based and other compensatory mitigation programs must operate transparently and be held to high standards that are uniformly applied across all compensatory mitigation mechanisms. Equally important is transparency in the implementation of the ESA and the development of mitigation programs for use by regulated communities.

Mitigation Defined

Because endangered and threatened species are by definition in danger of extinction or likely to become so in the foreseeable future, avoiding, minimizing, and compensating for impacts to their populations are all forms of mitigation that the Service may consider when administering the ESA. The Council on Environmental Quality (CEQ) NEPA regulations (40 CFR 1508.20) state that mitigation includes:

- Avoiding the impact altogether by not taking a certain action or parts of an action;
- Minimizing impacts by limiting the degree or magnitude of the action and its implementation;
- Rectifying the impact by repairing, rehabilitating, or restoring the affected environment;
- Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; and
- Compensating for the impact by replacing or providing substitute resources or environments.

In 600 DM 6, the Department of the Interior states that mitigation, as

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

enumerated by CEQ, is compatible with Departmental policy; however, as a practical matter, the mitigation elements are categorized into three general types that form a sequence: Avoidance, minimization, and compensatory mitigation for remaining unavoidable (also known as residual) impacts. Historically, those administering the ESA have often used a condensed mitigation sequence—avoid, minimize, and compensate; or avoid, minimize, and mitigate. This policy adopts the Department's definition of compensatory mitigation: Compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C). Throughout this policy, ''compensatory mitigation'' or ''compensation'' is used in this broad sense to include any measure that would rectify, reduce, or compensate for an impact to an affected resource. We also use the term ''minimize'' in the broad sense throughout this policy to include any conservation measure, including compensation, which would lessen the impact of the action on the species or other affected resource. We recognize there is some overlap in the use of these terms but, as a practical matter, this use in practice is consistent with the intent of the ESA. Information regarding avoidance and observance of the mitigation sequence can be found at our Mitigation Policy (81 FR 83440, November 21, 2016). This ESA Compensatory Mitigation Policy covers permittee-responsible mitigation, conservation banking, in-lieu fee programs, and all other compensatory mitigation mechanisms.

Implementation

The Service will issue interim guidance containing specific operational steps to assist Service staff in implementing this policy. This interim guidance will be issued in the form of a Director's memorandum, which will be used to develop a Service Manual chapter at a later date. Throughout this policy, the term ''implementation guidance'' will be used when referencing the interim guidance and future Service Manual chapter.

Changes From the Draft Policy

This final policy differs from the draft policy in a few substantive respects, which we list below, and contains editorial changes in response to comments we received that requested greater clarity of expression regarding various aspects of the policy's purpose, authorities, scope, general principles, framework for formulating mitigation measures, and definitions. The most common editorial change to the final policy addresses the concern that the Service lacks authority to apply compensatory mitigation to the ESA. Reasons cited by the commenters for not applying compensatory mitigation to the ESA included: (a) The ESA does not provide authority to require mitigation; and (b) policy concepts such as ''net conservation gain'' and a ''landscape approach'' to conservation are inconsistent with ESA statutory authority and regulatory requirements. This final policy adds new text to 2. Authorities and Coordination that identifies those circumstances under which we have specific authority to require, consistent with other applicable laws and regulations, one or more forms of compensatory mitigation for impacts to federally listed species, proposed species, and candidates as defined in the ESA. This policy provides a common framework for the Service when identifying and implementing compensatory mitigation measures pursuant to the ESA. The policy, however, cannot and does not alter or substitute for the regulations implementing the ESA. We summarize below the few substantive changes from the draft policy, listed by section.

Section 5 in the draft policy, Application of Compensatory Mitigation Under the ESA, was moved in its entirety to replace section 4, as we felt it more appropriate to discuss the policy's application under the ESA after section 2. Authorities and Coordination, and section 3. Scope. Section 4 in the draft policy, Compensatory Mitigation Standards, is now section 5 in this final policy.

In section 5.1, *Siting Sustainable Compensatory Mitigation,* this final policy focuses on overarching considerations and leaves specific factors or examples to be explained in the implementation guidance.

In section 6.1.3, ''Preference for Consolidated Compensatory Mitigation,'' we removed habitat credit exchanges as a specifically identified preference for compensatory mitigation because we do not yet have the record of success with this mechanism that we have with other mechanisms such as conservation banks.

The bulk of sections 6.2.3, ''Ensuring Durability on Public Lands,'', and 6.2.4, ''Transfer of Private Mitigation Lands to Public Agencies,'' was removed from the policy and will be discussed in the implementation guidance, as well as the prescriptive operational detail from section 6.6, *Managing Risk and Uncertainty.*

In section 7.1.4 ''Habitat Credit Exchange,'' we added text indicating that habitat credit exchanges are a relatively new mitigation mechanism, and warrant additional care and consideration when implementing them. We also removed section 7.1.5, ''Other Third-party Compensatory Mitigation,'' as this is a purely hypothetical mechanism which seems to differ little from proponent-responsible mitigation, and it was redundant with section 7.3, *Other Compensatory Mitigation Programs or Projects.*

In Table 1. ''Comparison of Habitat-based Compensatory Mitigation Sites Established Under Different Mechanisms,'' we removed the column ''Instrument Required'' because all discussion of instruments will be in the implementation guidance, and we removed the final row of the table: ''Other Third-party Mitigation Site.''

We removed the draft policy's section 8, Establishment and Operation of Compensatory Mitigation Programs and Projects; it will form the basis of the implementation guidance.

Section 9 of the draft policy, Criteria for Use of Third-party Mitigation, has been re-numbered in this policy, and is now section 8.

The majority of section 10, Compliance and Tracking, has been removed from the policy, and will be discussed in the implementation guidance; accordingly, the remaining paragraph has been renumbered in this policy as section 9.

Regarding appendix B, Glossary of Terms Related to Compensatory Mitigation, we removed several terms that are more appropriate for the implementation guidance document as well as items that could be confused with terms used in the ESA's implementing regulations.

Finally, we have removed appendix C, Requirement of the Marine Mammal Protection Act, to avoid confusion with the policy's focus on implementing the ESA.

Summary of Comments and Responses

The September 2, 2016, notice announcing our draft Endangered Species Act Compensatory Mitigation Policy (draft policy) (81 FR 61032) requested written comments, information, and recommendations from governmental agencies, tribes, the scientific community, industry groups, environmental interest groups, and any other interested members of the public.

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

That notice established a 45-day comment period, ending October 17, 2016, on the draft policy. Several commenters (1) requested an extension of time to provide their comments; (2) asked the Service to revise and recirculate the draft policy for comment; or (3) asked the Service to withdraw the draft policy to allow interested parties additional time to comment. The November 3, 2015, Presidential Memorandum on Mitigation states, ''Within 1 year of the date of this memorandum, the Department of the Interior, through the U.S. Fish and Wildlife Service, shall finalize a revised mitigation policy that applies to all of the U. S. Fish and Wildlife Service's authorities and trust responsibilities. The U.S. Fish and Wildlife Service shall also finalize an additional policy that applies to compensatory mitigation associated with its responsibilities under the Endangered Species Act of 1973.'' In order to finalize the policy as close as possible to the date outlined in the Presidential Memorandum on Mitigation, we were unable to publish an extension or reopen the comment period.

During the comment period, we received approximately 150 public comment letters, including comments from Federal, State, and local government entities; industry; trade associations; conservation organizations; nongovernmental organizations; private citizens; and others. The range of comments varied from those that provided general statements of support or opposition to the draft policy, to those that provided extensive comments and information supporting or opposing the draft policy in its entirety or specific aspects of the draft policy. The majority of comments submitted included detailed suggestions for revisions addressing major concepts, as well as editorial suggestions for specific wording or line edits.

All comments submitted during the comment period have been fully considered in preparing this final policy. All substantive information provided has been incorporated, where appropriate, directly into this final policy or is addressed below. The comments we received were grouped into general issues specifically relating to the draft policy, and are presented below along with the Service's responses to these substantive comments.

We received several comments requesting clarification on various aspects of the draft policy, including: Reporting; monitoring; financial instruments; coordination with States, tribes, and local groups; the compensatory mitigation mechanisms; and other implementation elements. We recognize the value of these comments and are giving them due consideration. We have removed these elements from this policy and will address them in the implementation guidance.

A. Definitions

Comment (1): One commenter suggested a more precise definition of compensatory mitigation. The commenter stated the draft policy's definition suggests any remaining impacts must be ''unavoidable'' and not simply ''un-avoided.'' The commenter suggests the draft policy's definition is confusing and inconsistent with the ESA language that uses ''minimize'' and ''mitigate.''

Response: The definition of ''compensatory mitigation'' in this policy derives from the Department of the Interior's Department Manual (600 DM 6.4C). This definition gives more flexibility in the use of avoidance and minimization measures for listed species than the recommendation provided in the comment. The use of the terms ''appropriate and practicable'' in this policy's definition give deference to project proponents and Federal agencies.

Comment (2): Comments included a statement that the definition of landscape-scale approach is unclear.

Response: Our definition of landscape-scale approach is informed by the definition used in 600 DM 6 and our Service's mitigation policy. The landscape approach to conservation considers the functional context of the species or habitat under consideration. For example, activities involving fairy shrimp might be evaluated at a vernal pool complex or regional scale. Issues affecting sturgeon may require strategies that consider an entire river system, thousands of miles long. Fundamental to this approach is an understanding of what is important to ensure the ecological function of the species or habitat in question, at the appropriate scale. Examples include the North American Waterfowl Management Plan, many fisheries management plans, recovery plans for federally listed species, watershed restoration plans, and State wildlife plans.

B. Policy Is Based on Existing Authority

i. ESA Sections 7 and 10

Comment (3): Several commenters stated that the mitigation sequence that uses ''avoidance'' cannot be required under sections 7 and 10 of the ESA, unless it alleviates a jeopardy situation. One of the commenters noted that ''avoidance'' is voluntary on the part of an action agency or applicant.

Response: The use of ''avoidance'' in the mitigation sequence is not a requirement in the sense that all impacts to listed species or critical habitat must be avoided. Through the policy, we are neither requiring nor mandating avoidance. One of the stated purposes of the ESA at section 2(b) is to ''provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved.'' Developing options to avoid impacts to listed resources under sections 7 and 10 is important to furthering this purpose and effectively implementing the ESA.

The policy is consistent with the Presidential memorandum (''Mitigating Impacts on Natural Resources from Development and Encouraging Related Private Investment'') issued November 3, 2015 (see 80 FR 68743, November 6, 2015), in which the President directed all Federal agencies that manage natural resources ''to avoid and then minimize harmful effects to land, water, wildlife, and other ecological resources (natural resources) caused by land- or water-disturbing activities, and to ensure that any remaining harmful effects are effectively addressed, consistent with existing mission and legal authorities.'' The Service agrees that some impacts to listed species or critical habitat may be unavoidable and that the ESA provides a mechanism for both Federal agencies (section 7) and non-Federal entities (section 10) to receive take coverage in the case of any unavoidable impacts. There are multiple sections of our implementing regulations in title 50 of the Code of Federal Regulations (CFR) at 50 CFR part 402 (§§ 402.10, 402.13) that direct the Service to suggest modifications or make advisory recommendations to Federal action agencies and applicants to avoid the likelihood of adverse effects to listed species or critical habitat. Additionally, if the Service is required to provide a reasonable and prudent alternative under section 7 consultation, the regulations state that such an alternative must be one ''that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or resulting in the destruction or adverse modification of critical habitat'' (50 CFR 402.02). Use of the full mitigation sequence including avoidance and minimization of impacts to listed species is consistent with the purposes and mandates set forth in the ESA.

Comment (4): Several commenters suggested compensatory mitigation cannot be required under section 7 of

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

the ESA, and that there is no authority to include such mitigation in reasonable and prudent measures (RPMs) and the accompanying mandatory terms and conditions that the Service includes in incidental take statements. Some stated that compensation is limited to voluntary actions on behalf of the action agency and recommendations on the part of the Service. One comment stated compensation was not appropriate in both RPMs and reasonable and prudent alternatives (RPAs). Another suggested that compensation under section 7 consultation was appropriate but not under section 7(a)(4) conference. Commenters cited the ESA, its implementing regulations, and the Service's 1998 Consultation Handbook.

Response: As discussed in sections 4.1.2 and 4.1.3 of this policy, compensatory mitigation can play an important role in section 7(a)(2) consultations and 7(a)(4) conferences. Compensatory mitigation can appropriately be included as part of an action subject to consultation, or in reasonable and prudent alternatives to avoid the likelihood of jeopardy, in order to reduce the net adverse effect of an action on proposed or listed species or designated critical habitat. This policy clarifies those circumstances where it may be appropriate to incorporate mitigation into reasonable and prudent measures and terms and conditions as part of a section 7(a)(2) consultation. For example, throughout this policy, ''compensatory mitigation'' or ''compensation'' is used to include any measure that would rectify, reduce, or compensate for an impact to an affected resource. Rectifying the impact means ''repairing, rehabilitating, or restoring the affected environment'' (40 CFR 1508.20). Restoring impacted habitat is a commonly used reasonable and prudent measure that meets the definition of compensatory mitigation in this policy, minimizes the amount or extent of incidental take, and can be accomplished consistent with the ESA and its implementing regulations at 50 CFR part 402.

Comment (5): Commenters said the policy's emphasis on the role of conservation in the section 7 consultation process is misdirected. Section 7(a)(2) does not include a conservation requirement for Federal agencies.

Response: The Service respectfully disagrees. Section 7(a)(2) requires that Federal agencies ensure their actions do not jeopardize the continued existence of endangered and threatened species or result in the destruction or adverse modification of critical habitat. This requirement is accomplished through the consultation process, which concludes with the Service's biological opinion. In the event a section 7 consultation concludes with a jeopardy or adverse modification determination, the Service will include reasonable and prudent alternatives (RPAs), when possible, that the action agency can implement to avoid violation of section 7(a)(2) of the ESA. Options for RPAs can include compensatory mitigation in order to avoid a jeopardy or adverse modification situation, as long as they are consistent with the definitions at 50 CFR 402.02. When the Service's biological opinion concludes that the agency action would not result in jeopardy or adverse modification, the Service will include reasonable and prudent measures (RPMs) to minimize any incidental take associated with the action. As described in the policy, minimization of impacts of the taking on the species may include compensation as consistent with the ESA implementing regulations. The Service provides technical assistance during the section 7(a)(2) consultation process to help reduce the need for RPMs and RPAs. These measures fall within the ESA's definition of ''conserve,'' which means ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.''

Comment (6): Several commenters expressed concern that the policy would complicate the process for sections 7 and 10, and cause project delays. The commenters stated that such delays could create increased project costs.

Response: The Service respectfully disagrees. Mitigation provided in advance of impacts, such as through a conservation banking program, can expedite project reviews by the Service, because the mitigation is already established and has already gone through the due diligence process. Clear guidance on application of compensatory mitigation mechanisms as provided in this policy, should assist Service staff and project proponents implement their ESA responsibilities in a timely fashion. Furthermore, conducting compensatory mitigation may assist in the compliance with other required laws, which may expedite the project process. For example, compensatory mitigation may lower the level of analysis required by NEPA (allowing a mitigated environmental assessment/finding of no significant impact instead of an environmental impact statement).

Comment (7): One commenter objected to the phrase ''recovery measure'' when discussing section 7(a)(1) of the ESA. The commenter provided substantial information, including a section of the preamble from the Service's 1986 interagency cooperation rulemaking (51 FR 19926, June 3, 1986), noting the ESA does not mandate specific actions under section 7(a)(1), nor does it authorize the Service to mandate how or when Federal agencies should implement their section 7(a)(1) responsibilities. Specifically, the commenter said that section 7(a)(1) is not a recovery measure, and the policy failed to properly state the basis for such a characterization.

Response: We agree that the directive under section 7(a)(1) of the ESA does not give the Service authority over other Federal agencies, nor does it specifically authorize actions to be implemented. It does, however, direct other Federal agencies to consult with the Service when developing conservation programs under section 7(a)(1). To this end, the policy provides guidance and recommendations on how Federal agencies may achieve the greatest effectiveness when implementing their section 7(a)(1) obligations.

The policy clearly describes the basis for the use of the term ''recovery measure'' when describing section 7(a)(1), which comes from the definition of the terms ''conserve,'' ''conserving,'' and ''conservation'' in section 3 of the ESA. Although the word ''recovery'' is not used in the definition, it clearly describes recovery as ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.'' Additionally, section 7(a)(1) directs all Federal agencies to ''utilize their authorities in furtherance of the purposes of [the ESA]''. One of the stated purposes of the ESA is to ''provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.'' The intent is that all Federal agencies have a responsibility, using their existing authorities, to help recover listed species.

Comment (8): One commenter stated the policy should focus only on implementation of voluntary mitigation actions under the ESA. The commenter noted that mitigation guidance for sections 7 and 10 under the ESA are provided in the habitat conservation planning and consultation handbooks.

Response: This policy provides greater clarity and detail with regard to mitigation implementation than the

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

section 7 and habitat conservation planning handbooks. As stated earlier, this policy reflects the many lessons learned by the Service during our more than 40-year history implementing the ESA, particularly sections 7 and 10. We agree that the use of voluntary mitigation programs and actions that further the purposes of the ESA should be encouraged. The development and implementation of voluntary mitigation programs should also be effective and consistent with other forms of mitigation. The policy will guide such voluntary efforts to promote consistency in the same way it will guide mitigation efforts in regulatory processes.

Comment (9): One commenter recommended we add ''and applicants'' following ''Federal agencies'' in two sentences in section 4.1.2.

Response: Applicants are not typically involved in the establishment of mitigation programs such as conservation banks and in-lieu fee programs; moreover, the responsibility for ensuring a Federal action does not violate section 7(a)(2) of the ESA ultimately lies with the Federal agency proposing the action. We did not make the suggested change.

Comment (10): One commenter thought the Service should recognize the importance of the Habitat Conservation Plan (HCP) Assurances (''No Surprises'') Rule (63 FR 8859, February 23, 1998) and explicitly state that remediation and alternative mitigation will not erode protections afforded by the No Surprises Rule.

Response: The Service does recognize the importance of the No Surprises Rule in the section 10 process, and agrees that remediation and alternative mitigation should not erode protections afforded by the No Surprises Rule. The Service works with applicants to develop HCPs that include contingencies for mitigation that does not function as expected, including remediation or alternative mitigation. The No Surprises Rule is not eroded in this case, because these contingencies are included in the HCPs and agreed upon ahead of time.

Comment (11): One commenter requested clarification of how the draft policy would apply to reinitiation of consultations under section 7(a)(2) of the ESA. Specifically, what would be different, especially with regard to the concepts of ''net gain'' and ''no net loss?''

Response: During the reinitiation process under section 7(a)(2), the concepts under this policy and their application to any consultation do not change. The ESA's directive to agencies to ensure any action is not likely to jeopardize the continued existence of any endangered or threatened species or adversely modify its critical habitat guides that process. The Service will recommend actions consistent with this policy, including consideration of the goal of a ''net gain'' or, at a minimum, ''no net loss.'' Considering the variety of actions under consultation, the reasons for reinitiation, and the multitude of species covered, it is not possible for the policy to provide specific details regarding the application of such concepts during the consultation process.

Comment (12): One commenter was concerned about section 4.7 (*Effective Conservation Outcomes and Accountability Through Monitoring, Adaptive Management, and Compliance*) of the draft policy, which states that: ''A process for achieving remediation or alternative mitigation for compensatory mitigation failures beyond the control of the responsible party (*e.g.,* unforeseen circumstances) must be clearly described in the mitigation instrument, biological and/or conference opinion, or permit.'' The commenter asked the Service to the clarify the statement to say that biological opinions issued in connection with section 7 consultations with Federal agencies, other than the Service itself, are not required to provide for unforeseen circumstances, saying that such a requirement is associated with ESA section 10(a) HCPs, but is not required in the context of section 7 consultations by the section 7 handbook, or existing law or regulations. They were concerned the current language of the draft policy could be misinterpreted to mean that section 7 biological opinions must include alternative mitigation for compensatory mitigation failures ''beyond the control of the responsible party,'' and this policy should not change the section 7 requirements for avoiding jeopardy to the species and adverse modification of critical habitat.

Response: The development and implementation of mitigation programs should be effective and consistent among all forms of mitigation offered in sections 7 and 10 of the ESA, regardless of whether the mitigation is voluntary or required. Planning for unforeseen circumstances is part of effective mitigation. The policy will guide efforts to promote consistency, and Service staff will work with applicants and Federal agencies to explain how all mitigation standards can be incorporated into their mitigation plans. Nevertheless, the ESA and its implementing regulations ultimately determine how the Service makes decisions regarding listed species. We do not include the statement in question in this final policy; we will address this topic in implementation guidance.

Comment (13): One commenter stated the Service has no statutory authority to require section 7 consultation on candidate or at-risk species or to include such species in HCPs. If the policy pursues a conservation goal in excess of the Service's actual regulatory and statutory authorities, separate guidance should be issued to draw this clear distinction, in order to provide complete transparency and direction to both Service staff and others in actual implementation.

Response: The commenter is correct that the Service cannot require section 7 consultation for candidate or at-risk species. ESA section 7 regulations provide for a conference between a Federal action agency and the Service for actions that are likely to jeopardize the continued existence of a proposed species or likely to result in destruction or adverse modification of proposed critical habitat (50 CFR 402.10). Including candidate or other at-risk species in conferences would be voluntary on the part of the Federal agency; however, it is encouraged by the Service and through this policy, and other Federal agencies may voluntarily conference to expedite possible future re-consultations. This is consistent with ESA goals of recovering listed species and, ideally, avoiding the need to list species because threats to them have been addressed. Further, intra-Service consultations and conferences will consider effects of the Service's actions on listed, proposed, and candidate species. Candidate species are treated as if they are proposed for listing for purposes of conducting internal Service conferencing.

Additionally, under section 10 of the ESA, HCPs are voluntary and developed by the applicant, in consultation with the Service. It is the applicant who decides which candidate or non-listed at-risk species they wish to include. The Service has found that many applicants elect to include at-risk species to receive ''no surprises'' assurances and preclude the need to amend the associated incidental take permit, should the species become listed in the future. The voluntary inclusion of at-risk species in both the conference and HCP processes are proactive approaches to reduce the need for future listing of the species.

Comment (14): One commenter said the Service mixes the concepts of voluntary conservation recommendations that can be provided under ESA section 7(a)(1) with requirements under ESA section 7(a)(2).

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

They also commented that neither standard under ESA section 10 imposes a ''no net loss'' requirement.

Response: Federal agencies are directed to consult with the Service under ESA section 7(a)(1) to assist their development of programs to conserve listed species. Technical assistance to agencies with actions that require compliance with section 7(a)(2) is a logical nexus for the Service to advise Federal agencies about section 7(a)(1) conservation opportunities associated with these actions. Similarly, technical assistance to non-Federal applicants for incidental take permits under section 10(a)(1)(B) is a logical nexus to advise them about conservation opportunities associated with these actions. This policy provides a framework for such recommendations, and does not otherwise alter or substitute for standards under the ESA or the regulations implementing ESA sections 7(a)(2) and 10(a)(1)(B). Though not required, striving for ''no net loss'' in the status of the species' conservation is an appropriate mitigation goal, and may be to the benefit of the other agency or private landowner in greater future regulatory certainty or expedited future compliance (*e.g.,* including ''at-risk'' species).

ii. Authorities—Other

Comment (15): One commenter requested that we revise section 5.3 of the draft policy to provide more detail about how compensatory mitigation would work in relation to section 4(d) rules for threatened species.

Response: This policy is intended to be general in nature. More detailed guidance documents covering specific activities may be developed in the future, such as for rules promulgated under section 4(d) of the ESA.

Comment (16): One commenter said that it was unclear how the policy would ''replace'' rules promulgated by other Federal agencies for guiding implementation of Federal laws such as the Clean Water Act (33 U.S.C. 1251 *et seq.*) and natural resources such as ''waters of the United States.'' They requested clarification of how the April 10, 2008, joint rulemaking of the U.S. Army Corps of Engineers (USACE) and the Environmental Protection Agency (EPA) (73 FR 19594) applies to ESA actions and what the impact of the policy would be.

Response: The Service has added clarification to this final policy that it does not replace or alter the referenced April 10, 2008, rule (73 FR 19594). Processes established by applicable statutes and regulations remain in effect and are not superseded by this policy. This policy applies to compensatory mitigation for all species and habitat protected under the ESA and for which the Service has jurisdiction. The April 10, 2008, rule (73 FR 19594) applies to impacts to aquatic resources permitted by section 404 of the Clean Water Act.

Comment (17): One commenter said that issuance of this policy violates the Administrative Procedure Act (APA; 5 U.S.C. subchapter II) or the Regulatory Freedom Act (RFA).

Response: The Service complied with all necessary requirements in publishing the final policy. We are unaware of the Regulatory Freedom Act but for the purposes of this response, will assume the commenter is referring to the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*). The policy does not require compliance with the APA or the RFA because it is not a regulatory document.

Comment (18): One commenter was concerned that voluntary mitigation could be abused if an agency were to unreasonably withhold action for the purpose of applying undue pressure to force an applicant to volunteer mitigation measures. They said the policy should acknowledge and protect against this possibility.

Response: We agree with the commenter that such an approach by Service or other agency staff would be unacceptable. It would also be contrary to this policy and existing authority. Processes established by applicable statutes and regulations remain in effect and are not superseded by this policy.

Comment (19): One commenter stated that the policy goes beyond the authorities granted the Service in both sections 7 and 10 of the ESA. The other authorities relied on by the Service in adopting this policy, including the Presidential directives and memoranda, cannot legally form the basis for the promulgation of the policy.

Response: This policy is designed to improve and clarify implementation of the ESA. Towards that end, it seeks to provide a framework for effecting mitigation that reflects a permissible reading of the law, while fulfilling the conservation purposes of the ESA. Federal agencies are directed to consult with the Service under ESA section 7(a)(1) to assist their development of programs to conserve listed species. A mitigation framework may provide valuable expertise for an agency considering their section 7(a)(1) responsibilities. Additionally, a framework may assist agencies with actions that require compliance with section 7(a)(2) of the ESA. Similarly, technical assistance to non-Federal applicants for incidental take permits under section 10(a)(1)(B) of the ESA is a logical nexus to advise them about conservation opportunities associated with these actions. The policy provides a framework for such recommendations and does not otherwise alter or substitute for the regulations implementing ESA sections 7(a)(2) and 10(a)(1)(B). Authority to make recommendations to mitigate impacts to resources covered by the ESA is provided by that statute. Promulgation of this policy is consistent with not only the ESA, but also the Office of Management and Budget's guidelines on interpretive policies. Those guidelines state that public policies, such as this one, guide administrative processes while increasing an agency's predictability to external parties.

Comment (20): One commenter noted the ESA imposes different standards and prohibitions with respect to pre-listing versus post-listing activities for candidate conservation agreements with assurances (CCAAs) and safe harbor agreements (SHAs). By incorporating the net conservation benefit standard used for SHAs, the Service fails to account for these differences and conflates its treatment of pre-listing and post-listing activities.

Response: The Service does not intend to change the requirements for CCAAs and SHAs. The intent of the policy is to describe the requirements for converting either of these agreements to a mitigation agreement should a landowner desire to make their conservation more permanent and use it for mitigation.

iii. NEPA

Comment (21): One commenter said that the policy should recommend that the Service comment on NEPA documents apart from, or in addition to, section 7 consultation.

Response: We agree that application of the Service's authority to make advisory comments and recommendations under NEPA provides a powerful capability for influencing conservation of a broad array of natural resources while helping agencies and proponents identify appropriate project alternatives. The Service will continue to comment on NEPA documents in addition to conducting section 7 consultations whenever warranted. Our application of NEPA in a mitigation context is covered in the Service mitigation policy (81 FR 83440, November 21, 2016).

Comment (22): One commenter said the policy would increase the time and resources required by Federal agencies to comply with section 7 of the ESA and by proponents of any projects that may

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

adversely affect an at-risk species. The commenter said that the policy meets the definition of a major Federal action defined at 40 CFR 1508.18 and should be analyzed in an environmental impact statement to comply with NEPA.

Response: As explained in more detail below, neither of the two alternatives evaluated in the NEPA assessment would be expected to result in significant effects to the human environment within the meaning of NEPA and the CEQ regulations. Although we describe potential actions and consequences that could flow from each of the alternatives, the nature and scope of environmental consequences that are likely to result from any of the alternatives would depend on a variety of intervening circumstances that are impossible to identify in this analysis. However, we find there is no basis to infer that any such effects, even viewed generously, would be significant.

In addition, because of the programmatic nature of the draft policy and the breadth of activities under consideration, the analyses of environmental effects must be very general, addressing the consequences from each alternative at a programmatic scale. Regardless of the alternative, we anticipate that the majority of the specific actions covered under the policy would receive additional project-specific NEPA review, either by other Federal agencies during their project review or by the Service during review of an ESA section 10(a)(1)(B) application. Those project-specific reviews would include development of appropriately detailed alternatives based on information necessary to complete informed and meaningful effects analyses. That information (*e.g.,* location, timing, duration, and affected resources, etc.) is currently not available. More detailed information is contained in the environmental assessment, which is available on the Internet at *http://www.regulations.gov* at Docket Number FWS–HQ–ES–2015–0165.

C. Net Conservation Gain/No Net Loss

Comment (23): One commenter stated the policy should more consistently emphasize throughout that ''conservation'' is the goal for protected species and their habitat, using our full suite of authorities including the ESA. While ''no net loss'' is appropriate under certain statutes like the Clean Water Act (as acknowledged in the April 10, 2008, joint rulemaking of USACE and EPA (73 FR 19594), for example), ''no net loss'' is a lower standard than what they have sought in conservation banking and in-lieu fee programs.

Response: The Service's mitigation policy (81 FR 83440, November 21, 2016) sets a mitigation planning goal of ''net conservation gain,'' which seeks to improve the status of affected resources, and, at a minimum, maintain the status of those resources (*i.e.,* ''no net loss''). Adhering to the standards discussed in section 5 of this policy (Compensatory Mitigation Standards) is the best way to attain this goal, although we recognize that achieving a net conservation gain will not be possible in every circumstance, and in those cases will strive for ''no net loss.''

Comment (24): One commenter strongly opposed the goal of a ''net gain'' in the policy, stating the Service lacks the underlying statutory authority to require it under the ESA and it will likely result in an uncompensated taking in violation of the U.S. Constitution. The commenter stated that the obligations under the policy, with the use of mandatory language such as ''must'' and ''shall,'' constitute a rulemaking.

Response: This policy adopts mitigation principles established by the Service's mitigation policy (81 FR 83440, November 21, 2016) and establishes compensatory mitigation standards to guide the use of compensatory mitigation under the ESA. The mitigation goal of ''net gain'' or, at a minimum, ''no net loss,'' is to assist the Service and its partners in developing mitigation programs and projects to further the purposes of the ESA. One of the stated purposes under section 2 of the ESA is to ''provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved.'' Section 3 of the ESA defines ''conserved'' as ''the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' This conservation purpose of the ESA is served by the policy's goal of a ''net gain'' when developing compensatory mitigation.

In this context, the policy is not a legally binding rulemaking; the ESA and its implementing regulations determine the Service's decisions for listed species. The policy will not effectively compel a property owner to suffer a physical invasion of property and will not deny all economically beneficial or productive use of the land or aquatic resources. This policy provides consistent standards for the Service, and its partners, to apply when developing compensatory mitigation programs or projects, as appropriate under the authority of the ESA. The use of the terms ''must'' and ''shall'' in the policy are directed toward the Service's authority in implementing the ESA.

The policy is broadly framed to encompass all species covered under the ESA, but does not result in any particular actions concerning specific properties. Additionally, this policy substantially advances a legitimate government interest (conservation of species and their habitats) and does not present a barrier to all reasonable and expected beneficial use of private property.

Comment (25): One commenter stated that the Service does not explain how it will determine or impose mitigation measures to meet a mitigation target that is somewhere between maintaining and improving the status of affected resources.

Response: The Service, being national in scope of operations, wrote this policy to allow for further clarification on a regional and local scale. This will allow the Service to work with Federal agencies and applicants to develop mitigation measures that meet objectives based on local conditions and tailored to the specific species that are impacted. A less flexible policy could cause rigid adherence to a protocol, which may be more suitable in one region, or for one species, versus another.

Comment (26): Commenters stated that the ESA requirements to avoid jeopardy or adverse modification and to minimize the impact of any take of listed species do not equate to the no net loss or net gain goal articulated in the draft policy, and the Service has no authority under the ESA to require measures that will result in a ''net gain'' or ''no net loss.'' In addition, one commenter said a ''net gain'' or ''no net loss'' goal is incompatible with well-established standards for administering sections 7 and 10 of the ESA.

Response: Action agencies or proponents may adopt Service recommendations provided under this policy as part of their proposed actions, but electing to do so does not change the applicable standards under the ESA or otherwise alter the processes prescribed under the ESA and its regulations.

The Service does not view a ''net gain'' or ''no net loss'' goal as incompatible with well-established standards for administering sections 7 and 10 of the ESA. Instead, it is complementary to the ESA requirements to avoid jeopardizing the continued existence of any listed species, or destroying or adversely modifying any designated critical habitat. To achieve

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

this goal, an action agency or applicant need not abandon the actions they have taken to avoid jeopardizing the continued existence of any listed species, or destroying or adversely modifying any designated critical habitat. Instead, they may complement these actions by including additional measures that allow their action to reach the ''net gain'' or ''no net loss'' goal.

Comment (27): One commenter said by encouraging Service staff to work with applicants to implement ''no net loss'' or ''net conservation gain,'' the judgment of applications will no longer be standardized. They said the policy does not state how conservation gain will be measured, whether on a numerical basis or under what circumstances the Service will make a qualitative judgment regarding the level of mitigation that achieves this standard.

Response: This policy is national in scope, and it is beyond the scope of the policy to provide specific quantifiable measures to achieve a ''net conservation gain'' or specify the methodology for assessing or measuring the ''net conservation gain.'' The Service's mitigation goal is to achieve a ''net conservation gain'' or, at a minimum, ''no net loss'' of the affected resources. The policy provides the framework for formulating compensatory mitigation measures to achieve this goal. The geographical and ecological breadth of this policy's coverage combined with the variation in project and impact types affecting species and habitats nationwide make the detailed specifications for calculating ''no net loss'' or ''net gain'' impossible to include. Such determinations will either be made on a case-by-case basis or will be addressed through additional guidance or planning processes.

Comment (28): Commenters said the policy should be revised to help Service staff avoid crossing the line between ''encouraging'' Federal agencies and applicants to achieve ''a net gain or, at a minimum, no net loss in the conservation of listed species'' and incorrectly representing to Federal agencies and applicants that they are somehow ''required'' to achieve a ''net gain'' or, at a minimum, ''no net loss'' in the conservation of listed species. Commenters added that Service staff should be instructed by the policy to clearly disclose to Federal agencies and applicants at all times that section 7 of the ESA does not require such a ''no net loss in the conservation of listed species'' or a ''net gain'' in relation to the ''no jeopardy'' and ''no adverse modification'' standards.

Response: This policy clearly states that the mitigation planning goal is a goal, not a requirement. We expect further clarification on a regional and local scale to reiterate this distinction.

Comment (29): One commenter stated the goal of ''no net loss'' is admirable and adequate with respect to the Presidential Memorandum (80 FR 68743, November 6, 2015); however, the commenter is concerned this new language may unfairly prohibit or require mitigation for agricultural actions without due process of assessment.

Response: The Service will consider the facts specific to the actions that we review under our authorities. This policy does not provide for the Service to categorically deny development or agricultural activities. Instead, our decisions and opinions on those activities will be guided by relevant statutes and regulations.

Comment (30): One commenter said the sentence, ''Losses of habitat that require many years to restore may be best offset by . . . preservation of existing habitat . . .,'' is counter to the ''no net loss policy.''

Response: The entire sentence reads, ''Losses of habitat that require many years to restore may best be offset by a combination of restored habitat, preservation of existing high-quality habitat, and improved management of existing habitat.'' It is the combination and ratios of these three habitat mitigation types that can create a ''no net loss'' scenario. Improved management can create an immediate conservation benefit and habitat restoration creates a long-term conservation benefit, while preservation of high quality habitat protects existing habitat from being lost. Long-term land management is included in the durability standard.

D. Applicability

Comment (31): Several commenters had concerns about the applicability of the policy to existing mitigation programs, HCPs and associated incidental take permits, and ongoing section 7 consultations that were initiated between the Federal agency and the Service prior to the effective date of the final policy. The comments requested clarity that the policy does not apply to existing projects or projects currently under development, including the associated real estate and financial assurances.

Response: The policy states that it applies to Federal and non-Federal actions permitted or otherwise authorized or approved prior to issuance of the policy only under circumstances where the action may require additional compliance review under the ESA. In addition, the policy states that it does not apply where the Service has already agreed in writing to mitigation measures for pending actions, except where new activities or changes in current activities associated with those actions would result in new impacts, or where new authorities or failure to implement agreed-upon recommendations warrant new consideration regarding mitigation. Service offices may elect to apply this policy to actions that are under review as of its effective date (see DATES, above).

Comment (32): The draft policy does not include any de minimus size consideration. While consultation considers the extent of potential impacts to ESA-listed species, the draft policy does not. It talks in general terms about credit valuation and ratios, but at some point, there should be a consideration of a de minimus project size to which this draft policy would not apply.

Response: The policy is intended to guide compensatory mitigation projects for listed and at-risk species regardless of the scope, magnitude, or size of the project. As such, it would not be reasonable to attempt to define ''de minimis'' limits for the application of the policy that would cover all species and mitigation projects across the country. However, step-down guidance derived from this policy for particular species would be more specific for the biological needs of the species and therefore likely consider factors related to the scope of compensatory mitigation projects.

E. Scope of the Policy

Comment (33): One commenter said that the Service should identify activities and projects that are exempt from the policy.

Response: We agree that the scope of coverage should be clearly described and have listed those circumstances when the policy does not apply in section 3, Scope.

Comment (34): One commenter said that it is important for the policy to address species protected under additional Federal laws, including the Bald and Golden Eagle Protection Act (BGEPA; 16 U.S.C. 668–668d) and the Migratory Bird Treaty Act (MBTA; 16 U.S.C. 703–712).

Response: We agree that conservation of the resources under BGEPA and MBTA is important. However, those resources, and processes specified by those Acts and any implementing regulations or guidance, are beyond the scope of this policy. We discuss these

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

authorities in the Service mitigation policy (81 FR 83440, November 21, 2016).

Comment (35): One commenter said that the policy should be limited to listed threatened species, listed endangered species, candidate species, and designated critical habitat.

Response: We agree that the commenter's list of covered resources is similar to our description of covered resources in section 3, Scope, of this policy. There we state that the policy applies to all species and habitat protected under the ESA and for which the Service has jurisdiction. Endangered and threatened species, species proposed as endangered or threatened, designated critical habitat, and proposed critical habitat are the primary focus of this policy. We also state that candidates and other at-risk species would benefit from adherence to this policy, and encourage all Service programs to develop programs and tools in cooperation with States and other partners.

F. At-Risk Species

Comment (36): Several commenters suggested only listed species should be covered by the policy, and ''at-risk'' species references should be removed. Commenters suggested there is no ESA basis for including at-risk species in the policy, that no standards exist for the definition of at-risk species, and that it would create additional burdens on the public. One comment requested clarification of the jurisdiction of the Service, States, and tribes regarding at-risk species.

Response: The Service has addressed at-risk species through implementation of the ESA under many voluntary programs. Often partners (*e.g.,* other agencies, private landowners) voluntarily consider ''at-risk'' species for greater regulatory certainty and to expedite future compliance if these ''at-risk'' species are later listed under the ESA. Under section 6 of the ESA, the Service partners with the States to fund research and recovery actions on listed and at-risk species. Candidate conservation agreements with assurances (CCAAs) are a highly successful program for private landowners providing voluntary conservation for at-risk species. Many HCPs under section 10 of the ESA also include voluntary coverage for at-risk species. These and other proactive efforts for at-risk species, including our draft Policy Regarding Voluntary Prelisting Conservation Actions (79 FR 42525, July 22, 2014), focus on preventing the need to list species under the ESA. The Service also values its partnerships with the States and tribes in conservation of fish and wildlife resources. This final policy aims to strengthen these partnerships and does not extend the Service's jurisdiction over at-risk species. We have included at-risk species, as appropriate, in the policy to further these efforts in preventing the decline of species to the point that protection under the ESA is necessary.

G. Equivalent Standards

Comment (37): One commenter thought the policy should emphasize that there are no prescribed standards that will dictate mitigation but that every situation will be considered fact-specific and flexible, and be based upon the voluntary actions of the proponent.

Response: The Service has written this policy in a manner that facilitates further clarification on a regional scale. As with many of the decisions made in impact analysis, determination of when and what type of mitigation should be implemented occurs on a project-by-project basis, under the authority at hand, with information most appropriate for the site or region of impact. Section 7 of this policy, Compensatory Mitigation Mechanisms, allows the Service flexibility in the type of mitigation mechanism used to meet this need. Section 5 of the policy, Compensatory Mitigation Standards, describes the standards we will require or recommend that all mechanisms meet.

H. Landscape-Scale Approach

Comment (38): Individual actions that harm ESA-listed, proposed, and at-risk species must not be discounted or minimized because they are considered to impart only small or moderate impacts within the broader context of the landscape. The policy should consider how these site-specific impacts could be identified and accounted for prior to development of the most appropriate compensatory approach.

Response: The Service agrees that small or moderate impacts that have cumulative effects are important to address. In each situation, the project effects analyses should identify all effects to the species under consideration, as well as measures to avoid, minimize, and compensate adverse effects. These analyses can characterize repeated, ongoing actions that may affect a species at a larger scale, and can help inform recovery efforts at a local or regional level. Ideally, the project proponent and the Service would also identify opportunities to support recovery/conservation of that species and include them in the action, if possible. This is a collaborative approach to conservation, consistent with relevant statutes and regulations, and can help offset the cumulative effects of many actions on the landscape.

Comment (39): One commenter said the draft policy should provide additional guidance on how landscape-scale indirect effects would be evaluated for buffers surrounding existing mitigation sites, including mitigation banks. They recommend clarification regarding the process when additional compensation may be necessary for landscape-scale indirect effects to existing mitigation sites.

Response: It is difficult at this time to provide specific guidance on buffers and indirect effects given the potential universe of actions that could arise and fact-specific situations of each mitigation site. We declined to provide such guidance in this policy.

Comment (40): Some commenters were concerned that the landscape-level approach to mitigation planning would focus too narrowly on certain species to the detriment of others, or that purchasing credits from a conservation bank or in-lieu fee program would not equate to replacing lost habitat.

Response: The goal of a landscape-scale approach to mitigation is to ensure functionally successful compensatory mitigation efforts for the habitats or species under consideration. While no project or habitat benefits all species all the time, using a landscape context to frame mitigation actions should reinforce functionality at the appropriate scale (*i.e.,* tract, regional, range) to benefit the target resource, and in most cases, other resources/species that also rely on that functional system. Using a landscape approach will help ensure the compensatory mitigation measures will meaningfully offset adverse effects to a species/habitat in a way that is ecologically sustainable over the long term. This is a more holistic approach to ensuring the functionality of the ecosystems on which federally listed and at-risk species depend.

Comment (41): One commenter recommends that the Service consider revising the guidance provided under section 5.1.2 of the draft policy to discuss not only economies of scale associated with conservation banks and small impacts, but also to state that large-scale impacts require large-scale mitigation and such development projects have the potential to create landscape-scale conservation benefit for species, which may not be best achieved through banks.

Response: The Service agrees large-scale projects have the potential to

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

provide large-scale mitigation measures to offset adverse effects and ideally contribute to recovery. The examples given in section 5.1.2 of the draft policy are compensatory mitigation programs that can be established in advance of impacts, such as conservation banking or in-lieu fee programs. A large-scale mitigation project implemented in advance of impacts will likely offset the impacts of multiple projects, and is essentially a conservation bank.

Comment (42): One commenter stated that landscape-scale mitigation is unauthorized and unfeasible. Landscape-scale impact evaluations and required mitigation measures on this basis imports a policy objective into official ESA decisions in excess of statutory authority and is incongruent with the ESA.

Response: The goal of the ESA is to conserve endangered and threatened species and the ecosystems on which they depend. Through science and technological advances, conservation has more tools than ever to effectively evaluate land use, populations, hydrology, and so forth, at scales relevant to the needs of federally listed and at-risk species. To ensure the most effective mitigation measures for these resources, it is critical to put them in an ecologically functional context, *i.e.,* a landscape. That does not mean every action requires advanced, ecosystem-level quantitative evaluations, but rather that the effects of an action and mitigation measures to offset those effects take into consideration truly functional strategies that will continue to provide long-term resource benefits. This does not expand any existing authorities for ESA implementation.

Comment (43): We received comments requesting clarification of when programmatic approaches to mitigation would be appropriate.

Response: This policy does not require the development of programmatic documents to support infrequent compensatory mitigations needs. The decision to develop programmatic approaches to mitigation will be made based upon resource-specific circumstances, such as how frequently agencies and applicants will need to compensate for their impacts.

Comment (44): Comments included concerns about the Service's proposed extension of critical habitat to areas not currently occupied by a listed species, on the basis that an area may become critical because the species' range is expected to expand to that area. In determining the scale of a landscape-level approach to mitigation, the Service should not ignore the need for a rational connection to the area of actual impact of a proposed project. Instead, it should base requirements for landscape-scale mitigation on demonstrable connections between truly foreseeable or predictable impacts, rather than speculative projections of habitat or range modifications due to climate change.

Response: The Service agrees that compensatory mitigation must be based on the best available science, and have a rational connection between project effects and proposed mitigation measures. The landscape approach provides the context within which to frame that connection. As our understanding of species' needs, habitats, and climate change increases, we will be better able to address potential future needs of species and their habitats. In planning mitigation strategies, it is also important to recognize uncertainties in future conditions, including habitats, water supplies, temperatures, etc. Those uncertainties should be built into the mitigation strategies to ensure that the proposed mitigation benefits adequately offset adverse effects over the long term. The policy does not address the designation of critical habitat; the regulations for the designation of critical habitat are found at 50 CFR 424.12.

Comment (45): One commenter said the focus on landscape-scale conservation is laudable, but the draft policy introduces new processes and standards that could make achieving this goal more costly, time-consuming, and burdensome. The policy should include ways to incentivize the creation of landscape-scale mitigation projects that capitalize on the multiple ecosystem services and efficiencies that landscapes provide. More consideration for the self-regulating aspects of natural landscapes that could reduce management and monitoring burdens (lowering costs), and the ability to unstack credits for different listed species when their habitats overlap in space but not in function (increasing market returns), would help make landscapes a priority for the conservation marketplace.

Response: The landscape approach to conservation provides a conceptual framework to design effective and durable mitigation strategies. The intent is to approach mitigation planning and implementation from an ecologically functional perspective for more effective, durable outcomes. Designing mitigation that works with natural landscapes will help reduce management costs and increase effectiveness. Monitoring also will help confirm our underlying understanding of mitigation benefits and may help identify where our assumptions need revision. This is critical to mitigation success.

Bundled or stacked credits cannot be unbundled or unstacked to offset the effects of multiple projects but can only be used to offset the effects of a single project. Once a unit of habitat is used as mitigation for one project, regardless of the number of listed species it supports, it cannot be used as mitigation a second time.

Comment (46): One comment suggested that it is unclear why the required inclusion of adjacent ecosystems and human systems, which is how landscapes are defined, into conservation plans will provide a benefit to species that do not require those habitats or ecosystems for survival. The Service should clarify whether it intends mitigation consistent with a landscape-scale approach to require grouping of permittee proposed compensatory mitigation projects or grouping of project proponents, and in situations where this is desired, the benefits should be explained.

Response: Including consideration of adjacent ecosystems and human systems into a landscape approach to compensatory mitigation recognizes the potential effects those systems may have on the species and habitats under consideration. This is especially important in ensuring long-term ecologic functioning of the compensatory mitigation that benefits the species/habitat. We are increasingly aware that adjacent landscapes and human management actions can significantly affect what was perceived as a protected area. This policy explicitly recognizes those factors in developing long-term, comprehensive conservation strategies for the resources under consideration. Because those strategies will be implemented using market-based and collaborative mitigation tools, the Service will work with our conservation partners to develop effective, feasible measures to put conservation on the ground. The policy does not require permittee proposed mitigation projects to be grouped, but they should be considered in the context of the landscape in which they occur.

Comment (47): One commenter said that most species lack an up-to-date analysis of conservation status, and few have forward-looking strategies that the Service intends to rely on in implementing the policy. Furthermore, not all landscape-scale conservation strategies noted by the Service are peer-reviewed, publicly vetted, scientifically sound, or without controversy. If the Service intends to rely on such strategies in the context of preparing

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

recovery plans, status reviews, and similar documents, then these landscape-scale conservation strategies and the process for implementing them must be vastly improved. The Service should let the conservation market identify lands that represent valuable conservation targets and take advantage of ''market efficiencies'' that are a benefit of the conservation banking and in-lieu fee forms of mitigation.

Response: The Service agrees on the importance of using the best available scientific information in developing conservation strategies. We rely on our conservation partners to bring their information and expertise into a collaborative process to help us develop those strategies. We also appreciate the assistance of the conservation market in designing, implementing, and expanding our suite of conservation tools to benefit listed and at-risk species.

Comment (48): One commenter said the policy would benefit from greater recognition that activities associated with the management, monitoring, protections, and assurances need not be as robust in some instances, yet will achieve a functional landscape that is capable of supporting the conservation of listed and at-risk species, different from the actions necessary to provide compensatory mitigation for wetlands and other aquatic resources.

Response: The Service agrees that some larger landscapes may require less intensive management than smaller areas. However, in most areas of the country, there are few ''self-regulating'' systems left that are not greatly influenced by invasive species, altered hydrology, ongoing erosion, and climate change. It is important in designing feasible, meaningful mitigation to appropriately scale the monitoring and management actions to most effectively provide resource benefits. This will depend on the resources, landscapes, and scale of the project, and should have a rational connection between the effects being offset and the benefits provided. We declined to modify the policy based on this comment.

Comment (49): One commenter said the draft policy's example of a proactive, landscape-scale mitigation approach provided by songbird mitigation guidance in Texas to encourage compensatory mitigation opportunities is misleading. The commenter cited two instances in which potential conservation banks were precluded from establishing species credits due to the requirements in the guidance.

Response: We respectfully disagree. The example used in the policy is intended to show instances where the Service has taken landscape-scale approaches for species conservation and compensatory mitigation. We recognize that not all proposals developed under the Texas example or other local guidance will ultimately be finalized and implemented, but the intent of this policy is to promote consistency and predictability so that mitigation providers may develop programs that are more likely to be implemented.

Comment (50): Some commenters indicated that the policy should offer far more guidance on when and how the Service would apply a ''landscape-level approach'' to ESA mitigation, questioned whether the Service would apply a landscape approach differently to species with different range sizes, and stated that the draft policy does not explicitly describe how or whether a landscape approach would apply to listed species with narrow ranges.

Response: The landscape approach to conservation considers the functional context of the species or habitat under consideration. Working with our conservation partners and project proponents, the Service will use a landscape context to provide the most effective and durable mitigation for listed and at-risk species, while preserving the greatest flexibility to implement those measures at many scales. Given the breadth of species and landscapes under consideration, it is impossible to give a ''one size fits all'' set of instructions. Using a landscape context to frame mitigation actions should reinforce functionality at the appropriate scale (*i.e.,* tract, regional, range) to benefit the target resource and, in most cases, other resources/species that also rely on that functional system. Though some species may have relatively narrow ranges, their threats may be best addressed at a landscape scale (*e.g.,* invasive species, altered hydrology, climate change). This approach will help ensure the compensatory mitigation measures will meaningfully offset adverse effects to a species/habitat in a way that is ecologically sustainable over the long term.

Comment (51): One commenter noted that the statement requiring compensatory mitigation to be ''sited in locations that have been identified in landscape level conservation plans or mitigation strategies'' does not take into account the limited lands available for acquisition or restoration in some areas of the United States and the need to acquire property from willing sellers.

Response: The Service recognizes conservation opportunities vary across the country by species and habitats. The landscape-scale approach is a way to place those opportunities in an ecologically functional context. The policy allows for compensatory mitigation on public lands (provided certain criteria are met, *e.g.,* ''additionality'') and on private lands. It also encourages market-based tools and incentives to take advantage of the unique circumstances in each area. While there may be limitations in available lands in some regions, the policy includes a suite of tools that should provide meaningful options for feasible, durable compensatory mitigation nationwide.

Comment (52): The policy will result in the creation of a landscape-scale system of conservation banks and other mitigation sites controlled by the Service that will take private land and their resources out of productive use.

Response: The landscape approach to conservation considers the functional context of the species or habitat under consideration. It does not affect land ownership or control. Working with our conservation partners and project proponents, the Service will use a landscape context to provide the most effective and durable mitigation for listed and at-risk species, while preserving the greatest flexibility to implement those measures at many scales. Providing incentives for a market-based approach to conservation allows many tools to better meet the needs of species as well as the needs of landowner/project proponents. Generally, the use of conservation banking and other mitigation projects will not take resources out of ''productive'' use. Rather, conservation banks and other mitigation projects located on private land remain under control of the property owner and often provide other productive uses, such as grazing livestock.

I. Metrics

Comment (53): One commenter stated that the policy should clarify that actions can meet ESA conservation standards using mitigation when adverse effects, and mitigation offsets of those effects, are calculated using tools that consider more than mere gain or loss of animals or habitat. For example, tools like Habitat Equivalency Analysis consider spatial, temporal, and functional parameters that look beyond mere loss or gain to calculate the extent and quality of mitigation required in given situations.

Response: A discussion of tools used to calculate mitigation is not within the scope of this policy.

Comment (54): Several commenters were concerned that adequate detail

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

about how assessment methodologies are developed and applied was not provided in the draft policy. Commenters were also concerned that the numerical loss and benefit to a site is largely a qualitative measurement, and the no methodology for quantification is offered. They said that transparent formulas to calculate ''mitigation ratios'' are needed to reduce subjectivity and increase transparency. They also noted that equivalent metrics for determining losses due to impacts and gains due to mitigation would aid in the assessment of ''no net loss'' or ''net gain.''

Response: The Service agrees that transparent formulas to calculate ''mitigation ratios'' reduce subjectivity and increase transparency. We also agree that equivalent metrics for determining losses due to impacts and gains due to mitigation would aid in the assessment of ''no net loss'' or ''net gain.'' This policy does include a statement that equivalent metrics should be used whenever possible.

Details about how to develop and apply assessment methodologies that are quantitative and transparent were not included in the draft, or this final, policy, because these details are species-specific and too complex to describe adequately within the framework of the policy. When detailed descriptions of assessment methodology development and application are prepared by the Service for a species-specific mitigation program, these descriptions are routinely shared with the public.

Comment (55): One commenter said that since buffers are so important, they should be counted in the crediting of a mitigation site at some ratio of a full credit.

Response: The Service agrees with this comment. In section 6.6, the policy states, ''If buffers also provide functions and services for the species or other resources of concern, compensatory mitigation credit will be provided at a level commensurate with the level of functions and/or services provided to the species.''

Comment (56): One commenter stated that for the purposes of mitigation, the Service has not shown compelling evidence that adequate assessment methodologies exist to consider adverse and beneficial actions that are fundamentally different in nature. Determining the numerical loss and benefit to a site is largely a qualitative measurement, and the draft policy offers no quantification methodology.

Response: The policy describes types of mitigation programs or projects that do not directly replace species or habitat losses resulting from development projects. These are the types of programs in which the adverse actions, like habitat development, would be offset by an action that is fundamentally different in nature, such as gating of caves that serve as habitat for the species. The Service acknowledges that these types of credit/debit systems can often be more subjective than the traditional habitat-for-habitat type of mitigation. However, this type of mitigation has been the exception rather than the rule, and we expect Service staff to use other programs or projects only when they are the best option to alleviate the greatest threats to the species involved. When these programs or projects are allowed as mitigation, the Service will clearly explain the link between the threat and the selected mitigation.

Comment (57): One commenter was concerned that there was no discussion of how successful ''surrogate'' indicators of incidental take have been in assuring adequate mitigation.

Response: The use of surrogate indicators for the species impacted, such as the species' habitat, when applying compensatory mitigation in accordance with 50 CFR 402.14(i)(1)(i) is discussed at section 5.2 of the policy. We declined to add additional detail to that discussion.

Comment (58): One commenter suggested that the Service require that all credits and debits associated with the same species and region be aggregated and reported across all compensatory mitigation mechanisms. They indicated this is critical to ensure an offset achieves ''net conservation gain,'' to ensure the offsets created by all mechanisms are using the best available science, and to ensure equivalency across multiple mechanisms. They also suggested when the same metric is not used by two different mechanisms; the requirement to define ''the relationship (conservation) between credits and debits'' can also be used to define the relationship between different credit metrics.

Response: Currently, the Service uses the Regulatory In-lieu Fee and Banking Information Tracking System (RIBITS) to track credits and debits for conservation banks. The Service intends to work with the USACE to adapt RIBITS for use by the Service to also track credits and debits for in-lieu fee programs. The type of credits that are acceptable for a given species is determined by the Service when a mitigation program for a specific species is developed and implemented. The Service agrees that tracking the types and amounts of credits used across a species' range is a good idea, as it informs our understanding of the species' status. Collecting this type of information and working to achieve consistency requires coordination among Service staff, including those from different program areas. Describing the actions necessary to ensure this coordination occurs is beyond the scope of this policy.

Comment (59): One commenter suggested a monitoring and verification process should be required of all mitigation. They said the verification process should include a method to verify that the outcomes of the project achieve the performance standard throughout the entire life of the mitigation project, and that method could be the initial assessment method or an abbreviated assessment that still quantifies the quality of the resource. They also suggested the party responsible for conducting the verification should be identified upfront.

Response: We agree that these are important requirements to ensure that mitigation remains adequate over time. Specific methodologies for such verification are beyond the scope of this policy.

Comment (60): One commenter said it should be made explicitly clear that while adaptive management is critical as knowledge and conditions change, the necessary updates to metrics or plans do not invalidate previous metrics or credits. They suggested that each credit, and debit if applicable, should be labeled with the method used at the time of assessment. They also suggested that reports should acknowledge when metrics are modified, but credits should still be aggregated across time. They noted that it may be necessary to use a correction method, and these correction methods should be transparent, scientifically supported, and included in all reports.

Response: We agree in concept; however, this comment goes beyond the scope of the policy.

Comment (61): One commenter asked that we clarify that plans should rely more on the criteria that define high-quality habitat, including criteria for landscape-scale attributes, indicating these criteria should be consistently reflected in the development of metrics used to define credits and debits within the region. They noted that opportunities to enhance and protect habitat may be outside of predefined conservation areas, but they must meet the definition for high-quality habitat and be deemed acceptable.

Response: We agree that metrics should define high-quality habitat. We also agree that opportunities to enhance

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

and protect habitat may be outside of predefined conservation areas, and regardless of location, they should meet the definition for high-quality habitat and be deemed acceptable. This concept is captured in the final policy.

Comment (62): One commenter liked the concept that ecological performance criteria must be tied to conservation goals and specific objectives identified in compensatory mitigation programs and projects, but they did not think the draft policy adequately describes how to accomplish this objective.

Response: The level of detail necessary to describe how to accomplish this objective is beyond the scope of this policy and may be addressed in implementation guidance.

Comment (63): One commenter stated the draft policy should more explicitly recognize the uncertainty associated with mitigation for certain species and describe a framework for managing the uncertainty. They said the policy should describe a framework the Service would use to assess the appropriate balance of avoidance, minimization, and mitigation, as informed by the likelihood of mitigation effectiveness and the species' recovery needs.

Response: The Service agrees that there is uncertainty associated with mitigation for certain species. This policy includes a discussion of risk management tools. These tools can be used after the Service determines that a mitigation program or project is appropriate. Assessing risks and determining if mitigation is appropriate for a species is not within the scope of this policy, as uncertainty associated with mitigation for certain species will be fact specific.

J. Additionality

Comment (64): We received two comments on the draft policy's use of ''additionality'' when developing compensatory mitigation on both public and private lands. Commenters believed additionality is not feasible when coupled with the ''no net loss'' goal, and that some inconsistencies exist in the descriptions in the text of the draft policy.

Response: One purpose of using ''additionality'' as a standard in the policy is to promote the ''net gain/no net loss'' goal. There are many examples of mitigation sites and programs that have achieved these standards. The concept of compensatory measures providing additional benefits above baseline conditions is described in general terms in the policy. Those descriptions in the text are intended to give context to the conservation benefits of mitigation actions being additive to baseline conditions on both private and public lands.

K. Durability

Comment (65): Some commenters were concerned that the requirement for perpetual management of mitigation sites places an undue burden on mitigation providers, or that perpetual management would be detrimental to the resource. They said that the imposition of perpetual endowment and adaptive management places burdens on all projects, and it would be impossible for industry to manage and maintain mitigation sites in perpetuity.

Response: Perpetual management of mitigation sites is essential to assure durability of compensatory mitigation. The species and resources present on a mitigation site will dictate what management actions are undertaken. Management plans are tailored to the needs of the site. Mitigation providers should carefully consider the long-term commitment they are making when they agree to implement a compensatory mitigation project. Mitigation that is permanent is expected to have appropriate financial and real estate assurances to meet the durability standard in the policy.

L. Collaboration and Coordination

Comment (66): One commenter said the policy would mandate the Service to work directly with landowners, potentially resulting in the loss of confidential information. The commenter noted recent conservation plans produced in Texas were developed by stakeholders and administered through State agencies to preserve confidentiality of private landowners.

Response: The Service has a long history of working with private landowners to conserve fish and wildlife resources, including endangered and threatened species. Our partnerships with private landowners are essential to achieving our conservation mission. The policy does not include a mandate to work directly with landowners, but supports the ESA and its implementing regulations, which allows us to work with a variety of entities towards the recovery of listed species, and encourages cooperative conservation with all of our partners, including the exchange of ideas and information to better inform species management and evaluation. As noted in the policy, transparency in compensatory mitigation programs and ESA implementation is essential to achieving success. The Service is considerate of confidentiality, and any personal information maintained by the Service is protected by law (*e.g.,* Freedom of Information Act, 5 U.S.C. 552; Privacy Act, 5 U.S.C. 552a) to prevent unlawful dissemination.

Comment (67): One commenter was concerned that the Service developed the policy without having addressed concerns raised by States and other parties regarding the Service's mitigation policy. They said that moving forward with this guidance without finalizing the overarching mitigation policy was premature, and created uncertainty and confusion over what the Service was likely to adopt.

Response: This compensatory mitigation policy is a step-down policy under the final Service mitigation policy, which published in the **Federal Register** on November 21, 2016 (81 FR 83440). There were no substantial changes between the draft and final Service mitigation policy. In finalizing the Service's mitigation policy, we fully considered all comments and concerns raised by States and other parties. We also considered those comments as we developed this policy.

Comment (68): Two commenters addressed the relationship between this policy and mitigation policy developments underway in other agencies. One commenter was concerned that while interagency cooperation is addressed in the draft policy, it only provided a history of previous ESA requirements. They were concerned that the draft policy did not address the relationship between similar policies being developed by other Federal land management agencies such as the Bureau of Land Management and the U.S. Forest Service. Another commenter noted that other Federal agencies are also responding to the Presidential memorandum (''Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment'') issued November 3, 2015. They said that this created the opportunity for the Service to enter into agreements with other Federal agencies to work together on the implementation of similar mitigation policies and to avoid conflicts, delays, and inefficiencies.

Response: At the time this policy is being finalized, neither the Bureau of Land Management nor the U.S. Forest Service has published final mitigation policies or regulations. The Service did provide comments on their proposed policies, and we did receive comments on this policy from those agencies. This policy, like the Service mitigation policy published November 21, 2016 (81 FR 83440), was developed in accordance with the November 3, 2015, Presidential Memorandum; the

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

Secretary of the Interior's Order 3330 entitled, ''Improving Mitigation Policies and Practices of the Department of the Interior'' (October 31, 2013); and Departmental Manual chapter (600 DM 6) on Landscape-Scale Mitigation Policy (October 23, 2015). The commenter's concern is anticipated by those documents, which envision the various agencies' mitigation policies applying common principles, terms, and approaches, thereby providing greater consistency and predictability for the public. Subsequent agreements between the Service and other agencies may be developed as need arises.

Comment (69): One commenter said the draft policy would be improved if it built upon and utilized the USACE and EPA's definitions and mitigation policies. They said that a reconciliation of terms and process should be part of the Service's next steps.

Response: We agree that this policy should apply concepts and definitions compatible with those developed through decades of mitigation practice under the Clean Water Act. Accordingly, we have developed this policy to use the same terms and approaches found in regulations and guidance promulgated by the USACE and EPA whenever possible. In some cases, we also recognized the need for language tailored to authorities, processes, and resources covered by the ESA rather than the Clean Water Act; in these cases, the policy's language complies with the Departmental Manual on Landscape-Scale Mitigation Policy (600 DM 6).

Comment (70): One commenter said that the implementation of this policy will establish an inconsistent ESA framework because the National Marine Fisheries Service did not adopt the Service's mitigation policy (81 FR 83440, November 21, 2016). The commenter said this approach is contrary to the typical practice of promulgating joint regulations by the two agencies that provide for uniform application of the ESA. The commenter stated that by unilaterally proposing this policy and the Service mitigation policy (81 FR 83440, November 21, 2016), the Service is creating disparate requirements that will impose significant and additional regulations on project sponsors based on the possibility of a species being affected.

Response: This policy is not a rulemaking and cannot otherwise alter or substitute for the existing regulations applied by both the National Oceanic and Atmospheric Administration (NOAA) and the Service in implementing the ESA. We also have coordinated development of both this policy and the Service mitigation policy (81 FR 83440, November 21, 2016) with NOAA, and incorporated their suggestions and modifications. Also, this policy was required under the Presidential Memorandum on Mitigation, the Department of the Interior Secretarial Order 3330, and 600 DM 6.

Comment (71): One commenter said that the Service and other agencies risk unnecessary duplication of efforts and conflicting requirements, which will further delay project approval. They encouraged the Service to consider mitigation frameworks already in place before adding another layer of mitigation requirements to an already complex and burdensome project approval process.

Response: We agree that existing mitigation programs and frameworks, as well as existing mitigation and conservation plans, should be considered. The Service recognizes that there may be existing plans developed by State and local governments and other stakeholders with characteristics that may be useful in mitigation planning depending on the specific action and the affected resources. The Service will work with project proponents and other stakeholders in reviewing existing programs, frameworks, and plans for applicability in the context of a specific action.

Comment (72): One commenter said the policy would complicate other agencies' processes. They said that it would increase opportunities for the Service to force concessions from other Federal agencies and permittees, and that it has the potential to violate organic acts and will undoubtedly complicate the approval process for mining operations and other land users.

Response: The scope of this policy does not limit the existing discretion of an action agency, or hold the action agency or applicant responsible for mitigation beyond an action agency's own authority, mission, and responsibilities. The Service recognizes that the authorities and processes of different agencies may limit or provide discretion regarding the level of mitigation for a project. This policy is not controlling upon other agencies, and the Service acknowledges that there may be limitations (*e.g.,* agency-specific authorities and 600 DM 6) on the implementation of measures that would achieve the policy's goal of ''net conservation gain'' or a minimum of ''no net loss'' when the costs of such mitigation are reimbursable by project beneficiaries under laws and regulations controlling agencies' activities (*e.g.,* Bureau of Reclamation). Other agencies may voluntarily adopt Service recommendations, which may expedite their other requirements.

Comment (73): Some commenters expressed interest in a collaborative approach to mitigation planning on a landscape level. One commenter expressed support for additional engagement with stakeholders; another commented that the role of State wildlife data, analyses, and expertise should be utilized to the greatest extent possible; another commenter was skeptical of the collaborative approach preferred by the Service.

Response: The Service agrees that developing multi-scale conservation plans and strategies benefits from many invested stakeholders that bring their unique insights and perspectives to ensure a more comprehensive and robust blueprint, and looks forward to building on our conservation partnerships through collaborative planning efforts. Our State partners in particular are critical to successful compensatory mitigation of federally listed and at-risk species. They bring statutory responsibility, data, expertise, and management capabilities to better ensure successful, durable mitigation efforts on the ground.

Comment (74): Several commenters were concerned about the level of coordination undertaken by the Service on establishment of mitigation programs, and encouraged the Service to engage with both mitigation partners and with State agencies, to avoid duplication of effort and cross-jurisdictional issues and to improve outcomes. One commenter urged the Service to expedite reviews by working with agencies that already have established mitigation policies and programs.

Response: The Service agrees that we have common goals with our partners and achieve much better outcomes when we work together on coordinated mitigation programs, especially where our jurisdiction overlaps with that of other agencies as it often does with our State wildlife agency partners. The Service intends to continue working with all of our partners.

M. Transparency

Comment (75): One commenter requested clarification on the Service's meaning of ''direct oversight'' in the draft policy regarding compensatory mitigation programs and projects. The commenter also requested clarification on use of third-party evaluators in preparing monitoring reports for programs or projects.

Response: The policy identifies the Service's authority for direct oversight

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

of compensatory mitigation programs and projects through sections 7 and 10 of the ESA. Under sections 7 and 10, the Service oversees the terms and conditions of the incidental take permit (section 10) or of the incidental take statement (section 7). Details on the roles of third-party evaluators involved in specific project actions are beyond the scope of the policy.

Comment (76): We received several comments pertaining to the availability of information generated from mitigation programs. Commenters recommended the policy include standards for transparency of data and documents, participation of stakeholders, and consistency of data reported through mitigation programs.

Response: Information on conservation banks is available to the public on the Regulatory In-lieu Fee and Banking Information Tracking System (RIBITS), and the Service intends to work with the USACE to add Service-approved in-lieu fee programs to that platform. As noted in the policy, the Service will share appropriate information concerning mitigation programs with the public, with the exception of personally identifiable information or other information that would be exempt under the Freedom of Information Act. We declined to add specific standards for transparency to the policy. Prescriptive standards for the type of data to be shared would not be reasonable for a policy that covers the myriad listed species across the country. Such standards would be better suited for species-specific guidance.

N. Preference for Advance Mitigation

Comment (77): One commenter stated the policy should adopt an approach similar to that taken in the HCP handbook to identify exceptions to the requirement to mitigate in advance of impacts.

Response: The policy is intended to provide standards and guidance to improve consistency of compensatory mitigation programs and projects for listed, proposed, and at-risk species. The preference for advance mitigation is based on the years of experience with compensatory mitigation programs. We realize that in some cases advance mitigation may not be possible, or even preferable; however, attempting to identify exceptions for this preference would not be reasonable, considering the vast diversity of species and programs that would occur across the country.

Comment (78): Several commenters were concerned about the draft policy's preference for compensatory mitigation in advance of project impacts. One commenter specifically identified that reclamation of mining operations often lacks the ability for advanced mitigation on site. Other commenters cited that: The process of project permitting and financing determinations would likely not allow for advanced mitigation; the Service should provide incentives such as higher ratios for ''after impact mitigation''; advance mitigation would be considered pre-decisional; or it is impossible to provide mitigation in advance of impacts.

Response: We recognize that project scheduling and implementing on-site mitigation may not always align with the Service's preference for advance mitigation; however, conservation banks, in-lieu-fee programs, and other third-party mechanisms provide advanced mitigation options that reduce timing and other constraints. The Service's current practice to recommend mitigation in advance of impacts under sections 7 and 10 of the ESA is based on years of experience in compensatory mitigation practices. This policy promotes the development of advanced mitigation mechanisms, providing more options for mitigation users. The Service agrees that mitigation ratios can be used to incentivize mitigation accomplished in advance of impacts, but the discussion of specifics is beyond the scope of this policy. The Service does not consider advance mitigation to be pre-decisional, as the majority of advance mitigation programs, such as conservation banking, are established prior to any impacts, and projects that will mitigate at such sites may be unknown at the time of bank establishment. In all cases, the Service will evaluate the appropriateness of using a specific site or proposal as compensatory mitigation to offset the unavoidable impacts of a project at the time the Service reviews the project that will likely result in the impacts.

O. Eligible Lands

Comment (79): Several commenters supported mitigation projects and programs on public lands and wanted us to add more flexibility to the policy. One commenter stated that if mitigation projects and programs occur on public lands, the land manager should be prepared to implement and fund alternative mitigation if a change in law allows incompatible uses to occur on mitigation lands. One commenter did not support mitigation projects and programs on Federal lands, but was in favor of it on State lands, and wanted State lands specifically mentioned in the policy.

Response: Compensatory mitigation can occur on public lands, either Federal or State lands, and in some cases, such siting may lead to the best ecological outcome. Compensatory mitigation for impacts on public lands can be sited on both public and private lands. Compensatory mitigation for impacts on private lands can be located on public lands, but it is this combination, or that particular change in ownership classification, where Service staff should be attentive to additional considerations before making such a recommendation. These additional considerations are necessary to achieve the ''net gain'' or, at a minimum ''no net loss,'' goal of the policy.

Comment (80): Several commenters provided comments on split estates. Commenters said the Service is arbitrarily limiting areas on which mitigation can occur by not allowing lands with split estates to qualify as mitigation lands; split estates do not necessarily result in an unsuitable mitigation site; and the holder of the rights would have to secure their own authorization under the ESA from the Service prior to exercising their rights.

Response: The Service agrees that there are cases in which lands with split estates can be used for mitigation. The policy advises caution because we strive to ensure the durability of mitigation projects and programs, but the policy does mention possible remedies and that there could be other approaches to using lands with split estates for mitigation. A detailed discussion of remedies and other approaches is not within the scope of this policy.

P. Tribal Lands/Tribal Rights

Comment (81): We received some comments regarding the siting of mitigation projects on tribal lands or on lands on which tribes hold treaty rights. One commenter expressed the need for local mitigation projects to be sited in or near reservation lands as well as on traditional off-reservation sites, to benefit the natural resources of the native peoples; another commenter was concerned that locating mitigation outside of treaty areas for projects that impact the resources in treaty areas would harm the treaty rights and the resources of the tribes. Other commenters asked that tribes be consulted in the siting and approval of mitigation sites and programs. Others were concerned about the impacts of habitat restoration and long-term management on treaty resources.

Response: The Service is committed to upholding our trust responsibilities to federally recognized tribes to conserve shared natural resources, consistent with the Service's Native American

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

Policy (revised January 2016; see 81 FR 4638, January 27, 2016). This is accomplished under this policy by ensuring that mitigation projects and programs are located in areas that provide the most benefit to the affected resources, while respecting treaty rights. The Service recognizes the importance of tribal involvement and expertise when siting mitigation projects and when developing service areas and management plans for conservation banks and other types of mitigation mechanisms. Specific guidance on Service coordination with tribes is beyond the scope of this policy.

Comment (82): We received some comments requesting specific guidance on facilitating creation of conservation banks on tribal lands, comments on including tribal cultural uses and practices as allowable uses on mitigation lands, and a suggestion for developing mitigation principles similar to those developed with the USACE in the State of Washington for specific mitigation programs.

Response: The Service agrees that these are all important considerations, and such guidance and suggestions will be more effectively addressed in step-down guidance at a later time.

Comment (83): We received comments regarding the applicability of the policy to tribes, or to a specific HCP under development, and a suggestion that the Service consult with any tribes who so request before finalizing this policy.

Response: The Service notified tribal contacts when we made the draft policy available for review and comment (81 FR 61032, September 2, 2016). We addressed all tribal comments, as appropriate, as we developed the final policy. The policy applies to all forms of compensatory mitigation for all species and habitat protected under the ESA and for which the Service has jurisdiction. The policy is flexible with regard to its application to specific mitigation projects or programs that are under development at the time this policy is finalized, leaving that decision to individual Service offices.

Q. Service Areas

Comment (84): Several commenters requested more detail in the policy about requirements for developing service areas.

Response: Specific considerations for developing service areas are beyond the scope of this policy and will be provided in implementation guidance.

R. Credit Bundling

Comment (85): A few commenters were concerned about credit bundling, also known as credit stacking, where multiple resources exist on the same unit area. One commenter was concerned that any resources bundled or stacked with a listed species would suffer, as the site would be managed only for the benefit of the listed species and not the other resource(s), and wanted multi-agency review teams to be aware of this when authorizing mitigation banks. Other commenters wanted the Service to make it clear that credits could potentially be used for multiple purposes, and another wanted the Service to allow mitigation credits to be used to compensate for multiple impact projects.

Response: The Service encourages credit bundling where multiple resources exist on the same unit area and where management actions benefit those multiple resources. However, bundled credits can only be used to compensate for one impact project (*i.e.,* the credits can never be ''unbundled'' or ''unstacked'' to compensate for multiple projects). If two resources, such as a California red-legged frog (CRLF) and a wetland regulated pursuant to section 404 of the Clean Water Act are bundled together in a credit, that credit may be used to compensate for impacts to both resources from the same project, or to compensate for impacts to CRLF or to wetlands. If the credit were used to compensate for CRLF, then it can no longer be used to compensate for wetlands (*i.e.,* that portion of the credit is ''retired''). Unbundling these functions and services would result in a net loss of habitat and would undermine the Service's efforts to conserve the species. This approach is consistent with the policies and regulations of the USACE, and other State and Federal agencies the Service works with on multi-agency-approved mitigation projects and programs.

S. Mitigation Mechanisms

Comment (86): One commenter suggested the *Benefits of the Draft Policy* section be clarified to include other mitigation mechanisms that may not be market-based. The commenter suggested that the first sentence of the final paragraph of that section be modified to read: ''This draft policy would encourage mitigation in conjunction with programmatic approaches to ESA section 7 consultations and HCPs designed to focus on conservation outcomes that achieve ''no net loss'' or ''net gain'' through the use of market-based approaches (*e.g.,* conservation banks), in-lieu fee programs, permittee-responsible, and other third-party implemented mitigation programs.''

Response: The Service considers that one of the benefits of this policy is the opportunity it creates for a market-based approach to mitigation as highlighted in the Presidential Memorandum of November 3, 2015, on Mitigating Impacts on Natural Resources From Development and Encouraging Related Private Investment (80 FR 68743, November 6, 2015), especially those that can be established in advance of impacts. Conservation banking is a proven example of this approach. The policy does not preclude the other mechanisms mentioned by the commenter. We declined to adopt the commenter's suggested sentence.

Comment (87): Several commenters stated that the draft policy was confusing and complex, citing the Service's definition of compensatory mitigation being too broad, lack of a mitigation protocol, and need for a guidance document to ensure a separation of regulatory and nonregulatory authority, goals, and standards. One comment stated the complexity of obtaining approval, as well as cost, for a mitigation site would discourage investment.

Response: One purpose of the policy is to provide predictability and thereby reduce uncertainty of investment for market-based mitigation programs. We acknowledge that the nature of existing compensatory mitigation mechanisms and programs currently being implemented is complex. We have revised the draft policy so that this final policy addresses overarching goals and standards only, and we will later provide more detailed implementation guidance. However, providing a mitigation ''protocol'' that covers the breadth of species and circumstances across the country would not be reasonable. We anticipate species- or geographic-specific guidance to be developed under the umbrella of this policy.

Comment (88): We received two comments regarding section 7.2, *Short-Term Compensatory Mitigation,* in the draft policy. One comment indicated it may not be helpful, particularly when dealing with aquatic species. The other requested more detail in this section and stressed it should be more widely used.

Response: The use of short-term compensatory mitigation is a novel approach, with long-term results yet to be evaluated. The policy fully acknowledges that it is likely to be limited in use, for a variety of reasons, primarily the ability to predict all temporal losses of an impact in order to provide an appropriate offset for those losses. However, the concept may be

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

useful in some circumstances. Thus, it is included in the policy in an effort to provide additional flexibility to conserve listed, proposed, and at-risk species.

Comment (89): Several commenters requested that the Service express a preference for conservation bank credits over other forms of compensatory mitigation. One commenter requested the Service add a preference for rehabilitation or restoration over preservation and that the Service prohibit use of alternative forms of mitigation if conservation bank credits are available in the same proposed service area.

Response: As stated in section 6 of this policy, the appropriate form of compensatory mitigation must be based on the species' needs and the nature of the impacts adversely affecting the species. All mitigation tools listed in the policy are capable of being strategically sited, consolidated, and provided in advance of impacts if they are designed to do so. These preferences will provide the best outcomes for species when they are implemented in any mitigation tool, and, therefore, we have retained flexibility for applicants when selecting mitigation tools. We decline to prohibit the use of alternative forms of mitigation where conservation bank credits are available, as that would limit flexibility and inherent choice of the applicant(s).

T. Climate Change

Comment (90): Several commenters addressed sections of the draft policy that referenced climate change for consideration in mitigation planning. Some commenters were concerned about the uncertainty of calculating the effects of climate change for compensatory mitigation and the use of mitigation ratios to address climate change. One commenter said the policy should provide more detail on integrating climate change effects in the analysis of mitigation programs. Another requested the basis for the term ''accelerated'' climate change used in the policy.

Response: Consistent with the Departmental Manual (600 DM 6), the Service recommends that climate change be considered when evaluating the effects of an action and developing appropriate mitigation measures. The Service recognizes the science of climate change is advancing, and assessment methodologies are continually being refined to address the effects of climate change to specific resources and at differing scales. Including specific information on these topics is beyond the scope of this policy. Therefore, the policy is written with language to ensure that it does not become quickly outdated as methodologies evolve. We use the term ''accelerated climate change'' in a general sense to reference a substantial portion of scientific literature and scholarly articles on the subject, including reports produced by the Intergovernmental Panel on Climate Change.

The final policy follows:

U.S. Fish and Wildlife Service

Endangered Species Act Compensatory Mitigation Policy

1. Purposes

This policy adopts the mitigation principles established in the U.S. Fish and Wildlife Service (Service) Mitigation Policy (81 FR 83440, November 21, 2016), establishes compensatory mitigation standards, and provides guidance for the application of compensatory mitigation through implementation of the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*). Compensatory mitigation (compensation) is defined in this policy as compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C). This policy applies to all Service compensatory mitigation requirements and recommendations involving ESA compliance. It is also intended to assist other Federal agencies carrying out their statutory and regulatory responsibilities under the ESA and to provide applicants with guidance on the appropriate use of compensatory mitigation for proposed actions. The standards and guidance in the policy will also assist mitigation providers in developing compensatory mitigation project proposals.

Adherence to the principles, standards, and guidance identified in this policy is expected to: (1) Provide greater clarity on applying compensatory mitigation to actions subject to ESA compliance requirements; (2) improve consistency and predictability in the implementation of the ESA by standardizing compensatory mitigation practices; and (3) promote the use of compensatory mitigation at a landscape scale to help achieve the purposes of the ESA.

This policy encourages Service personnel to collaborate with other agencies, academic institutions, nongovernmental organizations, tribes, and other partners to develop and implement compensatory mitigation measures and programs through a landscape-scale approach to achieve the best possible conservation outcomes for activities subject to ESA compliance. It also encourages the use of programmatic approaches to compensatory mitigation that have the advantages of advance planning and economies of scale to: (1) Achieve a net gain in species' conservation; (2) reduce the unit cost of compensatory mitigation; and (3) improve regulatory procedural efficiency.

Appendices A and B provide a list of acronyms and a glossary of terms used in this policy, respectively.

2. Authorities and Coordination

This policy is focused on compensatory mitigation that can be achieved under the ESA. The Service's authority to require mitigation is limited, and our authority to require a ''net gain'' in the status of endangered and threatened (listed) or at-risk species has little or no application under the ESA. However, we can recommend the use of mitigation, and in particular compensatory mitigation, to offset the adverse impacts of actions under the ESA. Other statutes also provide the Service with authority for recommending compensatory mitigation for actions affecting fish, wildlife, plants, and their habitats (*e.g.,* Fish and Wildlife Coordination Act (FWCA; 16 U.S.C. 661–667e), National Environmental Policy Act (NEPA; 42 U.S.C. 4321 *et seq.*), and Oil Pollution Act (33 U.S.C. 2701 *et seq.*)). In addition, statutes such as the Clean Water Act (CWA; 33 U.S.C. 1251 *et seq.*) and Federal Power Act (16 U.S.C. 791a–828c) provide other Federal agencies with authority to recommend or require compensatory mitigation for actions that result in adverse effects to species or their habitats. These other authorities are often used in combination with, or to supplement the authorities under, the ESA to recommend or require compensatory mitigation for a variety of resources including at-risk species and their habitats. For example, the ESA and the Federal Land Policy and Management Act (43 U.S.C. 1701 *et seq.*) together provide a greater impetus to conserve desert tortoise habitat than either statute alone.

Synchronizing environmental review processes, especially through early coordination with project proponents, allows the Service to provide comments

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

and recommendations for all mitigation types (*i.e.,* avoidance, minimization, and compensation) included as part of proposed actions in an effort to reduce impacts to listed, proposed, and at-risk species and designated and proposed critical habitat. For example, the Service may comment on proposed actions under NEPA and State environmental review statutes (*e.g.,* California Environmental Quality Act and Hawaii Environmental Policy Act). Coordination of environmental review processes generally results in conservation outcomes that have a greater likelihood of meeting the Service's mitigation goal.

The supplemental mandate of NEPA (42 U.S.C. 4335) adds to the existing authority and responsibility of the Service to protect the environment when carrying out our mission under the ESA. The Service's goal is to provide a coordinated review and analysis of the impacts of proposed actions on listed, proposed, and at-risk species, and designated and proposed critical habitat that are also subject to the requirements of other statutes such as NEPA, CWA, and FWCA. Consultation, conference, and biological assessment procedures under section 7 and permitting procedures under section 10(a)(1)(B) of the ESA can be integrated with interagency cooperation procedures required by other statutes such as NEPA or FWCA. This is particularly the case for cumulative effects. Cumulative effects are often difficult to analyze, are defined differently under different statutes, and are often not adequately considered when making decisions affecting the type and amount of mitigation recommended or required.

3. Scope

The ESA Compensatory Mitigation Policy covers all forms of compensatory mitigation, including, but not limited to, permittee-responsible mitigation, conservation banking, in-lieu fee programs, and other third-party mitigation projects or arrangements, for all species and habitat protected under the ESA and for which the Service has jurisdiction. Endangered and threatened species, species proposed as endangered or threatened, and designated and proposed critical habitat, are the primary focus of this policy. Candidates and other at-risk species would also benefit from adherence to the standards set forth in this policy, and all Service programs are encouraged to develop compensatory mitigation programs and tools to conserve at-risk species in cooperation with States and other partners.

This policy does not apply retroactively to approved mitigation programs; however, it does apply to amendments and modifications to existing conservation banks, in-lieu fee programs, and other third-party compensatory mitigation arrangements unless otherwise stated in the mitigation instrument. Examples of amendments or modifications to which this policy applies include authorization of additional sites under an existing instrument or agreement, expansion of an existing site, or addition of a new type of resource credit such as addition of a new species credit.

This policy does apply to other Federal or non-Federal actions permitted or otherwise authorized or approved prior to issuance of this policy under circumstances where the action may require additional compliance review under the ESA if: New information becomes available that reveals effects of the action to listed species or critical habitat not previously considered; the action is modified in a manner that causes effects to listed species and critical habitat not previously considered; authorized levels of incidental take are exceeded; a new species is listed or critical habitat is designated that may be affected by the actions; or the project proponent specifically requests the Service to apply the policy. This policy does not apply to actions that are specifically exempted under the ESA. It also does not apply where the Service has already agreed in writing to mitigation measures for pending actions, except where new activities or changes in current activities associated with those actions would result in new impacts, or where new authorities, or failure to implement agreed upon recommendations warrant new consideration regarding mitigation. Service offices may elect to apply this policy to actions that are under review as of December 27, 2016,

This policy clarifies guidance given in the Service's ''Guidance for the Establishment, Use, and Operation of Conservation Banks,'' published in the **Federal Register** on May 8, 2003 (68 FR 24753), and ''Guidance on Recovery Crediting for the Conservation of Threatened and Endangered Species,'' published in the **Federal Register** on July 31, 2008 (73 FR 44761).

4. Application of Compensatory Mitigation Under the ESA

Sections of the ESA under which the Service has authority to recommend or require compensatory mitigation for species or their habitat are identified below. In this section, we provide guidance on applications of these ESA authorities within the context of compensatory mitigation. The compensatory mitigation standards set forth in section 5. Compensatory Mitigation Standards of this policy apply to compensatory mitigation programs and projects established under the ESA, as appropriate.

4.1. Section 7—Interagency Cooperation

Section 2(c)(1) of the ESA directs all Federal departments and agencies to conserve endangered and threatened species. ''Conserve'' is defined in section 3 of the ESA as all actions necessary to bring the species to the point that measures provided pursuant to the ESA are no longer necessary (*i.e.,* recovery or the process through which recovery of listed species is accomplished). This requirement to contribute to the conservation of listed species is reaffirmed in section 7(a)(1) of the ESA. Congress recognized the important role Federal agencies have in conserving listed species.

When the ESA was enacted in 1973, section 7 was a single paragraph directing ''all Federal departments and agencies . . . [to] utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of [the ESA] *and* [emphasis added] by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined . . . to be critical.'' In 1979, section 7 was amended to create subsections 7(a)(1) and 7(a)(2). Federal agencies have separate responsibilities concerning species and their habitats under these two subsections. Section 7(a)(1) is a recovery measure that requires Federal agencies to carry out programs for the conservation of listed species. Section 7(a)(2) is a stabilization measure that requires Federal agencies to ensure actions they authorize, fund, or carry out are not likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat.

4.1.1. Section 7(a)(1)

Section 7(a)(1) of the ESA states, ''. . . Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of [the ESA] by carrying out programs for the conservation of

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

endangered species and threatened species.'' The Secretary's section 7(a)(1) consultation role has been delegated to the Service, and the Service therefore consults with and assists Federal agencies to accomplish these conservation programs. ''Conservation,'' as it is defined in section 3 of the ESA, means ''to use and the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary.'' Through this policy, the Service encourages Federal agencies to use section 7(a)(1) to achieve a goal of a ''net gain'' through their mitigation policies and approaches so that they may help bring endangered and threatened species to the point where they no longer need to be listed pursuant to the ESA.

Mitigation Goal: Development of landscape-scale conservation programs for listed and at-risk species that are designed to achieve a net gain in conservation for the species.

Guidance: One way that Federal agencies can meet their responsibility under section 7(a)(1) of the ESA is by working with the Service and other conservation partners to develop landscape-scale conservation plans that include compensatory mitigation programs designed to contribute to species recovery. Landscape-scale approaches to compensatory mitigation, such as conservation banking and in-lieu fee programs, are more likely to be successful if Federal agencies, especially those that carry out, fund, permit, or otherwise authorize actions that can use these programs, are involved in their establishment and support their use. For example, the Federal Highway Administration, as part of its long-term planning process, can use its authorities to work with the Service and other conservation partners on conservation programs for listed species that may be impacted by anticipated future actions. The conservation programs can include identifying priority conservation areas, developing crediting methodologies to value affected species, and developing guidance for offsetting those impacts that is expected to achieve ''no net loss,'' or even a ''net gain,'' in conservation for the species. These tools and information can then be used by conservation bank sponsors and other mitigation providers to develop compensatory mitigation opportunities (*e.g.,* conservation banks) for use by the Federal Highway Administration, and also by State departments of transportation and other public and private entities seeking compensation to offset the impacts of their actions for those same species. The resulting compensatory mitigation program provides conservation for the species that would otherwise not have been achieved—a contribution to listed species conservation under section 7(a)(1) of the ESA by the Federal agency.

4.1.2. Section 7(a)(2)

Section 7(a)(2) of the ESA states, ''[e]ach Federal agency shall . . . insure that any action authorized, funded, or carried out, by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat.'' The Service determines through consultation under section 7(a)(2) whether or not the proposed action is likely to jeopardize the continued existence of listed species or destroy or adversely modify critical habitat. The Service then issues a biological opinion stating our conclusion and, in the case of a finding of no jeopardy (or jeopardy accompanied by reasonable and prudent alternatives that can be taken by the Federal agency to avoid jeopardy), formulates an incidental take statement, if such take is reasonably certain to occur, that identifies the anticipated amount or extent of incidental take of listed species and specifies reasonable and prudent measures necessary or appropriate to minimize such impacts under section 7(b)(4) of the ESA. If the proposed action is likely to adversely affect critical habitat, the Service's biological opinion also analyzes whether adverse modification is likely to occur and specifies reasonable and prudent alternatives to avoid adverse modification, as necessary and if available. If the listed species is a marine mammal, incidental taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) prior to issuance of an incidental take statement under the ESA.

Mitigation Goal: The Service should work with Federal agencies to assist them in proposing actions that are not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of any designated critical habitat, as required under section 7(a)(2) of the ESA. While not required under section 7(a)(2), the Service may also encourage Federal agencies and applicants (consistent with Federal action agency authorities) to include compensation as part of their proposed actions to offset any anticipated impacts to these resources that are not avoided to achieve a ''net gain'' or, at a minimum, ''no net loss'' in the conservation of listed species.

Guidance: The Service should coordinate with Federal agencies and encourage them to use their authorities under appropriate statutes (*e.g.,* Federal Land Policy and Management Act) to avoid, minimize, and offset adverse impacts to listed species and designated critical habitat using the full mitigation sequence. Compensation is a component of the mitigation sequence that can be applied to offset adverse effects of actions on listed species and critical habitat. Furthermore, the Service can work with Federal agencies to establish compensatory mitigation programs such as conservation banking and in-lieu fee programs that incentivize offsetting the effects of their actions through the appropriate use of compensation while expediting regulatory processes for the Federal agencies and applicants. Due to economies of scale, such mitigation programs are particularly effective at providing more effective and cost-efficient compensation opportunities for offsetting the effects of multiple actions that individually have small impacts.

4.1.2.1. Proposed Actions and Project Descriptions

To better implement section 7(a)(2) of the ESA and prevent species declines, the Service will work with Federal agencies and applicants to identify conservation measures, using the full mitigation sequence, that can be included as part of proposed actions for unavoidable impacts to listed species and critical habitat to achieve, at a minimum, ''no net loss'' in the species' conservation. The mitigation sequence should be observed (*i.e.,* avoid first, then minimize, then compensate), except where circumstances may warrant a departure from this preferred sequence. For example, it may be preferable to compensate for the loss of an occupied site that will be difficult to maintain based on projected future land use (*e.g.,* the site is likely to be isolated from the population in the future) or climate change impacts. The Service will consider conservation measures, including compensatory mitigation, as appropriate, proposed by the action agency or applicant as part of the proposed action when developing a biological opinion addressing the effects of the proposed action on listed species and critical habitat. This consideration of beneficial actions (*i.e.,* compensatory mitigation) is consistent with our implementing regulations at 50 CFR 402.14(g)(8). Federal agencies should coordinate early with the Service on the

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

appropriateness of such beneficial actions as compensation for anticipated future actions.

4.1.2.2. Jeopardy or Adverse Modification Determinations and RPAs

When the Service issues a biological opinion with a finding of jeopardy or adverse modification of critical habitat, we include reasonable and prudent alternatives (RPAs) when possible. RPAs may include any and all forms of mitigation, including compensatory mitigation, that can be applied to avoid proposed actions from jeopardizing the existence of listed species or destroying or adversely modifying critical habitat, provided they are consistent with the regulatory definition of RPAs at 50 CFR 402.02.

4.1.2.3. No Jeopardy and No Adverse Modification Determinations and RPMs

When the Service issues a biological opinion with a finding of no jeopardy, we provide the Federal agency and applicant (if any) with an incidental take statement, if take is reasonably certain to occur, in accordance with section 7(b)(4) of the ESA. The incidental take statement specifies the amount or extent of anticipated take, the impact of such take on the species, and any reasonable and prudent measures (RPMs) and implementing terms and conditions determined by the Service to be necessary or appropriate to minimize the impact of the take.

RPMs can include mitigation, in appropriate circumstances, if such a measure minimizes the effect of the incidental take on the species, and as long as the measure is consistent with the interagency consultation regulations at 50 CFR 402.14. RPMs should also be commensurate with and proportional to the impacts associated with the action. The Service should provide an explanation of why the measures are necessary or appropriate. If the proposed action includes conservation measures sufficient to fully compensate for incidental take, it may not be necessary to include additional minimization measures (beyond monitoring) through RPMs.

4.1.3. Section 7(a)(4)

Section 7(a)(4) of the ESA states, ''[e]ach Federal agency shall confer with [the Service] on any agency action which is likely to jeopardize the continued existence of any species proposed to be listed . . . or result in the destruction or adverse modification of critical habitat proposed to be designated for such species.'' The conference is designed to assist the Federal agency and any applicant to identify and resolve potential conflicts at an early stage in the planning process.

Mitigation Goal: The Service should work with Federal agencies to assist them in proposing actions that are not likely to jeopardize the continued existence of any species proposed for listing or result in the destruction or adverse modification of any proposed critical habitat, in accordance with section 7(a)(4) of the ESA. The Service should also encourage Federal agencies and applicants to include compensation as part of their proposed actions to offset any anticipated impacts to resources that are not avoided to achieve a net gain or, at a minimum, no net loss in their conservation.

Guidance: The Service should coordinate with Federal agencies and encourage them to use their authorities to avoid and minimize adverse impacts to proposed and at-risk species and proposed critical habitat using the full mitigation sequence. The Service may recommend compensatory mitigation for adverse effects to proposed or at-risk species during informal conference or in a conference report or conference opinion, or the Federal action agency or applicant may propose compensatory mitigation as part of the action. If a conference opinion or report determines that a proposed action is likely to jeopardize the continued existence of a proposed species or adversely modify or destroy proposed critical habitat, the Service will include RPAs, if any are available, that may include compensatory mitigation. If the species is subsequently listed or critical habitat is designated prior to completion of the action, the Service will give appropriate consideration to compensatory mitigation when confirming the conference opinion as a biological opinion or if formal consultation is necessary. This consideration of beneficial actions is consistent with our implementing regulations at 50 CFR 402.14(g)(8).

4.2. Section 10—Conservation Plans and Agreements

4.2.1. Safe Harbor and Candidate Conservation Agreements

Under a candidate conservation agreement with assurances (CCAA), private and other non-Federal property owners may voluntarily undertake conservation management activities on their properties to address threats to unlisted species and to enhance, restore, or maintain habitat benefiting species that are candidates or proposed for listing under the ESA or other at-risk species in exchange for assurances that no further action on their part is required should the species become listed during the term of the CCAA. Under a safe harbor agreement (SHA), private and other non-Federal property owners may voluntarily undertake management activities on their property to enhance, restore, or maintain habitat benefiting species listed under the ESA in exchange for assurances that there will not be any increased property use restrictions as a result of their efforts that either attract listed species to their property or that increase the numbers or distribution of listed species already on their property during the term of the agreement. Both types of agreements are designed to encourage conservation of species on non-Federal land.

Mitigation Goal: Transitioning CCAAs and SHAs into long-term/permanent conservation that can serve as compensatory mitigation when appropriate and desired by landowners. Such transitions provide greater assurance that the species conservation efforts begun under the CCAA or SHA will persist on the landscape beyond the term of the original agreement.

Guidance: CCAAs or SHAs are not intended to be mitigation programs and do not require site protection and financial assurances that meet the compensatory mitigation standards set forth in this policy, however, the conservation achieved through implementation of a CCAA or SHA may be 'rolled over' for use as compensatory mitigation if: (1) The CCAA or SHA permit has expired or is surrendered; (2) the landowner is in compliance with the terms and conditions of the CCAA or SHA at the time of transition; (3) any commitments for conservation for which financial compensation from public sources was received has been fulfilled and if not fulfilled is prorated and deducted from the mitigation credit assigned to the property; and (4) all other requirements for providing compensatory mitigation are met. If the Service determines the CCAA or SHA would provide greater conservation to the species as compensatory mitigation, then the Service should inform the landowner of this assessment and provide the landowner with the opportunity to transition their property from a CCAA or SHA site to a mitigation site.

Landowners enrolled in CCAAs while the species remains unlisted can provide compensatory mitigation under a State or other non-Service mitigation program if the actions related to the mitigation are additional to those taken to satisfy the CCAA requirement. Should the species become listed before the CCAA expires, the landowner has the option to roll over the existing

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

mitigation agreement to a Service-approved mitigation instrument that meets the standards established in this policy.

4.2.2. Habitat Conservation Plans

Section 10(a)(1)(B) of the ESA allows the Service to issue an incidental take permit for ''any taking otherwise prohibited by section 9(a)(1)(B) [of the ESA] if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.'' If, under section 10(a)(2)(B) of the ESA, the Service finds the issuance criteria are met by the applicant, including that the applicant will, ''to the maximum extent practicable, minimize and mitigate the impacts of such taking,'' the Service will issue a permit. Plant species and unlisted animal species may also be covered in the habitat conservation plan (HCP), provided the applicant meets requirements for their coverage described in the implementing regulations. The Service incorporates these measures as terms and conditions of the permit. Regulations governing incidental take permits for endangered and threatened wildlife species are found at 50 CFR 17.22 and 17.32. The Service is required to conduct a section 7(a)(2) consultation on issuance of an incidental take permit.

Mitigation Goal: Consistent with the purposes and polices of the ESA, the Service should work with applicants to assist them in developing HCPs that achieve a ''net gain'' or, at a minimum, ''no net loss'' in the conservation of covered species and critical habitat. Though the statute does not require this of HCP applicants, applicants often will request additional measures for greater future assurances. This is generally achievable through programmatic approaches, which provide opportunities for the use of landscape-scale compensatory mitigation programs to offset impacts of actions.

Guidance: Compensatory mitigation should be concurrent with or in advance of impacts, whenever possible. Programmatic approaches are recommended when they will produce regulatory efficiency and improved conservation outcomes for the covered species. These HCPs operate on a landscape scale and often use conservation banks, in-lieu fee programs, or other compensatory mitigation opportunities established by mitigation sponsors and approved by the Service. These landscape-scale programmatic approaches can achieve a net gain in conservation for the covered species as a result of economies of scale. See the revised HCP Handbook for the various options available to address compensatory mitigation for HCPs.

4.3. Other Sections of the ESA Where Compensatory Mitigation Can Play a Role

Section 4(d) of the ESA authorizes the Service to issue protective regulations that are necessary and advisable to provide for the conservation of threatened species. The Service used this authority to extend the prohibition of take (section 9 of the ESA) to all threatened species by regulation in 1978, through promulgation of a ''blanket 4(d) rule'' (50 CFR 17.31). This blanket 4(d) rule can be modified by a species-specific 4(d) rule (*e.g.,* Special Rule Concerning Take of the Threatened Coastal California Gnatcatcher (58 FR 65088, December 10, 1993)). Depending on the threats, the inclusion of compensatory mitigation in a species-specific 4(d) rule may help offset habitat loss, and could hasten recovery or preclude the need to reclassify the species as endangered.

Section 5 of the ESA provides authority for the Service and the U.S. Department of Agriculture, with respect to the National Forest System, to establish and implement a program to conserve fish, wildlife, and plants, including those which are listed as endangered species or threatened species through:

- Use of land acquisition and other authority under the Fish and Wildlife Act of 1956, as amended (16 U.S.C. 742a–742j, not including 742d–1); the Fish and Wildlife Coordination Act, as amended (16 U.S.C. 661 *et seq.*); and the Migratory Bird Conservation Act (16 U.S.C. 715–715d, 715e, 715f–715r), as appropriate; and
- Acquisition by purchase, donation, or otherwise, of lands, waters, or interests therein.

Establishment of compensatory mitigation programs that conserve listed or at-risk species on lands adjacent to National Forests could be used to offset losses to those species and their habitats by actions authorized by the Service and also help buffer National Forests from incompatible neighboring land uses.

5. Compensatory Mitigation Standards

The mitigation principles, as described in the Service's Mitigation Policy (81 FR 83440, November 21, 2016), are goals the Service intends to achieve, in part through recommending or requiring, as appropriate, under the ESA and other applicable authorities, the inclusion of compensatory mitigation in proposed actions with adverse impacts to listed, proposed, or at-risk species, and designated or proposed critical habitat. The compensatory mitigation standards described in this section of the policy will implement the mitigation principles, as outlined in the Mitigation Policy, including using a landscape approach to inform mitigation and aspiring to meet the goal to improve (*i.e.,* a ''net gain'') or, at minimum, to maintain (*i.e.,* ''no net loss'') the current status of affected resources, as allowed by applicable statutory authority and consistent with the responsibilities of action proponents under such authority. Compensatory mitigation programs, projects, and measures that are consistent with the mitigation principles and adhere to the compensatory mitigation standards set forth in this section of the policy are expected to achieve the best conservation outcomes. The compensatory mitigation standards apply to all compensatory mitigation mechanisms (*i.e.,* permittee-responsible mitigation, conservation banks, in-lieu fee programs, etc.) and all forms of compensatory mitigation (*i.e.,* restoration, preservation, establishment, and enhancement) approved by the Service. Specific operational details regarding the standards will be in the implementation guidance to be issued by the Service. The standards are as follows:

5.1. Siting Sustainable Compensatory Mitigation

Compensatory mitigation will be sited in locations that have been identified in landscape-scale conservation plans or mitigation strategies as areas that will meet conservation objectives and provide the greatest long-term benefit to the listed, proposed, and/or at-risk species and other resources of primary conservation concern. The Service will rely upon existing conservation plans that are based upon the best available scientific information, consider climate-change adaptation, and contain specific objectives aimed at the biological needs of the affected resources. Where existing conservation plans are not available that incorporate all of these elements or are not updated with the best available scientific information, Service personnel will otherwise incorporate the best available science into mitigation decisions and recommendations and continually seek better information in areas of greatest uncertainty.

5.2. In-Kind for Species

Compensatory mitigation must be in-kind for the listed, proposed, or at-risk species affected by the proposed action. The same requirement does not

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

necessarily apply to the habitat type affected, as the best conservation outcome for the species may not be an offset of the same habitat type or ecological attribute of the habitat impacted by the action. Many species use different habitat types at different life stages or for different life-history requirements such as feeding, breeding, and sheltering. For example, some species are migratory. Selecting a habitat type different from that impacted by the action or selecting more than one type of habitat for compensatory mitigation may best meet the conservation needs of the species.

Offsetting impacts to designated or proposed critical habitat through the use of compensatory mitigation should target the maintenance, restoration, or improvement of the recovery support function of the affected critical habitat as described in the relevant biological or conference opinion, conservation or mitigation plan, mitigation instrument, permit, or conference report. Recovery plans, 5-year reviews, proposed and final critical habitat rules, and the best available science on species status, threats, and needs should be relied on to inform the selection of habitat types subject to compensatory mitigation actions for unavoidable adverse impacts to species or critical habitat.

The use of compensatory mitigation to minimize the impacts of incidental take on listed species can be based on habitat or another surrogate such as a similarly affected species or ecological conditions under circumstances where it is not practicable to express or monitor the amount or extent of take in terms of the number of individuals of the species, in accordance with 50 CFR 402.14(i)(1)(i). A causal link between the surrogate and take of the species must be explained and must be scientifically defensible. For example, occupied habitat of a listed species has been used as a surrogate to express the amount or extent of take of the vernal pool fairy shrimp (*Branchinecta lynchi*) because quantification of take in terms of individuals is not practicable, but the surface area of occupied vernal pool habitat is easily measured and monitored.

5.3. Reliable and Consistent Metrics

Metrics that measure ecological functions and/or services at compensatory mitigation sites and impact sites must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species. These metrics may be species- or habitat-based. Metrics used to calculate credits should be the same as those used to calculate debits for the same species or habitat type. If they are not the same, the relationship (conversion) between credits and debits must be transparent and scientifically defensible. Metrics must account for duration of the impact, temporal loss to the species, management of risk associated with compensatory mitigation, and other such measures. This does not mean that metrics developed to measure losses and gains on the landscape must be precise, as this is rarely possible in biological systems, but uncertainty should be noted where it exists and metrics must be based on the best scientific data available to gauge the adequacy of the compensatory mitigation. Modifying existing metrics on which approved conservation banks or other compensatory mitigation programs are based and still in use warrants careful consideration and must be based on best available science.

Scientifically defensible metrics also are needed to measure biological and ecological performance criteria used to monitor the outcome of compensatory mitigation. It may be necessary to adjust metrics over time through monitoring and adaptive management processes in order to respond to changing conditions and ensure they remain effective at assessing the conservation objectives of the compensatory mitigation program. However, modifying metrics used to monitor performance should not be a substitute for lack of compliance or failure to implement adaptive management.

5.4. Judicious Use of Additionality

Compensatory mitigation must provide benefits beyond those that would otherwise have occurred through routine or required practices or actions, or obligations required through legal authorities or contractual agreements. A compensatory mitigation measure is ''additional'' when the benefits of the measure improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure (600 DM 6.4G). The additional benefits may result from restoration or enhancement of habitat; preservation of existing habitat that lacks adequate protection; management actions that protect, maintain, or create habitat (*e.g.,* regularly scheduled prescribed burns or purchase of rights in a split estate); or other activities (*e.g.,* an action that reduces threats from disease or predation, or captive breeding and reintroduction of individuals or populations). Baseline conditions for the habitat relevant to the species must be assessed prior to implementing the compensatory mitigation project for comparison to conditions after completion of the compensatory mitigation project in order to quantify and verify the additional benefits derived from the mitigation project.

Demonstrating additionality on lands already designated for conservation purposes can be challenging, particularly when the lands under consideration are public lands. In general, credit can only be authorized for compensatory mitigation on public lands if additionality can be clearly demonstrated and is legally attainable. See section 6.2. *Eligible Lands* for guidance on using public lands for compensatory mitigation.

5.5. Timing and Duration

Compensatory mitigation projects must achieve conservation objectives within a reasonable timeframe and for at least the duration of the impacts. Ideally, compensatory mitigation should be implemented in advance of the action that adversely impacts the species or critical habitat. When this is not possible or practicable, temporal losses to the affected species must be compensated through some means (*e.g.,* increased mitigation ratio that reflects the degree of temporal loss). Temporal loss may include indirect effects of the action on the species that occur beyond the time period of any direct effects of the action (*e.g.,* removal of habitat during a season when individuals of a migratory species are absent). Temporal loss to the species as a result of both direct and indirect adverse effects must be addressed when determining appropriate compensatory mitigation. Losses of habitat that require many years to restore may best be offset by a combination of restored habitat, preservation of existing high-quality habitat, and improved management of existing habitat. The amount of temporal loss, the form of compensatory mitigation (*i.e.,* establishment, enhancement, restoration, preservation, or some combination of these forms), and the time anticipated to establish the compensatory mitigation on the landscape should be used to determine the amount of compensatory mitigation needed to meet the mitigation goal for the species, critical habitat, and/or other resources of concern.

5.6. Ensure Durability

Compensatory mitigation must be secured by adequate legal, real estate, and financial protections that ensure the success of the mitigation. Most compensatory mitigation projects are

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

permanent, and the viability of the assurances to achieve long-term stewardship of a mitigation site must be carefully planned and implemented to ensure durability. A compensatory mitigation measure is ''durable'' when the effectiveness of the measure is sustained for the duration of the associated impacts (including direct and indirect impacts) of the authorized action (600 DM 6.4H).

5.7. Effective Conservation Outcomes and Accountability

The Service has authority to conduct direct oversight of all compensatory mitigation programs and projects for which we have exempted or permitted incidental take under the ESA. A standard condition of HCP incidental take permits provides for such oversight. Incidental take exemptions provided by statute to Federal agencies and applicants through the ESA section 7 process require that mandatory terms and conditions included with the take statement must be implemented by the Federal agency or its applicant to activate the exemption in 7(o)(2) of the Act. Should a mitigation project fail to meet its performance criteria and therefore fail to provide the expected conservation for the species, the responsible party must provide equivalent compensation through other means.

5.8. Encourage Collaboration

Successful landscape-scale compensatory mitigation depends on the engagement of affected communities and stakeholders. Governments, communities, organizations, and individuals support what they help to develop. The Service will provide opportunities for and encourage appropriate stakeholder participation in development of landscape-scale compensatory mitigation strategies that affect listed, proposed, and at-risk species, and proposed and designated critical habitat through appropriate public processes such as those used for programmatic habitat conservation plans (HCPs). Programmatic approaches to compensatory mitigation programs for at-risk species are also encouraged, particularly when led by State agencies, and the Service will make every effort to participate in the planning, establishment, and operation of such programs as described in our draft Policy Regarding Voluntary Prelisting Conservation Actions (79 FR 42525, July 22, 2014). The Service's regional and field offices will determine or assist in determining, as appropriate, the level and methods of public participation using transparent processes.

5.9. Maintain Transparency and Predictability

Consistent implementation of ESA programs that permit or authorize incidental take of listed species will provide regulatory predictability for everyone. The Service will share appropriate information on the availability of compensatory mitigation programs and projects with the public through online media or other appropriate means. Information regarding conservation banks is available on the Regulatory In-lieu fee and Bank Information Tracking System (RIBITS) (*https://ribits.usace.army.mil*). The Service anticipates working with the USACE to update RIBITS so that it may be used for our in-lieu fee programs. Similar information for habitat credit exchanges and other third-party sponsored mitigation projects, or when it is not otherwise possible to use RIBITS, must be made publicly accessible.

6. General Considerations

Specific operational details, in addition to the information provided below in this section, will be in implementation guidance issued by the Service.

6.1. Preferences

The appropriate form of compensatory mitigation (*i.e.,* preservation, restoration, enhancement, establishment, or a combination of some or all of these forms) must be based on the species' needs and the nature of the impacts adversely affecting the species. The Service has the following general preferences related to compensatory mitigation.

6.1.1. Preference for Strategically Sited Compensatory Mitigation

Preference shall be given to compensatory mitigation projects sited within the boundaries of priority conservation areas identified in existing landscape-scale conservation plans as described in the Service's Mitigation Policy (81 FR 83440, November 21, 2016). Priority conservation areas for listed species may be identified in documents such as species status assessments, recovery plans, and/or 5-year reviews.

6.1.2. Preference for Compensatory Mitigation in Advance of Impacts

After following the principles and standards outlined in this policy and all other considerations being equal, preference will be given to compensatory mitigation projects implemented in advance of impacts to the species. Mitigation implemented in advance of impacts reduces risk and uncertainty. Demonstrating that mitigation is successfully implemented in advance of impacts provides ecological and regulatory certainty that is rarely matched by a proposal of mitigation to be accomplished concurrent with, or subsequent to, the impacts of the actions even when that proposal is supplemented with higher mitigation ratios. While conservation banking is by definition mitigation in advance of impacts, other third-party mitigation arrangements and permittee-responsible mitigation may also satisfy this preference by implementing compensatory mitigation in advance of impacts. In-lieu fee programs can also satisfy this preference through a ''jump start'' that achieves and maintains a supply of credits that offer mitigation in advance of impacts.

6.1.3. Preference for Consolidated Compensatory Mitigation

Mitigation mechanisms that consolidate compensatory mitigation on the landscape, such as conservation banks and in-lieu fee programs, are generally preferred to small, disjunct compensatory mitigation sites spread across the landscape. Consolidated mitigation sites generally have several advantages over multiple, small, isolated mitigation sites. These advantages include:

- Avoidance of a piecemeal approach to conservation efforts that often results in small, non-sustainable parcels of habitat scattered throughout the landscape;
- Sites that are usually a component of a landscape-level strategy for conservation of high-value resources;
- Cost effective compensatory mitigation options for small projects, allowing for effective offsetting of the cumulative adverse effects that result from numerous, similar, small actions;
- An increase in public-private partnerships that plan in advance and a landscape-scale approach to mitigation to provide communities with opportunities to conserve highly valued natural resources while still allowing for community development and growth;
- Greater capacity for bringing together financial resources and scientific expertise not practicable for small conservation actions;
- Economies of scale that provide greater resources for design and implementation of compensatory mitigation sites and a decreased unit cost for mitigation;
- Improved administrative and ecological compliance through the use of third-party oversight;

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

• Greater regulatory and financial predictability for project proponents, greatly reducing the uncertainty that often causes project proponents to view compensatory mitigation as a burden; and

• Expedited regulatory compliance processes, particularly for small projects, saving all parties time and money.

6.2. Eligible Lands

6.2.1. Lands Eligible for Use as Compensatory Mitigation

Compensatory mitigation sites may be established by willing parties on private, public, or tribal lands that provide the maximum conservation benefit for the listed, proposed, and at-risk species and other affected resources. Maintaining the same classification of land ownership between the impact area and mitigation site may be important in preventing a long-term net loss in conservation, in particular a reduction in the range of the species. Because most private lands are not permanently protected for conservation and are generally the most vulnerable to development actions, the use of private lands for mitigating impacts to species occurring on any type of land ownership is usually acceptable as long as durability can be ensured. Locating compensatory mitigation on public lands for impacts to species on private lands is also possible, and in some circumstances may best achieve the conservation objectives for species, but should be carefully considered—see section 6.2.2. Use of Public Land to Mitigate Impacts on Private Land for additional guidance.

Good candidates for compensatory mitigation sites are unprotected lands that are high value for conservation and that are acceptable to the Service. Designations of high conservation value may include lands with existing high-value habitat or habitat that when restored, enhanced, established, or properly managed will provide high value to the species. In addition to these general considerations, lands that may be good candidates for compensatory mitigation sites include:

• Lands previously secured through easements or other means but that lack the full complement of protections necessary to conserve the species (*e.g.,* buffer lands for a military installation that do not include management, or private lands with existing conservation easements for which landowners have not received financial compensation from public sources or regulatory assurances from the Service.);

• Lands adjacent to undeveloped, protected public lands such as National Wildlife Refuges or State Wildlife Management Areas;

• Private lands enrolled in programs that provide financial compensation from public sources to landowners in exchange for agreements that protect, restore, or create habitat for federally listed or at-risk species for a limited period of time, such as the Service's Partners for Wildlife Program or some Farm Bill programs (*e.g.,* Environmental Quality Incentives Program) if additional conservation benefits are provided above and beyond the terms and conditions of the agreement or if the agreement/easement has expired; and

• Private lands enrolled in programs that provide regulatory assurances to the landowner such as SHAs or CCAAs that can be transitioned into compensatory mitigation, after all terms and conditions of the agreement have been met and the agreement has expired or the permit is surrendered in exchange for a mitigation instrument (see section 4.2.1. Safe Harbor and Candidate Conservation Agreements for additional guidance).

See section 5.1. *Siting Sustainable Compensatory Mitigation* for other considerations when selecting a site suitable for compensatory mitigation.

Lands that generally do not qualify as compensatory mitigation sites include:

• Lands without clear title unless the existing encumbrances (*e.g.,* liens, rights-of-way) are compatible with the objectives of the mitigation site or can be legally removed or subordinated;

• Split estates (*i.e.,* lands that have separate owners of various surface and subsurface rights, usually mineral rights), unless a remedy can be found (see below for guidance on split estates);

• Private or public lands already designated for conservation purposes, unless the proposed compensatory mitigation project would add additional conservation benefit for the species above and beyond that attainable under the existing land designation;

• Private lands enrolled in government programs that compensate landowners who permanently protect, restore, or create habitat for federally listed or at-risk species (*e.g.,* Wetland Reserve Program easements administered by the United States Department of Agriculture's Natural Resources Conservation Service);

• Inventory and debt restructure properties under the Food Security Act of 1985 (16 U.S.C. 3801 *et seq.*); and

• Lands protected or restored for conservation purposes under fee title transfers.

Additional guidance on limitations involving Federal funding and mitigation, including grants, is provided in the Service's Mitigation Policy (81 FR 83440, November 21, 2016).

Lands with split estate ownership and laws and policies governing existing rights (*e.g.,* mining laws) may prevent land protection instruments (*e.g.,* permanent conservation easements) from providing sufficient protection from future development of mineral rights, including oil and gas exploration or development. Many potential high-value conservation properties throughout the United States are split estates. The risk of using split estate properties as compensatory mitigation should be carefully considered. When legal remedies to restore single ownership are not possible or practicable, other approaches to managing the risks may be available to bolster durability on split estates. A mineral deed acquisition, mineral assessment report, or subsurface use agreement are a few of the options for managing mineral rights on compensatory mitigation sites that provide varying levels of protection (Raffini 2012). Service personnel tasked with assessing the viability of split estates as mitigation sites should work with the Service's Realty Specialists and the Department of the Interior Solicitor to assess risks and possible remedies or other approaches.

6.2.2. Use of Public Land To Mitigate Impacts on Private Land

In general, the Service supports compensatory mitigation on public lands that are already designated for the conservation of natural resources to offset impacts to the species on private lands only if additionality is clearly demonstrated and is legally attainable. Additionality is a reasonable expectation that the conservation benefits associated with the compensatory mitigation actions would not occur in the foreseeable future without those actions. Offsetting impacts to private lands by locating compensatory mitigation on public lands already designated for conservation purposes generally risks a long-term net loss in landscape capacity to sustain species (*e.g.,* future reduction in the range of the species) by relying increasingly on public lands to serve conservation purposes. However, we recognize under certain circumstances this offset arrangement may provide the best possible conservation outcome for the species based on best available science. When this is the case, the Service will consider mitigation on

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

public lands to offset impacts to the species on private lands appropriate if:

- Compensatory mitigation is an appropriate means of achieving the mitigation planning goal for the species;
- Additionality can be clearly demonstrated and quantified, and is supplemental to conservation the public agency is foreseeably expected to implement absent the mitigation (only conservation benefits that provide additionality are counted towards achieving the mitigation planning goal);
- Durability of the compensatory mitigation is ensured (see section 6.2.3. Ensuring Durability on Public Lands);
- It is consistent with and not otherwise prohibited by all relevant statutes, regulations, and policies; and
- Private lands suitable for compensatory mitigation are unavailable or are available but cannot provide an equivalent or greater contribution towards offsetting the impacts to meet the mitigation planning goal for the species.

When the public lands under consideration for use as compensatory mitigation for impacts on private lands are National Wildlife Refuge (NWR) System lands, the Service's Final Policy on the NWR System and Compensatory Mitigation Under the Section 10/404 Program (USFWS 1999) states that the Regional Director must recommend the mitigation to the Service Director for approval. Additional considerations may apply to NWR System lands for habitat losses authorized through the section 10/404 program (*i.e.,* Rivers and Harbors Act/Clean Water Act).

6.2.3. Ensuring Durability on Public Lands

Ensuring the durability of compensatory mitigation on public lands presents particular challenges, especially regarding site protection assurances, long-term management, and funding assurances for long-term stewardship. Mechanisms available for ensuring durability of land protection for compensatory mitigation on public lands vary from agency to agency, are subject to site-specific limitations, and are likely to be politically and administratively challenging to secure. Some mechanisms may require a legislative act while other mechanisms can be achieved administratively at various levels of an agency's organization.

To ensure the durability of long-term management on public lands, there should be a high degree of confidence that incompatible uses are removed or precluded to ensure that uses of the public lands do not conflict with or compromise the conservation of the species for which the compensatory mitigation project was established.

6.2.4. Transfer of Private Mitigation Lands to Public Agencies

Private mitigation lands may be transferred to public agencies with a conservation mission if allowed by applicable laws, regulations, and policies.

6.2.5. Compensatory Mitigation on Tribal Lands

Tribal lands are generally eligible as compensatory mitigation sites if they meet the standards and other requirements set forth in this policy. Ensuring durability, particularly site protection, is usually a sensitive issue for a tribal nation because a conservation easement entrusts the land to another entity (Terzi 2012), but acceptable entities may be available to hold easements. Additional guidance regarding mitigation and tribes is included in the Service's Mitigation Policy (81 FR 83440, November 21, 2016).

6.3. Service Areas

A service area is the geographic area assigned to a compensatory mitigation site within which credits for a specific resource (*e.g.,* a species) can be utilized. The impacts for which mitigation is sought must be located within the designated service area for the species, unless otherwise approved by the Service. If a proposed action is located within the identified service area of a specific conservation bank, in-lieu fee program, or other third-party mitigation program or site, then the proponent of that action may offset unavoidable impacts, with the Service's approval, through transfer of the appropriate type and number of credits from that mitigation program or site. Use of the credits outside of service areas is subject to approval by the Service. Service areas that apply to all mitigation mechanisms may be designated by the Service's regional or field offices, usually through issuance of species-specific mitigation guidance.

The service area is an important component for a potential mitigation sponsor who will need to evaluate the market for credits prior to committing to a mitigation project. The mitigation sponsor has the responsibility to determine if a proposed mitigation project or program will be financially feasible and if they will move forward with the action.

6.4. Crediting and Debiting

A credit is a defined unit representing the accrual or attainment of ecological functions and/or services at a mitigation site. Credits are often expressed as a measure of surface area (*e.g.,* an acre or hectare), linear distance of constant width (*e.g.,* stream miles), number of individuals or mating pairs of a particular species, habitat function (*e.g.,* habitat suitability index), or other appropriate metric that can be consistently quantified.

Metrics developed to support credits by measuring an increase in ecological functions and services at compensatory mitigation sites and those developed to measure an expected loss or debit in ecological functions and services at impact sites must be science-based, quantifiable, consistent, repeatable, and related to the conservation goals for the species. In general, the method of calculating credits at a mitigation site should be the same as calculating debits at project impact sites. If use of a common ''currency'' between credits and debits is not practicable, the conversion between crediting and debiting metrics must be transparent.

Credits are available for use as mitigation once they are verified and released by the Service. Credits are released in proportion to administrative and ecological milestones. Credits are considered retired if they are no longer available for use as mitigation, including credits that have been transferred to fulfill mitigation obligations. Credits may also be voluntarily retired, without being used for mitigation, which may help achieve no net loss or net conservation benefit goals. Credits are not to be traded among developers or anyone else and cannot be re-sold. Once a credit has been transferred as mitigation for a particular action, it may not be used again.

A mitigation site may contain habitat that is suitable for multiple listed species or other resources in the same spatial area. When this occurs, it is important to establish how the credits will be stacked or bundled and if they can be unstacked and transferred separately. See section 8.3. *Credit Stacking and Bundling* for guidance.

Compensatory mitigation programs that use credits are voluntary, and permittees are never required to purchase credits from these compensatory mitigation sources. Pricing of credits is solely at the discretion of the mitigation provider.

6.5. Timelines

The Service does not have mandated timelines for review of conservation banks, in-lieu fee programs, or other compensatory mitigation projects that are not part of a consultation or permit decision. However, this does not mean

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

that compensatory mitigation programs and projects are not a priority for the Service. Establishment of programmatic compensatory mitigation options for project proponents will provide efficiencies, particularly when developed in coordination with programmatic consultations and HCPs for large landscapes. These efficiencies include reducing the Service's workloads associated with ESA sections 7 and 10, expediting incidental take authorization for project proponents, and achieving better conservation outcomes for listed and other at-risk species.

6.6. Managing Risk and Uncertainty

Compensatory mitigation can be a valuable conservation tool for offsetting unavoidable adverse impacts to listed and at-risk species if the risk can be sufficiently managed. Predictions about the effectiveness of compensatory mitigation measures have varying degrees of uncertainty. Compensatory mitigation accounting systems (*e.g.,* debiting and crediting methodologies) should consider risk and adjust metrics and mitigation ratios to account for uncertainty. An exact accounting of the functions and services lost at the impact sites and gained at the mitigation sites is rarely possible due to the variability and uncertainty inherent in biological systems and ecological processes. To buffer risk and reduce uncertainty, it is often helpful to design compensatory mitigation programs and projects to achieve measures beyond no net loss to attain sufficient conservation benefits for the species. Designing conservation plans with mitigation that is expected to achieve more than no net loss in species conservation generally increases regulatory predictability and can result in shorter project reviews and facilitated permitting.

7. Compensatory Mitigation Mechanisms

Compensatory mitigation mechanisms can be divided broadly into habitat-based mechanisms and other non-habitat-based mitigation programs or projects. Whatever mechanism(s) are selected, compensatory mitigation is expected to provide either equivalent or additional conservation for the species to that lost as a result of the action. Specific operational details regarding compensatory mitigation mechanisms will be in the implementation guidance to be issued by the Service.

7.1. Habitat-Based Compensatory Mitigation Mechanisms

Compensatory mitigation mechanisms based on habitat acquisition and protection may consist of restoration of damaged or degraded habitat, enhancement of existing habitat, establishment of new habitat, preservation of existing habitat not already protected, or some combination of these that offsets the impacts of the action and results in or contributes to sustainable, functioning ecosystems for the species. Preservation of existing habitat often includes a change in land management that renders the site suitable for the species or provides additional ecological function or services for the species. Preservation includes site protection and is a valid mechanism for achieving compensatory mitigation that, at a minimum, reduces threats to the species. Existing habitat that is not protected and managed for the long term is vulnerable to loss and cannot count toward recovery of listed species.

The five habitat-based mitigation mechanisms described below and compared in Table 1 differ by: (1) The party responsible for the success of the mitigation site (the permittee or a third party); (2) whether the mitigation site is within or adjacent to the action area (on-site) or elsewhere (off-site); and (3) whether credits are generated at the mitigation site for use by more than one action. Habitat-based compensatory mitigation will be held to equivalent standards (the standards set forth in this policy) regardless of the mitigation mechanism(s) proposed. Habitat-based compensatory mitigation programs developed to credit conservation actions that benefit unlisted species should meet all compensatory mitigation standards set forth in this policy if they are intended to be used as compensatory mitigation for adverse impacts of actions undertaken after listing.

7.1.1. Permittee-Responsible Compensatory Mitigation

Permittee-responsible compensatory mitigation is a conserved and managed mitigation site that provides ecological functions and services as part of the conservation measures associated with a permittee's proposed action. Permittee-responsible mitigation sites are usually permanent, as most proposed actions with a need for compensatory mitigation are anticipated to result in permanent impacts to the species. The permittee retains responsibility for ensuring the required compensatory mitigation is completed and successful. This includes long-term management and maintenance when the mitigation is intended to be permanent. Permittee-responsible compensatory mitigation may be on-site or off-site, and each permittee-responsible mitigation site is linked to the specific action that required the mitigation. Permittee-responsible mitigation approved for a specific action is not transferable to other actions and cannot be used for other mitigation needs.

7.1.2. Conservation Bank Program

A conservation bank is a site or suite of sites that is conserved and managed in perpetuity and provides ecological functions and services expressed as credits for specified species that are later used to compensate for adverse impacts occurring elsewhere to the same species. Bank sponsors may be public or private entities. Ensuring the required compensatory mitigation measures for a permitted action are completed and successful is the responsibility of the bank sponsor. The responsibility for success of the mitigation is transferred to the bank sponsor through the transfer (usually a purchase by the permittee) of credits. Conservation banks provide mitigation in advance of impacts.

7.1.3. In-Lieu Fee Program

An in-lieu fee site is a conserved and managed compensatory mitigation site established as part of an in-lieu fee program that provides ecological functions and services expressed as credits for specified species and used to compensate for adverse impacts occurring elsewhere to the same species. In-lieu fee sites are usually permanent as most proposed actions with a need for compensatory mitigation are anticipated to result in permanent impacts to the species. In-lieu fee programs may be sponsored by a government agency or an environmental, conservation-based, not-for-profit organization with a mission that is consistent with species or habitat conservation. The in-lieu fee sponsor collects fees from permittees that have been approved by the Service to use the in-lieu fee program, instead of providing permittee-responsible compensatory mitigation. An in-lieu fee site that meets the mitigation requirements for the impacts of permittees' actions will be established when the in-lieu fee program has collected sufficient funds. All responsibility for ensuring the required compensatory mitigation measures are completed and successful, including long-term management and maintenance, is transferred from the permittee to the in-lieu fee program sponsor through the transfer (usually purchase) of credits. In-lieu fee programs generally do not provide mitigation in advance of impacts.

In-lieu fee programs can also be established to fund non-habitat-based compensatory mitigation measures. See

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

section 7.3 *Other Compensatory Mitigation Programs or Projects* for guidance on these types of programs.

7.1.4. Habitat Credit Exchange

Habitat credit exchanges are relatively new and warrant additional care and consideration when being considered as a mitigation mechanism. A habitat credit exchange is an environmental market that operates as a clearinghouse in which an exchange administrator, operating as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and project permittees. This is in contrast to the direct transactions between compensatory mitigation providers and permittees that generally occur through conservation banking and in-lieu fee programs. Exchanges provide ecological functions and services expressed as credits that are conserved and managed for specified species and are used to compensate for adverse impacts occurring elsewhere to the same species. Exchanges may be designed to provide credits for permanent compensatory mitigation sites, short-term compensatory mitigation sites, or both types of sites. Habitat credit exchanges may operate at a local or larger landscape scale, may consist of one or more mitigation sites, and may obtain credits from conservation banks or in-lieu fee programs. Exchange administrators may be public or private entities. Exchanges developed for federally listed species will require Service approval as with all other mitigation mechanisms described in this policy.

TABLE 1—COMPARISON OF HABITAT-BASED COMPENSATORY MITIGATION SITES ESTABLISHED UNDER DIFFERENT MECHANISMS

Mitigation mechanism	Responsible party	Credits generated	Responsibility transferable
Permittee-responsible Mitigation Site	Permittee	No	No.
Conservation Bank	Bank Sponsor	Yes	Yes.
In-lieu Fee Program Site	In-lieu Fee Sponsor	Yes	Yes.
Habitat Credit Exchange Site	Exchange Administrator, Mitigation Sponsor, or other identified responsible entity.	Yes	Yes.

7.2. Short-Term Compensatory Mitigation

The concept of short-term compensatory mitigation has merit if it serves the conservation goals of the species. Short-term compensatory mitigation may be appropriate in some situations to offset impacts that can be completely rectified by repairing, rehabilitating, or restoring the affected environment within a short and predictable timeframe. Under this policy, short-term compensatory mitigation includes rectifying the damage at the impact site and providing short-term compensation to offset the temporal loss caused by the action to achieve a conservation outcome that results in, at a minimum, no net loss to the species.

A short-term impact is defined in this policy as an action that meets the following criteria: (1) The impact is limited to harassment or other forms of nonlethal take; (2) the impact can be completely rectified through natural or active processes, and the site will function long term within the landscape at the same or greater level than before the impact; (3) restoration of the impact site can occur within a short and predictable timeframe based on current science and the knowledge of the species; and (4) all temporal loss to the species by the impact can be estimated and compensated. Opportunities for short-term compensation are likely to be very limited and may not apply to most species.

Inherent in applying short-term compensatory mitigation is the recovery of the affected species' populations to pre-disturbance levels and any additional increase in population levels that was anticipated to occur if the action had not taken place (*i.e.,* adjusted for temporal loss). Determining the amount and duration of compensatory mitigation needed requires substantial knowledge of the biology of the species (*e.g.,* abundance, distribution, fecundity). Actions that meet the criteria for short-term impacts are not limited to short-term compensatory mitigation as a mitigation option. The Service prefers mitigation mechanisms that protect conservation values in perpetuity. Permanent compensatory mitigation either at the same or a reduced mitigation ratio (determined by the Service) is usually an alternative. Conservation banks or in-lieu fee programs with available credits that meet the compensatory mitigation needs for actions with short-term impacts are usually a good alternative to short-term compensatory mitigation.

7.3. Other Compensatory Mitigation Programs or Projects

Compensatory mitigation is based on the concept of replacing or providing substitute resources or environments for the impacted resource (40 CFR 1508.20). However, mechanisms or conservation measures that do not exactly meet this definition, but that meet the conservation objectives for the specified species and are expected to compensate for adverse effects to species or their habitats, may be suitable as compensatory mitigation. These types of compensatory mitigation measures are acceptable if they are closely tied to recovery actions identified in species status assessments, recovery plans, 5-year reviews, or best available science on the threats and needs of the species. Compensatory mitigation of this type is often funded through an in-lieu fee program. Examples of potentially suitable compensatory measures include, but are not limited to:

a. Transfer and retirement of timber, water, mineral, or other severed rights to an already existing conservation site, thereby significantly reducing or eliminating the risk of future development on the site that would be incompatible with conservation of the species;

b. Restricting human use of waterways or other public spaces through legal means to allow for increased or exclusive use by the species;

c. Controlled propagation, population augmentation, and reintroduction of individuals of the species to offset losses from an action;

d. Captive rearing and release of individuals of the species to offset losses from an action;

e. Administering vaccination programs vital to species survival and recovery;

f. Gating of caves that serve as habitat for the species;

g. Construction of wildlife overpasses or underpasses to protect migratory passages for the species; and/or

h. Programs that reduce the exposure of the species to contaminants in the

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

environment that are known to cause injury or mortality.

In rare circumstances, research or education that can be linked directly to the relative threats to the species and provide a quantifiable benefit to the species may be included as part of a mitigation package. Although research can assist in identifying substitute resources, it does not replace impacted resources or adequately compensate for adverse effects to species or habitat. See the Service's Mitigation Policy (81 FR 83440, November 21, 2016) for additional guidance on appropriate uses of research or education as mitigation.

8. Criteria for Use of Third-Party Mitigation

Specific operational details regarding the use of third-party mitigation will be in the implementation guidance to be issued by the Service.

8.1. Project Applicability

Activities regulated under sections 7 or 10 of the ESA may be eligible to use third-party sponsored mitigation, if the adverse impacts to the species from the particular project can be offset by transfer of the appropriate type and number of credits provided by the third-party sponsored mitigation program. The impacts for which third-party sponsored mitigation is sought must be located within the service area for the species provided by the third-party sponsored mitigation program unless otherwise approved by the Service. In no case may the same credit(s) be used to compensate for more than one action. However, the same credit(s) may be used to compensate for a single action that requires authorization under more than one regulatory authority (*e.g.,* a vernal pool restoration credit that provides mitigation for a listed species under the ESA and wetlands under section 404 of the CWA).

Only credits that have been verified by the Service and released are considered available. Only available credits can be used to mitigate actions.

8.2. Transfer of Responsibility

The mitigation sponsor assumes responsibility for success of the mitigation through the transfer (usually a purchase by the permittee) of credits or other quantified amount of compensatory mitigation.

The Service's role is regulatory. Credit transfers are subject to approval by the Service, as to their conservation value and appropriate application for use related to any authorization or permit issued under the ESA. Market and legal risks arising from the purchase and use of mitigation credits are borne solely by the parties to the sale of such credits.

8.3. Credit Stacking and Bundling

The Service recognizes the inherent efficiencies in leveraging multiple conservation efforts on the landscape and encourages these coordinated efforts. However, compensatory mitigation and other conservation actions that occur on the same mitigation site must be accounted for separately, and all aspects of the different actions must be managed and tracked in a transparent manner. Stacking mitigation credits within a mitigation site (*i.e.,* more than one credit type on spatially overlapping areas) is allowed, but the stacked credits cannot be used to provide mitigation for more than one permitted impact action even if all the resources included in the stacked credit are not needed for that action. To do so would result in a net loss of resources in most cases because using a species credit separately from the functions and services that accompany its habitat, such as carbon sequestration or pollination services, would result in double counting (*i.e.,* ''double dipping''). Double counting is selling or using a unit of the same ecosystem function or service on the ground more than once. This can occur through an accounting error in which the credit is sold twice, and it also can occur when stacked credits are unstacked and one or more functions or services are sold separately. For example, a credit representing an acre of habitat is sold once as a species habitat credit for a permitted action and again as a carbon credit for a different action in a different location. The loss of species habitat at the first impact site included all functions and services associated with that habitat including carbon sequestration, so selling that same unit of compensatory mitigation again for carbon sequestration results in no carbon offset for the loss of carbon sequestration at the second impact location. Using a stacked credit separately to reflect its various values is an ecologically challenging accounting exercise.

Compensatory mitigation projects may be designed to holistically address requirements under multiple programs and authorities for the same action and may use bundled credits to accomplish this goal. For example, a stream credit may satisfy requirements for an U.S. Army Corps of Engineers section 404 CWA permit and issuance of incidental take authority under the ESA for a listed mussel species occurring in that stream, or a county-wide HCP may establish an in-lieu fee program for which a single fee is collected from project applicants for a permit which covers multiple mitigation obligations under Federal, State, and local authorities. In both these examples, the bundled credit is used as a single commodity (*i.e.,* it is not unbundled or unstacked) and is only used once.

8.4. Use of Credits for Mitigation Under Authorities Other Than the ESA

Compensatory mitigation projects established for use under one Service program (*e.g.,* Ecological Services) may also be used to satisfy the environmental requirements of other Service programs (*e.g.,* Migratory Birds or Refuges) or other Federal, State, or local agency programs consistent with the laws and requirements of each respective program. However, the same credits may not be used for more than one authorized or permitted action (*i.e.,* no double counting of mitigation credits).

9. Compliance and Tracking

A tracking system is essential in ensuring compliance with the mitigation instruments used to implement compensatory mitigation programs described in this policy. Tracking systems also facilitate consistency in the implementation of compensatory mitigation programs and projects. It is vital that the Service track compliance directly for permittee-responsible mitigation and, at a minimum, through third parties responsible for operating compensatory mitigation programs or projects such as in-lieu fee programs and habitat exchanges. Transactions (credit withdrawals) at a Service authorized mitigation program or project that are not related to ESA compliance and are not approved by the Service must be tracked in the same tracking system. The Service is not liable for any event or transaction that eludes detection through the Service's tracking function. Specific operational details regarding compliance and tracking will be in the implementation guidance to be issued by the Service.

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Appendix A: List of Acronyms and Abbreviations Used in This Policy

CCAA—Candidate conservation agreement with assurances
CEQ—Council on Environmental Quality
CFR—Code of Federal Regulations
CWA—Clean Water Act
EPA—Environmental Protection Agency
ESA—Endangered Species Act
FWCA—Fish and Wildlife Coordination Act
HCP—Habitat conservation plan
MMPA—Marine Mammal Protection Act
NEPA—National Environmental Policy Act
NWR—National Wildlife Refuge
RPA—Reasonable and prudent alternative
RPM—Reasonable and prudent measure
RIBITS—Regulatory In-lieu fee and Bank Information Tracking System
SHA—Safe harbor agreement
USACE—United States Army Corps of Engineers
USFWS—United States Fish and Wildlife Service

Appendix B: Glossary of Terms Related to Compensatory Mitigation

Definitions in this section apply to the implementation of the U.S. Fish and Wildlife Service (Service) Endangered Species Act Compensatory Mitigation Policy and were developed to provide clarity and consistency. Some definitions are defined in Service authorities such as the Endangered Species Act or the National Environmental Policy Act, or in regulations or policies existing at the time this policy was issued. Other definitions have been developed based on compensatory mitigation practices. Definitions in the glossary do not substitute for statutory or regulatory definitions in the exercise of those authorities.

Action—an activity or program implemented, authorized, or funded, in whole or in part, by Federal agencies; or a non-Federal activity or program for which one or more of the Service's authorities apply to make mitigation recommendations, specify mitigation requirements, or provide technical assistance for mitigation planning (81 FR 83440; November 21, 2016).

Action area—all areas to be affected directly or indirectly by the Federal action and not merely the immediate area involved in the action (50 CFR 402.02).

Adaptive management—a systematic approach for improving resource management by learning from management outcomes. An adaptive approach involves exploring alternative ways to meet management objectives, predicting the outcomes of alternatives based on the current state of knowledge, implementing one or more of these alternatives, monitoring to learn about the impacts of management actions, and then using the results to update knowledge and adjust management actions. Adaptive management focuses on learning and adapting, through partnerships of managers, scientists, and other stakeholders who learn together how to create and maintain sustainable resource systems (Williams et al. 2009). As applied to compensatory mitigation, it is a management strategy that anticipates likely challenges associated with compensatory mitigation projects and provides for the implementation of activities to address those challenges, as well as unforeseen changes to those projects. It requires consideration of the risk, uncertainty, and dynamic nature of compensatory mitigation projects and guides modification of those projects to achieve stated biological goals. It includes the selection of appropriate measures that will ensure that the resource functions and services are provided and involves analysis of monitoring results to identify potential problems of a compensatory mitigation project and the identification and implementation of measures to rectify those problems (modified from 33 CFR 332.2).

Additionality—conservation benefits of a compensatory mitigation measure that improve upon the baseline conditions of the impacted resources and their values, services, and functions in a manner that is demonstrably new and would not have occurred without the compensatory mitigation measure (600 DM 6.4G).

Additive impacts, additive effects—the combined effects of past actions on a species, other resource, or community; impacts of an action may be relatively insignificant on their own, but when considered with the impacts from other actions as they accumulate over time collectively lead to significant overall loss or degradation of resources. See also ''*cumulative effects.*''

Applicant—any person who requires formal approval or authorization from a Federal agency as a prerequisite to conducting an action (50 CFR 402.02); ''person'' means an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States (16 U.S.C. 1532(13)).

At-risk species—candidate species and other unlisted species that are declining and are at risk of becoming a candidate for listing under the Endangered Species Act. This may include, but is not limited to, State listed species, species identified by States as species of greatest conservation need, or species with State heritage ranks of G1 or G2.

Avoidance—avoiding the impact altogether by not taking a certain action or parts of an action (40 CFR 1508.20).

Bank Sponsor—any public or private entity responsible for establishing and, in most circumstances, operating a conservation bank. Bank sponsors are most often private individuals, companies, or Limited Liability Corporations, but they may also be nongovernmental organizations, Tribes, or government agencies. See also ''*mitigation sponsor.*''

Baseline—the pre-existing condition of a defined area of habitat or a species population that can be quantified by an appropriate metric to determine level of functions and/or services and re-measured at a later time to determine if the same area of habitat or species population has increased, decreased, or maintained the same level of functions and/or services.

Candidate conservation agreement with assurances (CCAA)—a formal agreement between the Service or the National Marine Fisheries Service and one or more non-Federal parties who voluntarily agree to manage their lands or waters to remove threats to candidate or proposed species and in exchange receive assurances that their conservation efforts will not result in future regulatory obligations in excess of those they agreed to at the time they entered into the agreement. The management activities included in the agreement must significantly contribute to elimination of the need to list the target species when considered in conjunction with other landowners conducting similar management activities within the range of the species (USFWS CCAA Policy).

Candidate species (candidate)—any species being considered by the Secretary for listing as an endangered or threatened species, but not yet the subject of a proposed rule (50 CFR 424.02); a species for which the Service or the National Marine Fisheries Service has on file sufficient information on biological vulnerability and threats to support a proposal to list as endangered or

17-01174_017041;17-01174_017041;17-01174_017042;17-01174_017043;17-01174_017044;17-01174_017045;1...

threatened under the Endangered Species Act.

Compensatory mitigation (compensation)—compensation for remaining unavoidable impacts after all appropriate and practicable avoidance and minimization measures have been applied, by replacing or providing substitute resources or environments (see 40 CFR 1508.20) through the restoration, establishment, enhancement, or preservation of resources and their values, services, and functions (600 DM 6.4C).

Compensatory mitigation project—compensatory mitigation implemented by the action agency, a permittee, or a mitigation sponsor. Compensatory mitigation projects include permittee-responsible mitigation, conservation banks, in lieu fee programs and sites, habitat credit exchanges, and other third-party compensatory mitigation projects.

Conservation, conserve, conserving—to use and the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided pursuant to the Endangered Species Act are no longer necessary (16 U.S.C. 1532(3)).

Conservation bank—a site, or suite of sites, that is conserved and managed in perpetuity and provides ecological functions and services expressed as credits for specified species that are later used to compensate for impacts occurring elsewhere to the same species.

Conservation easement—a recorded legal document established to conserve biological resources for a specified duration, usually in perpetuity, on a identified conservation property and which restricts certain activities and requires certain habitat management obligations for the conservation property.

Conservation measures (conservation actions)—measures pledged in the project description that the Federal agency or applicant will implement to minimize, rectify, reduce, and/or compensate for the adverse impacts of the development project on the species. Conservation measures designed to compensate for unavoidable impacts may include the restoration, enhancement, establishment, and/or preservation of species habitat or other measures conducted for the purpose of offsetting adverse impacts to the species. Upon issuance of a permit, license or other such authorization associated with the proposed project, implementation of that project requires implementation of the conservation measures as well as any other terms and conditions of the permit.

Conservation objective—a measurable expression of a desired outcome for a species or its habitat resources. Population objectives are expressed in terms of abundance, trend, vital rates, or other measurable indices of population status. Habitat objectives are expressed in terms of the quantity, quality, and spatial distribution of habitats required to attain population objectives, as informed by knowledge and assumptions about factors influencing the ability of the landscape to sustain the species (81 FR 83440; November 21, 2016).

Conservation plan (species conservation plan)—a plan developed by Federal, State, and/or local government agencies, Tribes, or appropriate nongovernmental organizations, in consultation with relevant stakeholders, for the specific goal of conserving one or more listed or at-risk species. A conservation plan is developed using a landscape-scale approach and addresses the status of, needs of, and threats to the species, and usually includes recommended conservation measures for the conservation/recovery of the species. Examples of species conservation plans include species conservation frameworks, rangewide conservation plans, and conservation plans developed as part of a large landscape habitat conservation plan.

Covered species—species specifically included in a conservation bank, habitat conservation plan, safe harbor agreement, candidate conservation agreement with assurances, rangewide conservation plan, or other such conservation plan for which a commitment is made to achieve specific conservation measures for the species.

Credit (species credit, habitat credit)—a defined unit representing the accrual or attainment of ecological functions and/or services for a species at a mitigation site or within a mitigation program.

Credit bundling—allowing a single unit of a mitigation site to provide compensation for two or more spatially overlapping ecosystem functions or services that are grouped together into a single credit type and used as a single commodity to compensate for a single permitted action. A bundled credit may be used to compensate for all or a subset of the functions or services included in the credit type but may only be used once, even if all functions and services represented in the credit type were not required for the permitted action. See also ''*credit stacking*.''

Credit reserve account—credits set aside in reserve to offset force majeure or other unforeseen events as agreed to by the Service, allowing a mitigation program to continue uninterrupted.

Credit stacking—allowing a single unit of a mitigation site to provide two or more credit types representing spatially overlapping ecosystem functions or services which can be unstacked and used as separate commodities to compensate for different permitted actions. Credit stacking can result in double counting (*i.e.,* a net loss of resources on the landscape) if the same functions or services are not also accounted for separately at all impact sites. See also ''*credit bundling*'' and ''*double-counting*.''

Credit transfer—the use, sale, or conveyance of credits by a bank sponsor or mitigation provider to a permittee or other entity for the purposes of offsetting impacts of an action.

Critical habitat—specific areas within the geographical area occupied by the species at the time it is listed as endangered or threatened under the Endangered Species Act, on which are found those physical or biological features essential to the conservation of the species and which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed, which are determined by the Secretary of the Department of the Interior to be areas essential for the conservation of the species (16 U.S.C. 1532(5)(A)).

Cumulative effects—those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation under the Endangered Species Act (50 CFR 402.14(g)(3)). Under the National Environmental Policy Act, cumulative effects are defined as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions (40 CFR 1508.7).

Debit—a defined unit representing the loss of ecological functions and/or services for a species at an impact site. Debits should be expressed using the same metrics used to value credits at mitigation sites.

Direct effects—those effects to the species or other resource that are caused by the action and occur at the same time and place (81 FR 83440; November 21, 2016).

Double-counting (double-dipping)—using a credit, however defined, representing the same unit of ecosystem function or service on a mitigation site more than once. This is not allowed.

Durability—the condition or state in which the measurable environment benefits of the compensatory mitigation project or measure are sustained, at a minimum, for the duration of the associated impacts (including direct and indirect impacts) of the authorized action. To be durable, mitigation measures effectively compensate for remaining unavoidable impacts that warrant compensatory mitigation; use long-term administrative and legal provisions to prevent actions that are incompatible with the measure; and employ financial instruments to ensure the availability of sufficient funding for the measure's long-term monitoring, site protection, and management (600 DM 6.4G).

Effects (effects of the action)—changes in the environmental conditions caused by an action that are relevant to the species or other resources (81 FR 83440; November 21, 2016), including the direct, indirect, and cumulative effects of the action on the species and other activities that are interrelated to, or interdependent with, that action as defined at 50 CFR 402.02. See also ''*cumulative effects*.''

Endangered species—any species which is in danger of extinction throughout all or a significant portion of its range (16 U.S.C. 1532(6)).

Endowment—as used in this policy, funds that are conveyed solely for the long-term stewardship of a mitigation property and are permanently restricted to paying the costs of management and stewardship of that property. The management of endowment funds is generally governed by State and Federal laws, as applicable. Endowments do not include funds conveyed for meeting short-term performance objectives of a mitigation project.

Enhancement—activities conducted in existing habitat of the species that improve one or more ecological functions or services for that species, or otherwise provide added

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benefit to the species and do not negatively affect other resources of concern. Compare with ''*restoration.*''

Establishment—construction of habitat of a type that did not previously exist on a mitigation site but which will provide a benefit to the species and does not negatively affect other resources of concern. Compare with ''*restoration.*''

Fee title (fee)—an interest in land that is the most complete and absolute ownership in land; it is of indefinite duration, freely transferable, and inheritable.

Functions—the physical, chemical, and biological processes that occur in ecosystems (33 CFR 332.2); functions are the ecological processes necessary for meeting species' habitat and lifecycle needs.

Habitat—an area with spatially identifiable physical, chemical, and biological attributes that supports one or more life-history processes for the species (81 FR 83440; November 21, 2016).

Habitat conservation plan (HCP)—a planning document that describes the anticipated effects of a proposed activity on the taking of federally listed species, how those impacts will be minimized and mitigated, and how the plan will be funded (16 U.S.C. 1539). The HCP is required as part of an incidental take permit application to the Service or the National Marine Fisheries Service (see ''*incidental take*'').

Habitat credit exchange (habitat credit exchange program)—a market-based system that operates as a clearinghouse in which an exchange administrator, acting as a mitigation sponsor, manages credit transactions between compensatory mitigation providers and permittees or others authorized to implement actions that adversely affect protected species.

Impact(s) (of an action)—adverse effects relative to the affected resources (81 FR 83440; November 21, 2016). More specifically under this policy, adverse effects on the species or its habitat anticipated in a proposed action or resulting from an authorized or permitted action.

Incidental take—take of any endangered or threatened species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or an applicant (50 CFR 402.02). Incidental take may be authorized for endangered or threatened species through section 7 or 10, or for threatened species, through a rule codified under section 4(d) of the Endangered Species Act. (See also, ''*take.*'')

Indirect effects—those effects to the species that are caused by the action at a later time or another place, but are reasonably certain to occur (50 CFR 402.02).

In-kind—a resource of a similar structural and functional type to the impacted resource (33 CFR 332.2); when used in reference to a species, in-kind means the same species.

In-lieu fee program—a program involving the restoration, establishment, enhancement, and/or preservation of habitat through funds paid to a governmental or nonprofit natural resources management entity to satisfy compensatory mitigation requirements for impacts to specified species or habitat (modified from 33 CFR 332.2).

In-lieu fee program sponsor—any government agency or nonprofit natural resources management organization responsible for establishing, and in most circumstances, operating an in-lieu fee program. See also, ''*sponsor.*''

In-lieu fee site—a compensatory mitigation site established under an approved in-lieu fee program.

Landscape—an area encompassing an interacting mosaic of ecosystems and human systems that is characterized by a set of common management concerns. The landscape is not defined by the size of the area, but rather by the interacting elements that are relevant and meaningful in a management context (600 DM 6D).

Landscape-scale approach—an approach to conservation planning that applies the mitigation hierarchy for impacts to resources and their values, services, and functions at the relevant scale, however narrow or broad, necessary to sustain, or otherwise achieve established goals for those resources and their values, services, and functions. A landscape-scale approach should be used when developing and approving strategies or plans, reviewing projects, or issuing permits. The approach identifies the needs and baseline conditions of targeted resources and their values, services and functions, reasonably foreseeable impacts, cumulative impacts of past and likely projected disturbance to those resources, and future disturbance trends. The approach then uses such information to identify priorities for avoidance, minimization, and compensatory mitigation measures across that relevant area to provide the maximum benefit to the impacted resources and their values, services, and functions, with full consideration of the conditions of additionality and durability (600 DM 6E).

Listed species—any species or subspecies of fish, wildlife, or plant which has been determined to be endangered or threatened under section 4 of the Endangered Species Act (50 CFR 402.02). Listed species are found at 50 CFR 17.11 and 17.12.

Management plan—the stewardship plan prepared to instruct the land manager in the operations and biological management for the compensatory mitigation site to, at a minimum, maintain the functions and services for specified species and other resources on the mitigation site. These are generally long-term plans that include a detailed estimate of the itemized costs for all management actions required by the plan. These annual costs are used to estimate the size of the endowment that will be needed to maintain and monitor the mitigation site for the intended duration.

Mitigation (mitigation hierarchy, mitigation sequence)—as defined and codified in the Council on Environmental Quality (CEQ) National Environmental Policy Act (42 U.S.C. 4321 *et seq.*) regulations (40 CFR 1508.20), mitigation includes:

- Avoid the impact altogether by not taking the action or parts of the action;
- Minimize the impact by limiting the degree or magnitude of the action and its implementation;
- Rectify the impact by repairing, rehabilitating, or restoring the affected environment;
- Reduce or eliminate the impact over time by preservation and maintenance operations during the life of the action; and
- Compensate for the impact by replacing or providing substitute resources or environments.

This sequence is often condensed to: Avoidance, minimization, and compensation.

Mitigation ratio—the relationship between the amount of the compensatory offset for, and the impacts to, the species, habitat for the species, or other resource of concern.

Mitigation sponsor (mitigation project sponsor, sponsor, mitigation provider)—any public or private entity responsible for establishing, and in most circumstances, operating a compensatory mitigation program or project such as a conservation bank, in-lieu fee program, or habitat credit exchange (modified from 33 CFR 332.2).

Off-site—a mitigation area that is located neither on nor adjacent to the same parcel of land as the impact site (33 CFR 332.2).

On-site—a mitigation site located on or adjacent to the same parcel of land as the impact site (33 CFR 332.2).

Performance criteria—observable or measurable administrative and ecological (physical, chemical, or biological) attributes that are used to determine if a compensatory mitigation project meets the agreed upon conservation objectives identified in a mitigation instrument or the conservation measures proposed as part of a permitted or otherwise authorized action.

Permittee—any person who receives formal approval or authorization, generally in the form of a permit or license, from a Federal agency to conduct an action. See also, ''*applicant.*''

Permittee-responsible mitigation—activities or projects undertaken by a permittee or an authorized agent or contractor to provide compensatory mitigation for which the permittee retains full responsibility. As used in this policy, permittee-responsible mitigation also includes compensatory mitigation undertaken by Federal agencies to offset impacts resulting from actions carried out directly by the Federal agency.

Perpetuity—endless or infinitely long duration or existence; permanent.

Practicable—available and capable of being done after taking into consideration existing technology, logistics, and cost in light of a mitigation measure's beneficial value and a land use activity's overall purpose, scope, and scale (81 FR 83440; November 21, 2016).

Preservation—the protection and management of existing resources for the species that would not otherwise be protected through removal of a threat to, or preventing the decline of, the resources to compensate for the loss of the same species or resources elsewhere.

Proponent (project proponent)—the agency proposing an action, and if applicable, any applicant(s) for agency funding or authorization to implement a proposed action (81 FR 83440; November 21, 2016). For purposes of this policy, any person, organization, or agency advocating a development proposal that is anticipated to result in adverse impacts to one or more listed or at-risk species. See also, ''*applicant*'' and ''*permittee.*''

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Resources (resources of concern)—fish, wildlife, plants, and their habitats for which the Service has authority to recommend or require the mitigation of impacts resulting from proposed actions (81 FR 83440; November 21, 2016) .

Restoration—repairing or rehabilitating habitat for the benefit of the species on a mitigation site with the goal of returning it to its natural/historic habitat type with the same or similar functions where they have ceased to exist, or exist in a substantially degraded state.

Retired credit—a credit that is no longer available for use as mitigation. Credits that have been sold or otherwise used to fulfill a mitigation obligation are considered retired. Credits may also be voluntarily retired or forfeited, without being used for mitigation.

Safe harbor agreement (SHA)—formal agreement between the Service or National Marine Fisheries Service and one or more non-Federal property owners in which property owners voluntarily manage for listed species for an agreed amount of time providing a net conservation benefit to the species and, in return, receive assurances from the Service or National Marine Fisheries Service that no additional future regulatory restrictions will be imposed (USFWS Safe Harbor Policy). Under the Safe Harbor Policy, ''net conservation benefit'' is defined as contributing to the recovery of the listed species covered by the SHA.

Service area—the geographic area within which impacts to the species or other resources of concern can be mitigated at a specific compensatory mitigation site.

Species—the term ''species'' includes any species, subspecies of fish, or wildlife, or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature (16 U.S.C. 1532(16)).

Take—means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect a federally listed species, or to attempt to engage in any such conduct (16 U.S.C. 1532(19)). ''Take'' applies only to fish and wildlife, not plants.

Temporal loss—the cumulative loss of functions and/or services relevant to the species attributed to the time between the loss of habitat functions and/or services or individuals of the population(s) caused by the action and the replacement of habitat functions and/or services or repopulation of the species at the compensatory mitigation site to the same level had the action not occurred.

Threatened species—any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range (16 U.S.C. 1532(20)).

Unavoidable impact—an impact for which an appropriate and practicable alternative to the proposed action that would not cause the impact is not available (81 FR 83440; November 21, 2016).

Determinations Under Other Authorities

As mentioned above, we intend to apply this policy when considering the adequacy of compensatory mitigation programs, projects, and measures proposed by Federal agencies and applicants as part of a proposed action and mitigation sponsors. Below we discuss compliance with several Executive Orders and statutes as they pertain to this policy.

National Environmental Policy Act (NEPA)

We have analyzed this policy in accordance with the criteria of the National Environmental Policy Act, as amended (NEPA) (42 U.S.C. 4332(c)), the Council on Environmental Quality's regulations for implementing the procedural provisions of NEPA (40 CFR parts 1500–1508), and the Department of the Interior's NEPA procedures (516 DM 2 and 8; 43 CFR part 46). Issuance of policies, directives, regulations, and guidelines are actions that may generally be categorically excluded under NEPA (43 CFR 46.210(i)). Based on comments received, we determined that a categorical exclusion can apply to this policy; nevertheless, the Service chose to prepare an environmental assessment (EA) to inform decision makers and the public regarding the possible effects of the policy revisions.

We announced our intent to prepare an EA pursuant to NEPA when we published the draft policy. We requested comments on the scope of the NEPA review, information regarding important environmental issues that should be addressed, the alternatives to be analyzed, and issues that should be addressed at the programmatic stage in order to inform the site-specific stage during the comment period on the draft policy. Comments from the public were considered in the drafting of the final EA. The final EA is available on the Internet at *http://www.regulations.gov* under Docket Number FWS–HQ–ES–2015–0165.

Paperwork Reduction Act of 1995

This final policy does not contain any new collections of information that require approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). OMB has reviewed and approved the information collection requirements for applications for incidental take permits, annual reports, and notifications of incidental take for native endangered and threatened species for safe harbor agreements, candidate conservation agreements with assurances, and habitat conservation plans under OMB Control Number 1018–0094, which expires on January 31, 2017. We are currently in the process of seeking renewal for OMB Control Number 1018–0094. We may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, ''Government-to-Government Relations with Native American Tribal Governments'' (59 FR 22951), Executive Order 13175 ''Consultation and Coordination with Indian Tribal Governments,'' and the Department of the Interior Manual at 512 DM 2, we have considered possible effects on federally recognized Indian tribes and have determined that there are no potential adverse effects of issuing this policy. Our intent with the policy is to provide a consistent approach to the consideration of compensatory mitigation programs, projects, and measures, including those taken on Tribal lands. We will work with Tribes as applicants proposing compensatory mitigation as part of proposed actions and with Tribes as mitigation sponsors.

Authority: The authorities for this action include the Endangered Species Act of 1973, as amended (16 U.S.C. 1531 *et seq.*), and the National Environmental Policy Act (42 U.S.C. 4321 *et seq.*).

Dated: December 15, 2016.

Daniel M. Ashe,

Director, U.S. Fish and Wildlife Service.

[FR Doc. 2016–30929 Filed 12–23–16; 8:45 am]

BILLING CODE 4333–15–P

To: Caroline Boulton[caroline_boulton@ios.doi.gov]; Daniel Jorjani[daniel_jorjani@ios.doi.gov]
Cc: Jamie Reaser[jamie_reaser@ios.doi.gov]; Clement, Joel[joel_clement@ios.doi.gov]; Hilary Smith[hilary_smith@ios.doi.gov]
From: Cameron, Scott
Sent: 2017-03-15T10:07:21-04:00
Importance: Normal
Subject: Slide deck on invasive species for 11:30 meeting with the Secretary
Received: 2017-03-15T10:08:00-04:00
Briefing for Sec Zinke on invasives.pptx

Hi Caroline,
Here is the deck. Joel and I will see you just before 11:30.

Thanks,
Scott
Scott J. Cameron
Special Assistant
Office of the Secretary of the Interior
Desk 202 208 0969
Cell 202 706 9031

Invasive Species

Briefing for Secretary Zinke

March 15, 2017

Scott Cameron, Lead Political Appointee, Water and Science
and
Joel Clement, Director, Office of Policy Analysis, PMB

Definition and Examples

- Invasives are non-native species that cause damage in the invaded geography
  - Economic damage example: Invasive zebra mussel impact on water infrastructure systems; $500M/yr. in the Great Lakes
  - Ecological damage example: Invasive cheat grass almost pushed the greater sage grouse onto the endangered species list by increasing frequency and severity of wildland fire
  - Human health damage example: Invasive West Nile virus has killed about 3,000 Americans, hospitalized tens of thousands, in addition to killing millions of North American birds
- But not all non-native species are invasive, some are beneficial, for example
  - Most of our grain crops are not native to North America
  - Many sportfish and some game species are not native

Overall Impact of Invasives

- $120B annual damage to the US economy, about 50% of the impact is to agriculture (Cornell University)
- $1.2 Trillion damage to global economy (California Academy of Sciences)
- 42% of endangered species are endangered at least in part because of something an invasive has done to them, so invasives indirectly impose a greater regulatory burden on society (FWS)
- Invasives are solely responsible for 20% of extinctions since the year 1600, partially responsible for 40% (Time magazine cover story)

Success is possible

- US/Canada interstate cooperation has driven down invasive sea lamprey populations in the Great Lakes by 90%, protecting a $7B fishery
- State of Colorado biocontrol program is making dramatic progress against saltcedar/tamarisk that threatens riparian areas in the West
- Targeted livestock grazing appears to be a successful tool against cheatgrass
- California and the Navy extirpated an invasive algae in San Diego Bay
- Colorado is now zebra mussel-free
- Nebraska has reduced its noxious weed acreage by 75% in 15 years

We need to plan for the next century

- Improved intergovernmental and federal interagency coordination in headquarters, but especially on the front line, is key to defeating invasives
- Regionally-based, state governor-driven, early detection and rapid response capability is the most certain and most cost-effective strategy for success
  - Western Governors Association is organizing for joint action, ready to engage DOI
  - Great Lakes Governors may turn to DOI for leadership, with EPA stepping back
  - Pacific territories are among the most vulnerable areas to invasives
- Research and technology investment has proven its value in the past, and will solve future problems
- If we don't accept the challenge, we will lose much of what we associate with North American ecosystems
  - The Burmese python is already the top predator in the Everglades
  - The Asian emerald ash borer has killed hundreds of millions of ash trees in the Midwest, setting the stage for catastrophic wildfires

Assets at your disposal: National Invasive Species Council (NISC)

- You are the lead Co-Chair, with USDA and DOC as the other Co-chairs
- Membership: Senior officials of 13 line agencies and CEQ, OSTP, OMB
- Standing Orders: "Provide the vision and leadership necessary to coordinate, sustain, and expand Federal efforts to safeguard the interest of the United States through the prevention, eradication, and control of invasive species…"
- Small staff administered and funded by DOI, reports up through PMB.
- Access to FACA Committee representing wide variety of interests and expertise
- NISC generally ignored under the Obama Administration
- **Key to Future Success: Leveraging HQ leadership across agencies to foster interagency coordination and empower the front line through helpful policy and appropriate resources**

Assets at your disposal: DOI Invasive Species Task Force

- Leadership body of 10 DOI Bureaus/Offices
- DOI invasive species spending of about $100M, of total federal spend of about $2.3B
- DOI bureaus have relationships with wide variety of stakeholders on the ground
- Ensure effective coordination/communication on regional priorities
- Identify cross-cutting priorities and develop shared budget proposals that are strategic, high impact, and benefit multiple bureaus to optimize resources
- Identify top science and research needs to provide resource managers with the tools to effectively prevent, detect, and control invasive species
- Support efforts to enable sharing data among federal, state, tribal, and local levels to inform decision making and strategic action
- **Key to Future Success: Leveraging Secretarial Orders and DOI's internal budget process to foster interbureau coordination and empower the front line through helpful policy and appropriate resources**

Possible Next Steps

- Leverage your NISC leadership role to secure Corps of Engineers, Bonneville Power Administration, and Forest Service participation in this spring's Columbia River Basin invasive mussel strategy meeting with the States
- Use DOI Invasive Species Task Force to ensure available DOI resources for preventing invasive mussels from dealing with Columbia River Basin are allocated most effectively
- Use DOI Invasive Species Task Force to engage the Western Governors Association on how DOI can support their invasive species data collection and management initiative
- Use DOI Invasive Species Task Force to engage the Great Lakes Governors on how DOI can support their early detection and rapid response initiative
- Leverage your NISC leadership role to start an interagency discussion on how regulatory reform and streamlining could enhance the effectiveness of federal and state invasive species eradication and control efforts
- Leverage your NISC leadership role to identify management actions that could be taken to prevent invasive species from undercutting the potential Administration infrastructure initiative

Notes Summary:

No speaker notes are contained in this presentation.

To: James Cason[james_cason@ios.doi.gov]; Scott Hommel[scott_hommel@ios.doi.gov]; Daniel Jorjani[daniel_jorjani@ios.doi.gov]; Domenech, Douglas[douglas_domenech@ios.doi.gov]
Cc: Clement, Joel[joel_clement@ios.doi.gov]; Bloomgren, Megan[megan_bloomgren@ios.doi.gov]
From: Cameron, Scott
Sent: 2017-03-16T18:52:26-04:00
Importance: Normal
Subject: To Do List from invasive species meeting with the Secretary on March 15
Received: 2017-03-16T18:53:04-04:00
Follow Up Actions Based on Invasive Species Briefing for the Secretary 3-15-17.docx
Zinke Invasive Species.pdf

Jim, Scott, Dan and Doug,
Attached is the To Do List from the meeting with the Secretary. Also attached is the letter just received from Idaho Governor Otter asking the Secretary to convene the Pacific Northwest governors to explore joint strategies for excluding zebra/quagga mussels from the Columbia River Basin. That subject was addressed in some detail in the To Do List I sent out yesterday associated with the Secretary's meeting with me on Reclamation.

Jim, I'll await your direction before proceeding with either To Do list.

Thanks,
Scott
Scott J. Cameron
Special Assistant
Office of the Secretary of the Interior
Desk 202 208 0969
Cell 202 706 9031

C.L. "BUTCH" OTTER
GOVERNOR

March 15, 2017

The Honorable Ryan Zinke
Secretary
U.S. Department of the Interior
1849 C Street NW
Mail Stop 7329
Washington, DC 20240

Dear Secretary Zinke,

Congratulations on your recent Senate confirmation. I look forward to working with you and your team at the Department of the Interior on the many issues impacting Idaho and the West.

One issue of particular economic concern throughout the West is the introduction and spread of noxious aquatic plants and such aquatic nuisance species as quagga mussels and zebra mussels. Like Montana, Idaho's strong agriculture industry would be at serious risk should these aquatic nuisance species be introduced into our streams, lakes and rivers.

Idaho is requesting your leadership on this issue. There is an immediate need for a collaborative effort between the Western states and the federal government to prevent, control and eradicate the spread of these harmful aquatic species. To this end, I urge the Interior Department to convene a meeting as soon as possible with the affected states and begin developing a series of strategic recommendations. As you likely are aware, the Western Governors' Association (WGA) has helped states tackle difficult natural resource issues, and I think WGA would be an excellent vehicle for facilitating such a meeting.

I appreciate your attention to this critical issue and look forward to your positive response. Idaho stands ready to offer its help and assistance in reducing and eliminating this threat.

As Always – Idaho, "Esto Perpetua"

C.L. "Butch" Otter
Governor of Idaho

Follow-up Actions Based on the Invasive Species meeting with the Secretary on March 15, 2017				
Responsible Organization	Action	Next Step	Responsible Person(s)	Timeframe
National Invasive Species Council	Secretary wants to convene the first Council meeting outside of Washington DC, and shortly after the Secretary of Agriculture is confirmed	Develop list of possible venues, including the Great Lakes Region, for the Secretary to choose among	W&S (Cameron) NISC (Reaser) OCO (Bloomgren) OIEA (Williams) Scheduling (Russell)	April
National Invasive Species Council	Confirm level of participation in first Council meeting by Co-Chair agencies USDA and DOC	Contact DOC and USDA Senior White House Advisors or Chiefs of Staff and establish at what level their agencies will be represented	(IOS) Domenech or Hommel	Early May
National Invasive Species Council	Invite federal member agencies and affected nonfederal stakeholders to attend the NISC meeting	Once the location and theme of the event is selected, develop an agenda for the meeting, compile a list of invitees, and send out invitations 30 days in advance of the meeting	W&S (Cameron) NISC (Reaser) OCO (Bloomgren) OIEA (Williams)	Late May
National Invasive Species Council	Conduct NISC meeting	Take advantage of logistical support from nearest DOI Regional or State Offices	W&S (Cameron) NISC (Reaser) OCO (Bloomgren) PMB (Clement) Scheduling (Russell)	Late June
National Invasive Species Council	Secure Corps of Engineers, USDA, and Bonneville Power Administration participation in Pacific Northwest invasive mussel meeting	NISC staff to reach out to the liaisons from those agencies once logistics are established for the meeting (details being managed through the Bureau of Reclamation meeting To Do list)	NISC (Reaser) W&S (Cameron) Reclamation (Murillo)	April
National Invasive Species Council	Remove regulatory impediments to timely and effective invasive species control projects to better protect biodiversity, economic growth, and public health from invasive species	Ask Invasive Species Advisory Committee and NISC member agencies to identify counterproductive regulatory obstacles to protecting biodiversity, economic growth, and public health from invasive species	NISC (Reaser) W&S (Cameron)	June
National Invasive Species Council	Remove regulatory impediments to timely and effective invasive species control projects to protect biodiversity, economic growth, and public health from invasive species	Circulate report identifying regulatory obstacles and reform plans to NISC member agencies for comment	NISC (Reaser) W&S (Cameron)	August
National Invasive Species Council	Remove regulatory impediments to timely and effective invasive species control projects to protect	NISC adopts final report and submits it to OMB/OIRA, CEQ, and appropriate regulatory agencies for action	NISC (Reaser) W&S (Cameron) IOS (Jorjani)	September

	biodiversity, economic growth, and public health from invasive species			
National Invasive Species Council	Inform agencies involved in Administration's infrastructure initiative of potential risks to the success of their infrastructure projects posed by invasive species	Once the composition of the infrastructure initiative becomes clear, share recent infrastructure report from Invasive Species Advisory Committee with appropriate federal agencies so they might consider appropriate strategies to address risks from invasive species	NISC (Reaser) W&S (Cameron)	TBD
DOI Invasive Species Task Force	Ensure measures to control risks of aquatic invasive species from recreational boats are appropriately balanced so as not to unnecessarily impede outdoor recreation	Explore the feasibility and advisability of developing a risk-based DOI-wide policy on this issue	FW&P (Johnson) W&S (Cameron) BLM (Benedetto) PMB (Clement)	May
DOI Invasive Species Task Force	Ensure measures to control risks of aquatic invasive species from recreational boats are appropriately balanced so as not to unnecessarily impede outdoor recreation	If determined to be both feasible and advisable, present specific recommendations to the Deputy Secretary or Secretary for possible subsequent inclusion in a Secretarial Order	IOS (Cason) FW&P (Johnson) W&S (Cameron) BLM (Benedetto) PMB (Clement)	June
DOI Invasive Species Task Force	Coordinate bureau support for Pacific Northwest state efforts to exclude zebra mussels	Develop a unified DOI-wide budget and program strategy focused on risk reduction	W&S (Cameron) PMB (Flanagan) PMB (Clement) Reclamation (Wolf)	April
DOI Invasive Species Task Force	Support Western Governors Association West-wide invasive species data management and data sharing initiative	Offer to join WGA's advisory group working on the procurement strategy and statement of work	W&S (Cameron) USGS (Werkheiser) PMB (Clement)	April
DOI Invasive Species Task Force	Support Western Governors Association West-wide invasive species data management and data sharing initiative	Establish what invasive species datasets that DOI bureaus own that would be helpful to WGA and how to provide them to WGA	W&S (Cameron) USGS (Werkheiser) FW&P (Johnson) BLM (Benedetto) PMB (Clement)	April
DOI Invasive Species Task Force and NISC	Support Western Governors Association West-wide invasive species data management and data sharing initiative	Establish whether other NISC member agencies might have invasive species datasets that would be helpful to WGA and how to provide them to WGA	W&S (Cameron) USGS (Werkheiser) PMB (Clement) NISC (Reaser)	May
DOI Invasive Species Task Force	Explore how DOI, and the federal government more generally, can support the Great Lakes Commission's efforts to operationalize early	At request of the Great Lakes Commission, designate FWS through Secretarial Order as the lead DOI agency to coordinate with the Great Lakes Commission's mutual aid agreement	Deputy Secretary (Cason) FW&P (Johnson) PMB (Clement)	June

	detection and rapid response to new invasive species introductions through a mutual aid agreement on both sides of the US-Canada border			
DOI Invasive Species Task Force/National Invasive Species Council	Explore how DOI, and the federal government more generally, can support the Great Lakes Commission's efforts to operationalize early detection and rapid response to new invasive species introductions through a mutual aid agreement on both sides of the US-Canada border	Sign MOU with USDA and Coast Guard concurring that FWS is the lead federal agency to coordinate with the Great Lakes Commission's mutual aid agreement	Deputy Secretary (Cason) FW&P (Johnson) NISC (Reaser)	September

To: Daniel Jorjani[daniel_jorjani@ios.doi.gov]
Cc: Kevin Haugrud[jack.haugrud@sol.doi.gov]
From: Dalton, Kenneth
Sent: 2017-04-19T17:47:51-04:00
Importance: Normal
Subject: ITLO Briefing Paper
Received: 2017-04-19T17:47:59-04:00
Copy of ITLO Transition Document (April 2017).docx
ITLO Settlements between November 8, 2016 and January 20, 2017.docx
ITLO Case Roster - April 2017.docx
Briefing Paper - ITLO Overview.docx

When we met last week you asked for a briefing paper on ITLO. Please find attached the general overview of our office. I have also attached electronic versions of the other ITLO reference documents that I shared at our last meeting as well another relevant transition-related documents. Please let me know if there are aspects of this information that you would like to explore more in-depth.
Thanks,
Ken

THE INDIAN TRUST LITIGATION OFFICE

Kenneth A. Dalton, Director

The Indian Trust Litigation Office (ITLO) within the Immediate Office of the Solicitor provides legal advice and support in defensive litigation and other matters arising from the Department's role as federal trustee to American Indian tribes and individual Indians. The Bureau of Indian Affairs (BIA) has responsibility for the administration and management of 55.7 million acres of land held in trust by the United States for American Indians, Indian tribes, and Alaska Natives. There are 561 federal recognized tribal governments in the U.S. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure and economic development are all part of the BIA's responsibility. The Office of the Special Trustee for American Indians (OST) has the primary fiduciary responsibility to manage approximately 3,400 tribal trust accounts and 401,000 Individual Indian Money (IIM) accounts, in addition to accounting for and investing the trust funds that are deposited and disbursed from these accounts.

Since about the year 2000, Indian Tribes and Individual Indians have filed close to 200 lawsuits against the United States and Interior alleging breaches of fiduciary duties with respect to the Trustee's management and accounting for funds, lands, and natural resources held in trust for their benefit. The scope of allowable claims that the federal courts have entertained have been broad and unspecific but generally encompass claims such as unlawful failure to provide an accounting; mismanagement of trust funds; failure to record transactions accurately; failure to disburse funds only where authorized; under investments – failure to achieve the proper earnings on trust funds investments; mismanagement of natural resources and other non-monetary trust assets – failure to get maximum price/production/value for natural resource trust assets. Currently, there are approximately 40 accounting and mismanagement lawsuits brought by Tribes or individuals Indians in various federal district courts or in the U.S. Court of Federal Claims.

ITLO develops and provides subject matter expertise on trust management issues to provide advice and counsel for litigation or settlement discussions. ITLO attorneys work directly

with the Office of the Secretary, OST, the Assistant Secretary for Indian Affairs, BIA, the Department of the Treasury, the Department of Justice, and with Indian Tribes and their attorneys. ITLO attorneys provide the full range of services of agency counsel both at the trial and appellate levels including legal research, drafting correspondence and pleadings, initiating and responding to discovery, establishing extensive contacts and working with Department employees nationwide to marshal pertinent information in pursuit of fair resolution of the cases either through trial practice or alternative dispute resolution.

Some Important Legal and Policy Issues in Indian Trust Litigation

1. Whether and to what extent has the plaintiff Tribe or individual Indian properly invoked an applicable waiver of sovereign immunity for the claims?
2. Whether and to what extent should the applicable statute of limitations bar the claims?
3. What is the source and nature of the trust duty or trust right that the plaintiff seeks to enforce or vindicate?
4. As to the merits of a claim for a breach of a trust duty, what is the appropriate standard by which the Trustee's conduct should be judged?
5. Whether and to what extent should the burden of proof or burden of production of evidence shift from the plaintiff-beneficiary to defendant-trustee?
6. How does the Interior Department balance forthrightly defending its interests in litigation brought against it, while at the same time honoring the ongoing trust relationship it maintains with sovereign nation Indian Tribes?
7. To what extent should we advise the client bureaus to modify or alter their administration of trust programs and services in light of litigation brought that challenges that administration?

Indian Trust Litigation Office ("ITLO") at-a-glance

MIB 5300 East, MS 5310

Staff [22]

[1] – SL Director (Ken Dalton)

[9] – GS-14 Attorney-Advisors (Michael Bianco; Karen Boyd; Holly Clement; Gladys "Nicky" Cojocari; Josh Edelstein (duty station SOL-PHX); Ericka Howard; Kristen Kokinos; Dondrae Maiden; Shani Walker)

[1] –Administrative Assistant (Bonita Butler) [Contractor]

[11] – Contractor Attorneys (*Washington, DC*: Alexis Cejas; Monique de Quay-Jones; Kehinde Ijaola; Robert Merritt; Jaida Moore; Brandon Porter; Benjamin Shelton. *American Indian Records Repository (AIRR), Lenexa, KS:* Larry Franklin; Michele LanFranca; James Milsap, Jennifer O'Neill.)

Budget [FY 17 - $3,486,000; (Proposed) FY 18 $2,400,000]

Since its inception, ITLO has been 100 percent client-funded by the Office of the Special Trustee (OST). Arising from the most recent budget passback, OST has proposed a significant decrease to ITLO's allocation for the upcoming years beginning in FY 18. The projected lower level of funding for FY 18, FY 19, and FY 20 can be substantially offset without impact on current staffing or services by the approximately $2.7 million carryover we have from previous years where we didn't backfill open positions. After FY 20, it is likely that our contractual services would need to be cut by 60-75%.

Cases [40]

See roster and assignments. ITLO primarily handles defensive litigation that implicates the Secretary's trust duties whether those matters are seeking money damages in the Court of Federal Claims or declaratory and injunctive relief in district courts. We occasionally will handle administrative appeals, especially where a district court matter has been remanded to the agency for further review.

Most matters are in active litigation at both the trial and appellate level, while there are a few cases in various stages of formal or informal ADR dating back several years.

<u>Formal or Informal ADR Matters</u>

1. *Delaware Tribe of Indians* [Agreement reached in December 2016. SOL settlement recommendation pending]
2. *Pechanga Band of Luiseno Indians* [Agreement reached in December 2016. SOL settlement recommendation pending]*Gayle, et al.* (Western Shoshone

Per Capita Roll case) [Agreement reached in April 2017. SOL settlement recommendation pending.]

3. *Chippewa Cree ("Pembina Judgment Fund Case")* [Agreement in principle reached in 2014. Parties continue to negotiate the settlement framework.]
4. *Quapaw/Goodeagle/Bear* [Agreement in principle reached in August 2016. Parties continue to negotiate the settlement framework.]
5. *Yomba Shoshone/Western Shoshone Identifiable Group* [Agreement in principle reached in 2015. Parties continue to negotiate the settlement framework.]
6. *Downs* (Western Shoshone Per Capita Roll case) [Awaiting Plaintiff's response to Government counter-offer]
7. *Blackfeet Tribe ("Red Eagle Fire Case")* [Awaiting Tribe's response to Government's counter-offer.]
8. *Yankton Sioux* [Awaiting Tribe's response to Government's counter-offer.]
9. *Hopi Tribe* [Awaiting Tribe's response to Government's counter-offer.]

Office of the Solicitor
Indian Trust Litigation Office

Report of Settlements that have been approved by DOI between November 8, 2016 and January 20, 2017.

1. ***Cheyenne and Arapaho Tribes*** **(named plaintiff in *Nez Perce, et. al., v. Zinke, et al.*)**, No. 06-cv-02239 (D.D.C.); and ***Cheyenne and Arapaho Tribes v. U.S.***, No. 12-357L (Fed. Cl.) (**Ken Dalton-ITLO**, 202-208-5986)

Settlement agreement SIGNED 1/19/2017 – In *Nez Perce, et al.* (D.D.C.), Cheyenne-Arapaho Tribes (the "Tribes"), along with more than 40 other Native American Indian tribes filed suit in 2006 seeking declaratory and injunctive relief and for judicial review of final administrative agency action regarding accountings of funds held in trust for their benefit. The tribes alleged breaches of fiduciary accounting and management duties owed to Plaintiffs including, the duty to provide full and complete accountings, the duty to correct trust fund accounts improperly accounted for and/or improperly managed and make those accounts whole.

On June 5, 2012, the Cheyenne-Arapaho filed a separate suit in the Court of Federal Claims seeking damages for breaches of trust duty in connection with an alleged unlawful disbursement of trust funds to an unauthorized third-party. Around that time, the Tribes were mired in an intra-tribal government dispute and, at the request of one of the disputed tribal Governors, the BIA did disburse $760,225 to that individual from the Tribes' trust account.

Under the terms of the settlement, the United States agreed to pay the Tribes $8,548,000. In exchange for that payment, the Tribes agreed to dismiss their claims in the lawsuits with prejudice. Paragraph 4 of the settlement agreement provided a broad release of historical claims against the United States with the following language:

> Plaintiff hereby waives, releases, and covenants not to sue . . . on any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before the date of this Court's entry of this Joint Stipulation of Settlement as an Order and that relate to Defendants' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources.

The provision goes on to provide a non-exclusive list of released claims that encompassed all types of breach of trust claims that tribes have generally asserted in this category of cases.

Other important aspects of the settlement are that the Tribes agreed to (1) accept the accuracy of its trust account balances as stated in the most recent Periodic Statements of Performance provided to the Tribes as "fulfillment of any accounting of Plaintiff's trust fund accounts that is required by law"; (2) accept that Interior complies with the existing reporting duties of the 1994 Reform Act by continuing to provide Statements of Performance; and (3)

accept that the United States satisfies its accounting and reporting duties through "compliance with applicable provisions of the United States Constitution, treaties, and federal statutes and regulations, as well as any subsequent amendments thereto, as those requirements may be construed by the courts."

Each party was responsible for their own attorneys' fees and costs.

2. ***The Delaware Tribe of Indians and The Delaware Trust Board v. U.S.***, No. 02-26L (Fed. Cl.) (**Ken Dalton-ITLO**, 202-208-5986)

AGREEMENT IN PRINCIPLE reached on January 11, 2017 – The Delaware Tribe of Indians, a federally-recognized Indian tribe, and the Delaware Trust Board, the legal entity formed to receive funds awarded to the Delaware Tribe of Indians under the 1972 Delaware Judgment Funds Act (collectively, the "Tribe"), filed suit in January 2002 seeking damages for broadly stated alleged breaches of trust related to the accounting and management of trust funds.

Under the terms of the proposed settlement, the United States agrees to pay the Tribe $2,435,000. In exchange for this payment, the Tribe agrees to dismiss its claims in the pending lawsuit with prejudice. Paragraph 4 of the proposed settlement agreement provides a broad release of historical claims against the United States with the following language:

> Delaware hereby waives, releases, and covenants not to sue . . . on any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before the date of the execution of this Settlement Agreement by both Parties and that relate to the United States' management or accounting of Delaware's trust funds or Delaware's non-monetary trust assets or resources.

The provision goes on to provide a non-exclusive list of released claims that encompassed all types of breach of trust claims that tribes have generally asserted in this category of cases.

Other important aspects of the settlement are that the Tribe would agree to (1) accept the accuracy of its trust account balances as stated in the most recent Periodic Statements of Performance provided to the Tribe as "fulfillment of any accounting of Plaintiff's trust fund accounts that is required by law"; (2) accept that Interior complies with the existing reporting duties of the 1994 Reform Act by continuing to provide Statements of Performance; and (3) accept that the United States satisfies its accounting and reporting duties through "compliance with applicable provisions of the United States Constitution, treaties, and federal statutes and regulations, as well as any subsequent amendments thereto, as those requirements may be construed by the courts."

Each party would be responsible for their own attorneys' fees and costs.

3. ***Pechanga Band of Luiseno Mission Indians of California v. Zinke, et al.***, No. 06-cv-02206 (D.D.C.) (**Ken Dalton-ITLO**, 202-208-5986)

AGREEMENT IN PRINCIPLE reached on December 15, 2016 – The Tribe filed suit in December 2006, and filed an amended complaint on February 12, 2008 (the "Amended Complaint"), seeking declaratory and injunctive relief for accounting and investment mismanagement claims. Specifically, the Amended Complaint requested an injunction requiring the Government to perform a full and complete accounting; a declaration that the Government was in breach of its fiduciary duty to maximize returns on investments and to provide accurate and timely reports; and an injunction requiring the Government to take the necessary steps to manage and invest the Tribe's trust funds so as to maximize the total return on investment and to provide accurate and timely investment reports.

Under the terms of the proposed settlement, the United States agrees to pay the Tribe $125,000. In exchange for this payment, the Tribe agrees to dismiss its claims in the pending lawsuit with prejudice. Paragraph 4 of the proposed settlement agreement provides a broad release of historical claims against the United States with the following language:

> Plaintiff hereby waives, releases, and covenants not to sue . . . on any and all claims, causes of action, obligations, and/or liabilities of any kind or nature whatsoever, known or unknown, regardless of legal theory, for any damages or any equitable or specific relief, that are based on harms or violations occurring before the date of this Court's entry of this Joint Stipulation of Settlement as an Order and that relate to the Defendants' management or accounting of Plaintiff's trust funds or Plaintiff's non-monetary trust assets or resources.

The provision goes on to provide a non-exclusive list of released claims that encompassed all types of breach of trust claims that tribes have generally asserted in this category of cases.

Other important aspects of the settlement are that the Tribe would agree to (1) accept the accuracy of its trust account balances as stated in the most recent Periodic Statements of Performance provided to the Tribe as "fulfillment of any accounting of Plaintiff's trust fund accounts that is required by law"; (2) accept that Interior complies with the existing reporting duties of the 1994 Reform Act by continuing to provide Statements of Performance; and (3) accept that the United States satisfies its accounting and reporting duties through "compliance with applicable provisions of the United States Constitution, treaties, and federal statutes and regulations, as well as any subsequent amendments thereto, as those requirements may be construed by the courts."

Each party would be responsible for their own attorneys' fees and costs.

	NAME	CASE NUMBER	ATTORNEY	NOTE
1.	*Alabama-Quassarte Tribal Town v. Jewell* (10th Cir.)	16-219	Shani Walker	On appeal
2.	*Bear, Thomas C., et al. v. United States* (CFC) ("Quapaw Congressional Reference")	13-51 X	Shani Walker Karen Boyd	Agreement in principle
3.	*Birdbear, Roger et al. v. United States* (CFC)	16-75L	Holly Clement	Litigation
4.	*Blackfeet Tribe v. U.S.* (CFC) ("Red Eagle Fire Case")	12-429L	Dondrae Maiden Mike Bianco Kristen Kokinos	Post-trial briefing
5.	*Bruette, Felix J. Jr. v. Rinke* (E.D. Wisc.)	17-C-286	Dondrae Maiden	Litigation
6.	*Chemehuevi Indian Tribe v. U.S.* (CFC)	16-492	Karen Boyd	Litigation
7.	*Cherokee Nation v. Interior, et al.* (W.D. Okla.) (Trust Accounting)	16-cv-1354	Dondrae Maiden Shani Walker Josh Edelstein	Litigation
8.	*Cherokee Nation v. HHS, et al.* (D.D.C.) (Fraud Recoveries)	16-cv-2502	Nicky Cojocari Mike Bianco	Litigation
9.	*Chippewa Cree et al. v. United States* ("Pembina Judgment Fund") (CFC)	92-675-L	Joshua Edelstein Nicky Cojocari	Agreement in principle
10.	*Crow Creek Sioux v. U.S.* ("Water Rights") (CFC)	16-760	Nicky Cojocari	Litigation
11.	*Delaware Tribe of Indians v. U.S.* (CFC)	02-26L	Dave Moran Josh Edelstein	Settlement
12.	*Downs v. U.S.* (Fed. Cl.)	15-650L	Mike Bianco	Litigation
13.	*Enrolled Blackfeet Members v. Crowe, et al.* (D. Mont.)		Dondrae Maiden	Awaiting service
14.	*Fletcher, et al. v. United States* (10th Cir.)	16-5050	Ericka Howard	Appellate briefing
15.	*Fredericks, Susan et al. v. United States* (CFC)	14-296L	Holly Clement	Litigation
16.	*Fredericks, Judy v. U.S.* (CFC)	16-1695L	Holly Clement	Litigation
17.	*Gayle, Marion et al. v. U.S.* (CFC)	16-624L	Ericka Howard	Settlement demand and counter offer pending
18.	*Godfrey, Sylvan v. U.S.* (CFC)	16-954C	Ericka Howard	Litigation
19.	*Goodeagle, Grace M. et al. v. United States* ("Goodeagle III") (CFC)	12-431L	Shani Walker Karen Boyd	Agreement in principle
20.	*Hopi Tribe v. United States* (CFC) (Tribal Trust Case)	06-941-L	Holly Clement Josh Edelstein	Settlement negotiations
21.	*Inter-Tribal Council of Arizona v. U.S.* (CFC)	15-342L	Karen Boyd	Litigation
22.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-291	Kristen Kokinos Karen Boyd	Litigation; awaiting service
23.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-292	Kristen Kokinos Karen Boyd	Litigation; awaiting service
24.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-293	Kristen Kokinos Karen Boyd	Litigation; awaiting service
25.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-310	Kristen Kokinos Karen Boyd	Litigation; awaiting service
26.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-466	Kristen Kokinos Karen Boyd	Litigation; awaiting service
27.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-473	Kristen Kokinos Karen Boyd	Litigation; awaiting service

28.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-495	Kristen Kokinos Karen Boyd	Litigation; awaiting service
29.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-499	Kristen Kokinos Karen Boyd	Litigation; awaiting service
30.	*Mohn, Ayinde v. U.S.* (E.D. Okla.)	16-cv-500	Kristen Kokinos Karen Boyd	Litigation; awaiting service
31.	*Pechanga Band of Luiseno Missions Indians of California v. Jewell* (DDC)	06-cv-02206	Josh Edelstein	Agreement in principle
32.	*Quapaw Tribe of Oklahoma v. U.S.* (CFC)	12-592L	Shani Walker Karen Boyd	Agreement in principle
33.	*Redboy, Judy Rae v. U.S.* (CFC) (Buy Back Case)	17-cv-19	Ericka Howard	Litigation
34.	*Tanner-Brown, Leatrice et al. v. Jewell et al.* (D.C. Cir.)("Cherokee Freedman Case")	16-5040	Nicky Cojocari	On appeal
35.	*Two Hearts, Chad S. v. U.S.* (CFC) (Buy Back Case)	16-1578	Ericka Howard	Litigation
36.	*Walking Eagle, Clarence v. U.S.* (CFC)	16-659L	Dondrae Maiden	Litigation
37.	*White Mountain Apache v. U.S.* (CFC)	17-359L	Joshua Edelstein	Litigation
38.	*Wyandot Nation of Kansas v. U.S.* (Fed. Cir.)	16-1654	Nicky Cojocari	On appeal
39.	*Yankton Sioux v. Jewell* (DDC)	03-cv-01603	Holly Clement	Settlement negotiations
40.	*Yomba Shoshone Tribe, et al. v. United States (nka Western Shoshone Identifiable Group v. United States)* (CFC)	06-896-L	Mike Bianco Josh Edelstein	Settlement negotiations

To: Jorjani, Daniel[daniel.jorjani@sol.doi.gov]
Cc: Greg Gould[Greg.Gould@onrr.gov]
From: Oliver, Kimiko
Sent: 2017-06-14T07:14:00-04:00
Importance: Normal
Subject: Re: RPC Nominations
Received: 2017-06-14T07:14:37-04:00
Nominees Roster_06-09-17.pdf

Good morning:
The nomination period is still open. It closes on July 3rd. I have attached the most recent list of nominees that I have received so far. Please let me know if you need anything else.

Thanks,
Kim

On Tue, Jun 13, 2017 at 7:09 PM, Jorjani, Daniel <daniel.jorjani@sol.doi.gov> wrote:

> Hi Kimiko: By chance, would you have a spreadsheet setting forth the RPC nominees and, if so, could you send me a copy? Thank you. Dan

--
Kim Oliver
Program Analyst
Office of Natural Resources Revenue
202/513-0370 office phone
Kimiko.Oliver@ONRR.gov

EX OFFICIO

FIRST NAME	LAST NAME	ORGANIZATION
Daniel	Jorjani	Office of the Solicitor
Gregory	Gould	Office of Natural Resources Revenue Title: Director
James	Steward	Office of Natural Resources Revenue Title: Deputy Director
Katharine	MacGregor	Department of the Interior - Land Management Title: Principle Deputy Assistant Secretary
Laura "Renee"	Orr	Bureau of Ocean Energy Management Title: Strategic Resources Chief
Margaret	Schneider	Bureau of Safety and Environmental Enforcement Title: Deputy Director/Acting Director
Michael	Black	Department of the Interior - Indian Affairs Title: Acting Principle Deputy Assistant Secretary
Michael	Nedd	Bureau of Land Management Title: Acting Director
Richard	Cardinale	Department of the Interior - Land Management Title: Chief of Staff
Scott	Angelle	Bureau of Safety and Environmental Enforcement Title: Director
Timothy	Spisak	Bureau of Land Management Title: Senior Advisor
Vincent	Devito	Immediate Office of the Secretary Title: Counselor to the Secretary for Energy Policy
Walter	Cruickshank	Bureau of Ocean Energy Management Title: Deputy Director/Acting Director
Weldon "Bruce"	Loudermilk	Bureau of Indian Affairs Title: Director

INDUSTRY

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Albert	Modiano	US Oil & Gas Association	New Mexico Oil and Gas Association US Oil and Gas Association Texas Oil and Gas Association Louisiana Mid-Continent Oil & Gas Association Oklahoma Oil & Gas Association
Daniel	Rusz	Wood Mackenzie	SELF
David	Crabtree	Blue Mountain Energy Inc. and Deseret Power	Jeffrey M. Peterson Executive Director Utah Rural Electric Cooperative Association and National Rural Electric Cooperative Association
David	Romig	Freeport-McMoRan Oil & Gas	SELF
Estella	Alvarado	Anadarko Petroleum Corporation	SELF
Jennifer	Fortier	Incremental Oil & Gas	SELF
Jeremy	Norton	Devon Energy	Devon Energy and COPAS
Marisa	Mitchell	Recurrent Energy	SELF
Patrick	Noah	ConocoPhillips	John M. Dabbar VP, Federal and State Government Affairs ConocoPhillips

INDUSTRY

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Quintin	Shear	West Slope Colorado Oil & Gas Association	David Ludlam Executive Director West Slope Colorado Oil and Gas Association
Randall	Luthi	NOIA America's Offshore Energy Industry	SELF
Rebecca	Paris	WPX Energy	WPX Energy and COPAS
Rory	McMinn	Read Operating, LLC	SELF
Roxanne	Perruso	The Anschutz Corporation	William J. Miller Senior Vice President Energy and Land Resources The Anschutz Corporation
Sharon	Clute	Eland Energy, Inc.	Robin D. McGuire VP Land & General Counsel Eland Energy, Inc.
Kathleen	Sgamma	Western Energy Alliance	Trey Thee Senior Manager – Energy Industry Services Grant Thornton and Morris Miller, President Miller Energy Consulting
Gabrielle	Gerholt	Concho Resources	Congressman Steve Pearce New Mexico
David	Finnerty	Ark Land LLC	National Mining Association

INDUSTRY

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Matthew	Adams	Cloud Peak Energy	National Mining Association
Robert	Bruer	Peabody Energy	National Mining Association
James	Kreutzer	Contura Energy Services LLC	National Mining Association
Jason	St. John	Coud Peak Energy	National Mining Association
Christopher	Friez	North American Coal Royalty Company	National Mining Association Lignite Energy Council Mississippi Energy Institute Mississippi Manufacturers Association Texas Mining and Reclamation Association
Gregory	Morby	Chevron North America E&P	SELF
Doreen	Heuck	Western Fuels	Western Fuels Association Basin Electric Power Cooperative National Rural Electric Cooperative Association
Emily	Kennedy Hague	American Petroleum Institute	American Petroleum Institute
Erik	Milito	American Petroleum Institute	American Petroleum Institute
Triscilla	Taylor	BP America Inc.	John C. Mingé Chairman & President BP America Inc.

INDUSTRY

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Williamson	Turner	BP America Inc.	John C. Mingé Chairman & President BP America Inc.
Michael	Sorenson	Tri-State Generation and Transmission Association, Inc.	Micheal McInnes Chief Executive Officer Tri-State Generation and Transmission Association Inc. and National Rural Electric Cooperative Association
John	Northington	Northington Strategy Group	SELF
Pamela	Williams	Shell Exploration and Production Company	Shell Exploration and Production Company
Kevin	Simpson	Shell Exploration and Production Company	Shell Exploration and Production Company

STATES

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Daniel	Saddler	Representative -Alaska	William T. Pound Executive Director National Conference of State Legislatures
Diane	Mitsch Bush	Representative - Colorado	William T. Pound Executive Director National Conference of State Legislatures
William	Darby	Representative - Texas	William T. Pound Executive Director National Conference of State Legislatures
Matthew	McQueen	Representative - New Mexico	William T. Pound Executive Director National Conference of State Legislatures
Hans	Hunt	Representative - Wyoming	William T. Pound Executive Director National Conference of State Legislatures
Mark	Edwards	Legislative Council Service - New Mexico	William T. Pound Executive Director National Conference of State Legislatures
Andrew	McKee	State of Wyoming	Governor Mead
John	Andrews	State of Utah	Governor Herbert

STATES

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Dennis	Roller	North Dakota State Auditor's Office	SELF
Brent	Sanford	State of North Dakota Lieutenant Governor	Governor Burgam
Lynn	Helms	State of North Dakota Director of the Department of Mineral Resources	Governor Burgam
John	Crowther	State of Alaska Department of Natural Resources	Governor Walker
Byron	Mallott	State of Alaska Lieutenant Governor	Governor Walker
Shawn	Thomas	Department of Natrual Resources and Conservation - Sta	Governor Bullock
Jerry	Strickland II	Texas Office of State Relations	Governor Abbott
Clinton	Carter	State Finance Director - Alabama	Governor Ivey

TRIBES

FIRST NAME	LAST NAME	ORGANIZATION	Nominated By
Leslie	Shakespeare	Eastern Shoshone Tribe	Vernon Hill Vice-Chairman Eastern Shoshone Business Council
Neal	McCaleb	The Chickasaw Nation	Bill Anoatubby Governor The Chickasaw Nation
Harry	Barnes	Blackfeet Tribal Business Council	SELF
Everett	Waller	Osage Minerals Council Chairman	SELF
Mark	Abshire	Wilnat, Inc. DBA Koons Gas Measurement,	Jill S. Jones Board Member Osage Nation Energy Services, LLC,
Christopher	Redd	Southern Ute Tribe	Clement J. Frost Chairman Southern Ute Indian Tribe
Russell	Begaye	Navajo Nation - President	SELF
Charles	Robertson	Choctaw Nation	Chief Gary Batton
Vanessa	Vance	Wichita and Affiliated Tribes	Terri Parton, President Wichita and Affiliated Tribes

NON-GOVERNMENT ORGANIZATIONS

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
John	Cornell	Theodore Roosevelt Conversation Partnership	SELF
Amy "Ryan"	Alexander	Taxpayers for Common Sense	SELF
Mark	Squillace	University of Colorado Law School	SELF
Jayni	Hein	NYU School of Law	Richard L. Revesz Lawrence King Professor of Law and Dean Emeritus
Kwame	Awuah-Offei	Missouri University of Science and Technology, Mining Engineering	Braden Lusk PhD, P.E. Professor and Chair Mining and Nuclear Engineering
Graham	Davis	Professor of Mineral and Energy Economics Division of Economics and Business Colorado School of Mines	SELF
Van	Romero	New Mexico Institute of Mining and Technology	Congressman Steve Pearce New Mexico
Roderick	Eggert	Colorado School of Mines	SELF
Monte	Mills	University of Montana School of Law	Governor Bullock

To: vincent_devito@ios.doi.gov[vincent_devito@ios.doi.gov]
From: Daniel Jorjani
Sent: 2017-06-14T08:00:05-04:00
Importance: Normal
Subject: Fwd: RPC Nominations
Received: 2017-06-14T08:00:33-04:00
ATT00001.htm
Nominees Roster_06-09-17.pdf

From Kim Oliver at ONRR -

Sent from my iPhone

Begin forwarded message:

From: "Oliver, Kimiko" <kimiko.oliver@onrr.gov>
Date: June 14, 2017 at 7:14:00 AM EDT
To: "Jorjani, Daniel" <daniel.jorjani@sol.doi.gov>
Cc: Greg Gould <Greg.Gould@onrr.gov>
Subject: Re: RPC Nominations

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Kim Oliver
Program Analyst
Office of Natural Resources Revenue
202/513-0370 office phone
Kimiko.Oliver@ONRR.gov

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James	Steward	Office of Natural Resources Revenue Title: Deputy Director
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Laura "Renee"	Orr	Bureau of Ocean Energy Management Title: Strategic Resources Chief
Margaret	Schneider	Bureau of Safety and Environmental Enforcement Title: Deputy Director/Acting Director
Michael	Black	Department of the Interior - Indian Affairs Title: Acting Principle Deputy Assistant Secretary
Michael	Nedd	Bureau of Land Management Title: Acting Director
Richard	Cardinale	Department of the Interior - Land Management Title: Chief of Staff
Scott	Angelle	Bureau of Safety and Environmental Enforcement Title: Director
Timothy	Spisak	Bureau of Land Management Title: Senior Advisor
Vincent	Devito	Immediate Office of the Secretary Title: Counselor to the Secretary for Energy Policy
Walter	Cruickshank	Bureau of Ocean Energy Management Title: Deputy Director/Acting Director
Weldon "Bruce"	Loudermilk	Bureau of Indian Affairs Title: Director

INDUSTRY

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Albert	Modiano	US Oil & Gas Association	New Mexico Oil and Gas Association US Oil and Gas Association Texas Oil and Gas Association Louisiana Mid-Continent Oil & Gas Association Oklahoma Oil & Gas Association
Daniel	Rusz	Wood Mackenzie	SELF
David	Crabtree	Blue Mountain Energy Inc. and Deseret Power	Jeffrey M. Peterson Executive Director Utah Rural Electric Cooperative Association and National Rural Electric Cooperative Association
David	Romig	Freeport-McMoRan Oil & Gas	SELF
Estella	Alvarado	Anadarko Petroleum Corporation	SELF
Jennifer	Fortier	Incremental Oil & Gas	SELF
Jeremy	Norton	Devon Energy	Devon Energy and COPAS
Marisa	Mitchell	Recurrent Energy	SELF
Patrick	Noah	ConocoPhillips	John M. Dabbar VP, Federal and State Government Affairs ConocoPhillips

INDUSTRY

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Quintin	Shear	West Slope Colorado Oil & Gas Association	David Ludlam Executive Director West Slope Colorado Oil and Gas Association
Randall	Luthi	NOIA America's Offshore Energy Industry	SELF
Rebecca	Paris	WPX Energy	WPX Energy and COPAS
Rory	McMinn	Read Operating, LLC	SELF
Roxanne	Perruso	The Anschutz Corporation	William J. Miller Senior Vice President Energy and Land Resources The Anschutz Corporation
Sharon	Clute	Eland Energy, Inc.	Robin D. McGuire VP Land & General Counsel Eland Energy, Inc.
Kathleen	Sgamma	Western Energy Alliance	Trey Thee Senior Manager – Energy Industry Services Grant Thornton and Morris Miller, President Miller Energy Consulting
Gabrielle	Gerholt	Concho Resources	Congressman Steve Pearce New Mexico
David	Finnerty	Ark Land LLC	National Mining Association

INDUSTRY

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Matthew	Adams	Cloud Peak Energy	National Mining Association
Robert	Bruer	Peabody Energy	National Mining Association
James	Kreutzer	Contura Energy Services LLC	National Mining Association
Jason	St. John	Coud Peak Energy	National Mining Association
Christopher	Friez	North American Coal Royalty Company	National Mining Association Lignite Energy Council Mississippi Energy Institute Mississippi Manufacturers Association Texas Mining and Reclamation Association
Gregory	Morby	Chevron North America E&P	SELF
Doreen	Heuck	Western Fuels	Western Fuels Association Basin Electric Power Cooperative National Rural Electric Cooperative Association
Emily	Kennedy Hague	American Petroleum Institute	American Petroleum Institute
Erik	Milito	American Petroleum Institute	American Petroleum Institute
Triscilla	Taylor	BP America Inc.	John C. Mingé Chairman & President BP America Inc.

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Williamson	Turner	BP America Inc.	John C. Mingé Chairman & President BP America Inc.
Michael	Sorenson	Tri-State Generation and Transmission Association, Inc.	Micheal McInnes Chief Executive Officer Tri-State Generation and Transmission Association Inc. and National Rural Electric Cooperative Association
John	Northington	Northington Strategy Group	SELF
Pamela	Williams	Shell Exploration and Production Company	Shell Exploration and Production Company
Kevin	Simpson	Shell Exploration and Production Company	Shell Exploration and Production Company

STATES

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Daniel	Saddler	Representative -Alaska	William T. Pound Executive Director National Conference of State Legislatures
Diane	Mitsch Bush	Representative - Colorado	William T. Pound Executive Director National Conference of State Legislatures
William	Darby	Representative - Texas	William T. Pound Executive Director National Conference of State Legislatures
Matthew	McQueen	Representative - New Mexico	William T. Pound Executive Director National Conference of State Legislatures
Hans	Hunt	Representative - Wyoming	William T. Pound Executive Director National Conference of State Legislatures
Mark	Edwards	Legislative Council Service - New Mexico	William T. Pound Executive Director National Conference of State Legislatures
Andrew	McKee	State of Wyoming	Governor Mead
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Brent	Sanford	State of North Dakota Lieutenant Governor	Governor Burgam
Lynn	Helms	State of North Dakota Director of the Department of Mineral Resources	Governor Burgam
John	Crowther	State of Alaska Department of Natural Resources	Governor Walker
Byron	Mallott	State of Alaska Lieutenant Governor	Governor Walker
Shawn	Thomas	Department of Natrual Resources and Conservation - Sta	Governor Bullock
Jerry	Strickland II	Texas Office of State Relations	Governor Abbott
Clinton	Carter	State Finance Director - Alabama	Governor Ivey

TRIBES

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Leslie	Shakespeare	Eastern Shoshone Tribe	Vernon Hill Vice-Chairman Eastern Shoshone Business Council
Neal	McCaleb	The Chickasaw Nation	Bill Anoatubby Governor The Chickasaw Nation
Harry	Barnes	Blackfeet Tribal Business Council	SELF
Everett	Waller	Osage Minerals Council Chairman	SELF
Mark	Abshire	Wilnat, Inc. DBA Koons Gas Measurement,	Jill S. Jones Board Member Osage Nation Energy Services, LLC,
Christopher	Redd	Southern Ute Tribe	Clement J. Frost Chairman Southern Ute Indian Tribe
Russell	Begaye	Navajo Nation - President	SELF
Charles	Robertson	Choctaw Nation	Chief Gary Batton
Vanessa	Vance	Wichita and Affiliated Tribes	Terri Parton, President Wichita and Affiliated Tribes

NON-GOVERNMENT ORGANIZATIONS

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John	Cornell	Theodore Roosevelt Conversation Partnership	SELF
Amy "Ryan"	Alexander	Taxpayers for Common Sense	SELF
Mark	Squillace	University of Colorado Law School	SELF
Jayni	Hein	NYU School of Law	Richard L. Revesz Lawrence King Professor of Law and Dean Emeritus
Kwame	Awuah-Offei	Missouri University of Science and Technology, Mining Engineering	Braden Lusk PhD, P.E. Professor and Chair Mining and Nuclear Engineering
Graham	Davis	Professor of Mineral and Energy Economics Division of Economics and Business Colorado School of Mines	SELF
Van	Romero	New Mexico Institute of Mining and Technology	Congressman Steve Pearce New Mexico
Roderick	Eggert	Colorado School of Mines	SELF
Monte	Mills	University of Montana School of Law	Governor Bullock

17-01174_017164;17-01174_017164

To: Amy Holley[amy_holley@ios.doi.gov]; Daniel Jorjani[daniel_jorjani@ios.doi.gov]; Greg Gould[greg.gould@onrr.gov]; James Cason[james_cason@ios.doi.gov]; Judith Wilson[judith.wilson@onrr.gov]; Katharine Macgregor[katharine_macgregor@ios.doi.gov]; Margaret Triebsch[margaret_triebsch@ios.doi.gov]; Michael Black[mike.black@bia.gov]; Rachel Milner Gillers[rachelmilner1@yahoo.com]; Richard Cardinale[richard_cardinale@ios.doi.gov]; Vincent Devito[vincent_devito@ios.doi.gov]; deirdremg@voicesofvaluellc.com[deirdremg@voicesofvaluellc.com]; downey_magallanes@ios.doi.gov[downey_magallanes@ios.doi.gov]
From: Oliver, Kimiko
Sent: 2017-06-15T14:12:46-04:00
Importance: Normal
Subject: RPC - Updated List of Nominees
Received: 2017-06-15T14:13:29-04:00
Nominees Roster_06-15-17.pdf

Hi there and good afternoon:
I have attached the updated list of nominees for the Royalty Policy Committee.

Thank you,
Kim

--
Kim Oliver
Program Analyst
Office of Natural Resources Revenue
202/513-0370 office phone
Kimiko.Oliver@ONRR.gov

EX OFFICIO

FIRST NAME	LAST NAME	ORGANIZATION
Daniel	Jorjani	Office of the Solicitor
Katharine	MacGregor	Department of the Interior - Land Management Title: Principle Deputy Assistant Secretary
Laura "Renee"	Orr	Bureau of Ocean Energy Management Title: Strategic Resources Chief
Margaret	Schneider	Bureau of Safety and Environmental Enforcement Title: Deputy Director/Acting Director
Michael	Black	Department of the Interior - Indian Affairs Title: Acting Principle Deputy Assistant Secretary
Michael	Nedd	Bureau of Land Management Title: Acting Director
Richard	Cardinale	Department of the Interior - Land Management Title: Chief of Staff
Scott	Angelle	Bureau of Safety and Environmental Enforcement Title: Director
Timothy	Spisak	Bureau of Land Management Title: Senior Advisor
Vincent	Devito	Immediate Office of the Secretary Title: Counselor to the Secretary for Energy Policy
Walter	Cruickshank	Bureau of Ocean Energy Management Title: Deputy Director/Acting Director
Weldon "Bruce"	Loudermilk	Bureau of Indian Affairs Title: Director
Jerold	Gidner	Office of Natural Resources Revenue Title: Senior Policy Advisor
John	Mehlhoff	Office of Natural Resources Revenue Title: Program Director

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Matthew	McQueen	Representative - New Mexico	William T. Pound Executive Director National Conference of State Legislatures
Hans	Hunt	Representative - Wyoming	William T. Pound Executive Director National Conference of State Legislatures
Mark	Edwards	Legislative Council Service - New Mexico Title: Bill Drafter	William T. Pound Executive Director National Conference of State Legislatures
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Jayni	Hein	NYU School of Law	Richard L. Revesz Lawrence King Professor of Law and Dean Emeritus
Kwame	Awuah-Offei	Missouri University of Science and Technology, Mining Engineering	Braden Lusk PhD, P.E. Professor and Chair Mining and Nuclear Engineering
Graham	Davis	Professor of Mineral and Energy Economics Division of Economics and Business Colorado School of Mines	SELF
Van	Romero	New Mexico Institute of Mining and Technology	Congressman Steve Pearce New Mexico
Roderick	Eggert	Colorado School of Mines	SELF

NON-GOVERNMENT ORGANIZATIONS

FIRST NAME	LAST NAME	ORGANIZATION	NOMINATED BY
Monte	Mills	University of Montana School of Law	Governor Bullock

To: Daniel Jorjani[daniel.jorjani@sol.doi.gov]; Kevin Haugrud[jack.haugrud@sol.doi.gov]
From: McKeown, Matthew
Sent: 2017-06-27T17:09:06-04:00
Importance: Normal
Subject: Fwd: Meeting between SUIT Leadership and James Cason
Received: 2017-06-27T20:48:32-04:00
20170606 Letter to Secretary Zinke.pdf

Hi Guys: [redacted] *(b)(5)*

[redacted] *(b)(5)*

Matt McKeown
Regional Solicitor
Rocky Mountain Region
Office of the Solicitor
U.S. Department of the Interior
755 Parfet St., Suite 151
Lakewood, CO 80215
New Direct Line: 303-445-0625

---------- Forwarded message ----------
From: **Wenger, Lance** <lance.wenger@sol.doi.gov>
Date: Tue, Jun 27, 2017 at 2:43 PM
Subject: Re: Meeting between SUIT Leadership and James Cason
To: Eric Shepard <eric.shepard@sol.doi.gov>
Cc: "McKeown, Matthew" <matthew.mckeown@sol.doi.gov>, "Simpson, Stephen" <stephen.simpson@sol.doi.gov>, Danielle Dimauro <danielle.dimauro@sol.doi.gov>, "Blackstone, Evan" <evan.blackstone@sol.doi.gov>, Rachel Kent <rachel.kent@sol.doi.gov>

No objection from me either.

On Tue, Jun 27, 2017 at 2:39 PM, Eric Shepard <eric.shepard@sol.doi.gov> wrote:

> That would be great. No objection here.

Sent from my iPhone

On Jun 27, 2017, at 4:36 PM, McKeown, Matthew <matthew.mckeown@sol.doi.gov> wrote:

Hi All: [redacted] (b)(5)

[redacted] (b)(5)

Matt McKeown
Regional Solicitor
Rocky Mountain Region
Office of the Solicitor
U.S. Department of the Interior
755 Parfet St., Suite 151
Lakewood, CO 80215
New Direct Line: 303-445-0625

On Tue, Jun 27, 2017 at 2:23 PM, Simpson, Stephen <stephen.simpson@sol.doi.gov> wrote:

> Thanks, Lance. The onbly thing that I would add to Evan's excellent summary is that, following the receipt of the attached letter, on June 15, Sam Maynes, one of the Tribe's lawyers, gave us comments on the meeting notes that repeated the mischaracterization of the SOL comments from the meeting. I responded that we had not said that, but had encouraged cooperating agency status. The text of my response was as follows:
>
> > Sam, I cannot agree with your edits (this also goes to the letter to the Secretary about this issue). While we did note that the CEQ regulations and the Departmental regulations say that (1) a lead agency is a Federal or State agncy (assuming that the State agency has its own "mini-'NEPA process that it must fulfill); (2) unlike an EA, an "applicant" (in this case, the Tribe) cannot prepare an EIS or direct the contractor preparing the EIS); and (3) the Tribe cannot 638 the preparation of the EIS for the same reason that it cannot prepare it, we also extensively discussed the role that the Tribe could play if it chooses to do so. The Tribe certainly has jurisdiction by law over, and special expertise in, the subject matter of the EIS. It therefore could be a cooperating agency under 40 CFR 1501.6 and 1508.5 and 43 CFR 46.225 and 46.230. As noted in the Departmental regulations, a cooperating agency "may, by agreement with the lead bureau, help to do the following:
> >
> > (a) Identify issues to be addressed;

(b) Arrange for the collection and/or assembly of necessary resource, environmental, social, economic, and institutional data;

(c) Analyze data;

(d) Develop alternatives;

(e) Evaluate alternatives and estimate the effects of implementing each alternative; and

(f) Carry out any other task necessary for the development of the environmental analysis and documentation. "

Such functions are far more than "funding." As discussed at the meeting, we are developing a draft MOU, on which we will soon request comments from the Tribe, that will lay out this relationship. I hope that this helps to refresh recollection of this meeting. Both the Solicitor's Office and the BIA sincerely hope that the Tribe will agree to work with us to prepare the EIS in this very important role.

I have not received any response or other communication since that date from the Tribe or its counsel.

Stephen L. Simpson

Division of Indian Affairs

Office of the Solicitor

202-219-1659

202-805-4117 (cell)

202-219-1791 (fax)

Stephen.Simpson@sol.doi.gov

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On Tue, Jun 27, 2017 at 3:05 PM, Wenger, Lance <lance.wenger@sol.doi.gov> wrote:

Eric and Stephen,

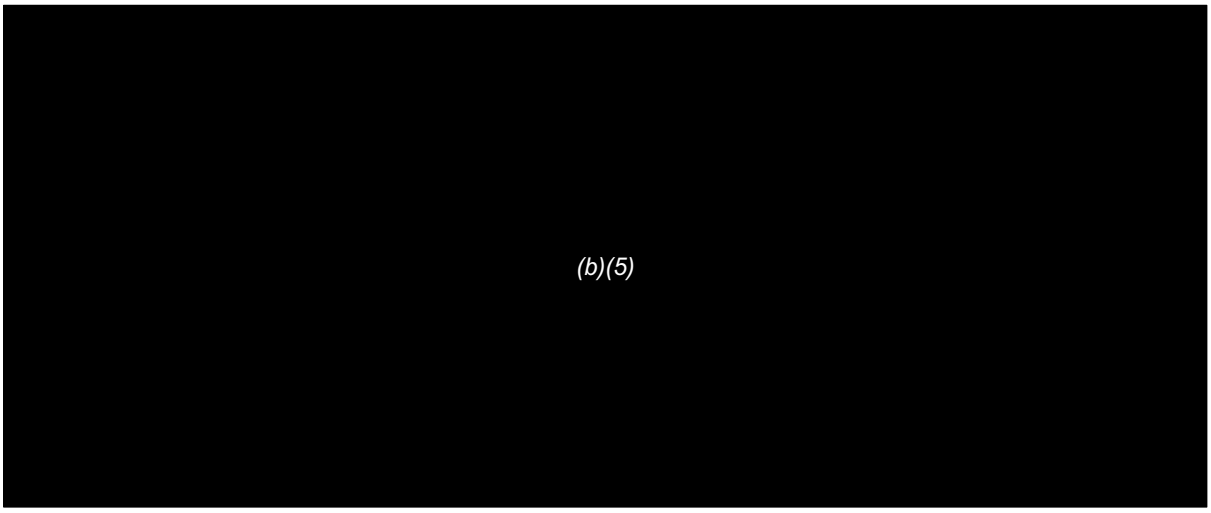
You may already know about this, but just in case, below is an e-mail describing a meeting which will occur tomorrow between Jim Cason and leadership (including counsel) for the Southern Ute Indian Tribe regarding a NEPA process for allowing additional oil and gas development on the Tribe's reservation and the attached letter sent by the Tribe to the Secretary. Please especially note the last paragraph of this e-mail, which describes how the letter mischaracterizes the position communicated by the Solicitor's Office.

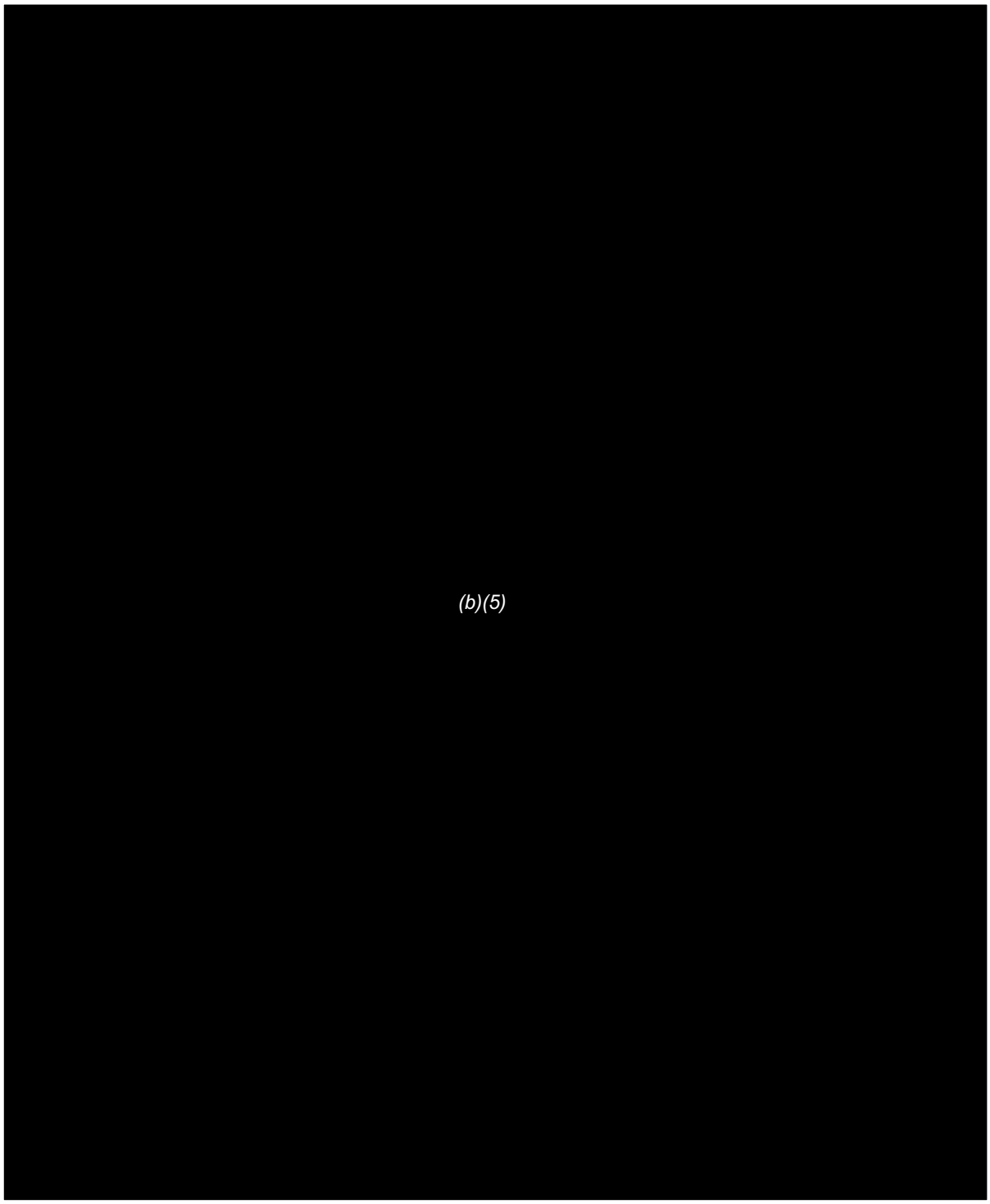
Please let us know whether you would like additional information before the meeting. Thanks.

---------- Forwarded message ----------
From: **Blackstone, Evan** <evan.blackstone@sol.doi.gov>
Date: Tue, Jun 27, 2017 at 12:40 PM
Subject: Meeting between SUIT Leadership and James Cason
To: Lance Wenger <Lance.Wenger@sol.doi.gov>

Lance,

I just found out from BIA SWRO Deputy RD Greg Mehojah that a meeting is set tomorrow between James Cason and leadership of the Southern Ute Indian Tribe. I also think that SUIT's attorney, Thomas Shipps, will be present. The Tribe's Chairman sent a letter on June 6, 2017 to Secretary Zinke that outlines certain concerns SUIT has related to the NEPA review of shale development that the Tribe wants to undertake on its Reservation. I've attached that letter here.





Please let me know if you have any questions or need additional info.

Thanks,
Evan

Evan Blackstone, Attorney-Adviser

Office of the Solicitor, Southwest Region
U.S. Department of the Interior
505 Marquette Ave. NW, Ste. 1800
Albuquerque, New Mexico 87102
Telephone: 505.248.5606
Telefax: 505.248.5623

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--
Lance Wenger
Regional Solicitor - Southwest Region
Office of the Solicitor
U.S. Department of the Interior
(505) 248-5613

--
Lance Wenger
Regional Solicitor - Southwest Region
Office of the Solicitor
U.S. Department of the Interior
(505) 248-5613

SOUTHERN UTE INDIAN TRIBE

June 6, 2017

The Hon. Ryan Zinke,
Secretary
U.S. Department of the Interior
1849 C Street N.W.
Washington, D.C. 20240

Re: Urgent Request for Assistance

Dear Secretary Zinke:

The Southern Ute Indian Tribe is recognized for its record of prudent and successful development of its natural gas resources. The Tribe's accomplishments have often been achieved despite archaic statutory and regulatory structures and dysfunctional bureaucratic institutions. For many years, the Tribe's leaders have presented Congress and the Department of the Interior (the Department) with constructive suggestions for improving the Department's management of Indian lands and energy resources by stressing tribal empowerment.

In recent weeks, a long-standing and burdensome federal process has become more so to the point of severely diminishing, if not eliminating, our ability to protect our mineral resources and develop our resources in a timely, responsible, and profitable way. I am writing to bring this matter to your attention and to respectfully request your assistance in fixing the problem.

As you know, the environmental review process under the National Environmental Policy Act (NEPA) with which federal agencies must comply is particularly onerous when applied to proposed federal actions affecting tribal lands. With few exceptions, Indian tribes may not make decisions that affect their lands and livelihoods without Secretarial approval (usually either through the Bureau of Indian Affairs (BIA) or the Bureau of Land Management (BLM).

So for instance, Secretarial review and approval of a mineral lease triggers NEPA compliance. The time needed for the Department to comply with NEPA, however, often leads to extraordinary delays in the approval of mineral leases and agreements. Additionally, the costs of compliance are exorbitant, exceeding available agency funding. Consequently, we and other energy tribes are at a competitive disadvantage in using our mineral resources to build and sustain viable reservation economies and to provide programs and services to our members.

The expense and delay imposed upon our Tribe due to federal NEPA compliance requirements is staggering and impedes economic development on our lands.
In 1995, in cooperation with the BIA and BLM, the Tribe undertook preparation of an environmental impact statement for conventional natural gas and coalbed methane gas

development on the western two-thirds of the Southern Ute Indian Reservation (Reservation). The study took seven years to complete (BLM Record of Decision issued in 2002), at a cost to the Tribe of approximately $2 million.

In 2007, the Tribe, BIA, and BLM, undertook preparation of a programmatic environmental assessment, studying an increase in well density within the previously studied area. The programmatic environmental assessment took two years to complete (completed in 2009) at a cost to the Tribe of approximately $635,000. The collaborative role of the Tribe in facilitating NEPA compliance for the BIA and BLM related to tribal oil and gas resources was also memorialized in a Memorandum of Understanding among the Tribe, the BIA and the BLM dated January 17, 2007 ("2007 MOU").

In accordance with the 2007 MOU, the Tribe initiated the process with the BIA and BLM to complete NEPA review for possible future leasing and development of oil and gas from shales that are located throughout the Southern Ute Indian Reservation. Completion of the NEPA process seemed prudent to the Tribe since the Reservation is a checkerboard of mineral ownership and future wells on non-Indian mineral lands could potentially drain the Tribe's oil and gas resources.

After over three years of work by a qualified contractor approved by the Tribe, BIA and BLM, and after the Tribe had spent an additional $750,000 for the contractor to prepare a draft supplemental environmental impact statement ("SEIS"), approximately ten weeks ago, the BLM abruptly stated it no longer felt an SEIS was procedurally adequate under NEPA. Rather, the BLM maintained that *an entirely new programmatic EIS* was the proper procedural vehicle for obtaining NEPA compliance. Furthermore, even though it was a co-lead agency in the 2002 and 2009 environmental studies and is the agency charged with subsurface regulatory responsibility on leased Indian lands, the BLM simply withdrew from its role as lead agency, handing the role to the BIA.

Making the situation even worse, last week, the Department of the Interior – Office of the Solicitor notified us that the Tribe could no longer be involved in any environmental impact statement processes, except for paying the contractor. To ensure contractor independence, we were told, the federal agencies must handle all communications with the contractor, and, with no assistance from the Tribe, the federal agencies must consider and prepare responses to all public comments. Frustratingly, this position conflicts with the 2007 MOU under which the parties agreed the Tribe could fund necessary Reservation environmental studies and serve as an administrative coordinator to drive forward the studies' preparations. But now, according to the Office of the Solicitor, no one with a financial interest in the outcome of an environmental impact statement can be involved in an EIS's development. In the Solicitor's view, because our Tribe is the proponent of the proposed action, we have a conflict of interest and cannot participate in preparation of the NEPA evaluation of shale resource development regardless of whether an SEIS or an EIS is the appropriate document.

This turn of events with the draft SEIS makes clear that our Tribe's ability to develop our own resources is almost entirely at the mercy of the understaffed and underfunded BIA and BLM. With the specter looming of an approximately thirty-percent cut in the Department's

budget, it is even more likely that neither the BIA nor BLM will be able to complete the environmental studies required to approve tribal-authorized mineral development actions in a timely manner. Under NEPA, public comment periods and citizen appeals can lead to interminable delays. While NEPA is intended to simply ensure that the federal government considers the environmental consequences of its actions, delayed implementation of tribal-approved actions can have devastating effects. Often the burden of NEPA compliance erases meaningful economic opportunities because comparable opportunities involving the use of neighboring non-Indian land do not include the delays and uncertain outcomes resulting from NEPA.

For a tribe like ours, with a sterling track record for prudent and environmentally-sensitive oil and gas development, this arrangement is unacceptable. Our tribal lands are not public lands and our tribal government decisions regarding our tribal lands should take precedence. NEPA subjects our tribal land use decisions – which cannot be implemented without federal involvement – to broad public comment, extortionate consultant fees, interminable delay, and potential litigation. We are urgently appealing to you for assistance in changing this paternalistic and unfair system. While the ultimate avenues for such change may be legislative, we believe that you, as Secretary, have the authority to intervene so that the longstanding NEPA review of shale development on our lands can be completed. Because the application of NEPA to our tribal land use decisions in this manner threatens to stymie our development efforts, we respectfully request your immediate assistance in fixing this problem.

If you or your staff has questions about this letter, please contact our general counsel, Thomas H. Shipps, at (970) 247-1755 or tshipps@mbssllp.com, or our Legal Department Director, Lorelyn Hall, at (970) 563-2140 or lhall@southernute-nsn.gov. We will contact your office shortly hoping to schedule a meeting to discuss this matter and possible ways for fixing it.

Sincerely,

Clement J. Frost

Clement J. Frost, Chairman
Southern Ute Indian Tribe

cc: Senator Michael Bennett
Senator Cory Gardner
Representative Scott Tipton
John Hoeven, Chairman, Senate Committee on Indian Affairs
Tom Udall, Vice Chairman, Senate Committee on Indian Affairs
Rob Bishop, Chairman House Committee on Natural Resources
Raul Grijalva, Ranking Member, House Committee on Natural Resources
Doug La Malfa, Chairman, House Subcommittee on Indian, Insular and Alaska Native Affairs
Michael D. Nedd, Acting Director, Bureau of Land Management

Ruth Welch, Colorado State Director, BLM
Michael Black, Acting Assistant Secretary – Indian Affairs
William Walker, Southwest Regional Director, BIA
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Sent: 2017-08-06T20:27:47-04:00
Importance: Normal
Subject: Cert. Petition - CH for Dusky Gopher Frog
Received: 2017-08-06T20:28:48-04:00
APPELLATE-#355251-v1-Markle_-_Petition_for_cert__of_Markle_Interests.PDF
APPELLATE-#355213-v1-Markle_-_Weyerhaueser_s_cert__petition.PDF
Goverment's Opposition to Petition for Cert. - Markle Investments.docx

Attached are two Petitions for *Cert*. and the Government's Response in Opposition in consolidated cases addressing the critical habitat designation for the Dusky Gopher Frog.

As framed by one Petitioners, the issues are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.
2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

The second Petitioner identifies the issues as:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

The issues have been difficult for the courts to resolve: The district court very reluctantly ruled in favor of the Service; on appeal, Fifth Circuit panel ruled for the Service 2-1, with a strong dissent; on rehearing *en banc,* the Service won by the narrowest of margins, 8-6.

The case may be a topic during your weekly call with DOJ.

Note that DOJ is looking for comments on their Opposition Brief by COB Tuesday.

Rick

--
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No.

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceedings Below ii
Corporate Disclosure Statement ii
Opinions Below.....1
Jurisdiction.....1
Statutes and Regulations Involved 1
Statement 2
A. The Statutory And Regulatory Scheme.....5
B. The ESA's Critical Habitat Provisions 6
C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog 9
D. The District Court Decision 12
E. The Fifth Circuit's Divided Panel Decision And En Banc Vote 13
Reasons For Granting The Petition.....14
I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.....14
A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat. 15
B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit. 24
II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance. 26
A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.....26

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review. 30

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law" 31

Conclusion 33

Appendix A — Opinion of the court of appeals (June 30, 2016) 1a

Appendix B — Opinion of the district court (Aug. 22, 2014) 78a

Appendix C — Order denying rehearing en banc (Feb. 13, 2017) 123a

Appendix D — Statutes Involved 163a

Appendix E — Regulations Involved 166a

TABLE OF AUTHORITIES

Page(s)

Cases

All. for Wild Rockies v. *Lyder*,
728 F.Supp.2d 1126 (D. Mont. 2010).....25

Am. Forest Res. Council v. *Ashe*,
946 F. Supp. 2d 1 (D.D.C. 2013), *aff'd*,
601 F. App'x 1 (D.C. Cir. 2015).....25

Arizona Cattle Growers' Ass'n v. *Salazar*,
606 F.3d 1160 (9th Cir. 2010).....4, 24

Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*,
515 U.S. 687 (1995).....6, 20

Bennett v. *Spear*,
520 U.S. 154 (1997).....5, 6, 14, 32, 33

Cape Hatteras Access Pres. All. v. *U.S. Dep't of Interior*,
344 F.Supp.2d 108 (D.D.C. 2004).....25

Chevron, U.S.A., Inc. v. *N.R.D.C.*,
467 U.S. 837 (1984).....18

Clark v. *Martinez*,
543 U.S. 371 (2005).....21

Ctr. for Biological Diversity v. *Kelly*,
93 F.Supp.3d 1193 (D. Idaho 2015).....25

Esquivel-Quintana v. *Sessions*,
137 S. Ct. 1562 (2017) 18

Home Builders Ass'n of N. Cal. v. *U.S. Fish & Wildlife Services*,
616 F.3d 983 (9th Cir. 2010) 24

Mach Mining, LLC v. *EEOC*,
135 S. Ct. 1645 (2015) 32

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 32, 33

Nat'l Ass'n of Home Builders v. *Babbitt*,
130 F.3d 1041 (D.C. Cir. 1997) 22

Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*,
551 U.S. 644 (2007) 6, 18

Nat'l Fed. of Indep. Business v. *Sebelius*,
567 U.S. 519 (2012) 22

Rapanos v. *United States*,
547 U.S. 715 (2006) 4, 22, 23

Solid Waste Agency of N. Cook Cty. v. *Army Corps*,
531 U.S. 159 (2001) 5, 21, 22, 23

Tenn. Valley Auth. v. *Hill*,
437 U.S. 153 (1978) 6, 7

Util. Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014) 20

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

Statutes, Rules, and Regulations

15 U.S.C. § 1536(a)(2) 18

16 U.S.C.
§ 1531 1
§ 1531(c)(2) 23
§ 1532(5)(A) 7, 17
§ 1532(5)(A)(i) 17
§ 1532(5)(A)(ii) 3, 8
§ 1532(5)(C) 7, 19
§ 1532(6) 20
§ 1533(a) 5, 15
§ 1533(a)(1)(A) 20
§ 1533(a)(3)(A) 7
§ 1533(a)(3)(A)(i) 3, 15
§ 1533(b)(2) 11, 32
§ 1533(b)(5)(A)(ii) 20
§ 1533(c)(1) 19, 20
§ 1534 20
§ 1535(c)(1)(A)-(E) 20
§ 1535(d)(1)(C) 20
§ 1536(a)(2) 5, 19
§ 1536(a)(3) 6
§ 1536(b)(3) 6
§ 1536(b)(4) 6

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1344 6

50 C.F.R.
§ 424.12 (2011) 2, 30
§ 424.12(b) (2012) 8
§ 424.12(e) 8

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

62 Fed. Reg. 39129 (July 22, 1997).....28

68 Fed. Reg. 46684 (Aug. 6, 2003) 28

75 Fed. Reg. 31387 (June 3, 2010).....10

76 Fed. Reg. 59774 (Sept. 27, 2011) 10, 20

77 Fed. Reg. 35118 (June 12, 2012)..... *passim*

81 Fed. Reg. 7414 (Feb.11, 2016).....8, 30, 31

Miscellaneous

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) 16, 19

Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961 (2015).....29

BLACK'S LAW DICTIONARY (5th ed. 1979) 17

Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013).....33

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17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1 (2016).....6

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OXFORD ENGLISH DICTIONARY (2d ed. 1989).....19

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987).....16, 18, 19

St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).....11

S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980 (COMM. PRINT 1982).....8, 21

Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE (10th ed. 2013).....16

Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678 (2013) 26

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) 16, 18

Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67 (2006).....28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

---

[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra.* Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

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[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20*.

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity–of–Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

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nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

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

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

> fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

* * *

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill,* 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.,* 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club,* 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.,* 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson,* 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear,* 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor,* 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler,* 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA,* 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft,* 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA,*—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour,* 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior,* 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA,* 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson,* 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York,* 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.,* 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin,* 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar,* 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior,* 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton,* 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez,* 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez,* which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States,* 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF,* 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez,* 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service,* 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar,* 606 F.3d 1160 (2010), *cert. denied,* 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne,* 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.,* 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.,* 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White,* 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436–39 (10th

[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall,* 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant
v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

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ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

tionate costs that are likely to result from the designation." *Id*. at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

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For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id. See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non–Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

17-01174_017197;17-01174_017197;17-01174_017198;17-01174_017199;17-01174_017200;17-01174_017201;1...

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
LIST OF ALL PARTIES ii
CORPORATE DISCLOSURE STATEMENT ii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1
INTRODUCTION 4
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE PETITION 18

I This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act 18

II This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat 24

TABLE OF CONTENTS - Continued

Page

III This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear* 29

IV This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species 32

CONCLUSION..... 40

APPENDIX A – Panel Opinion of U.S. Court of Appeals, Fifth Circuit, and Dissent, 827 F.3d 452 (5th Cir. 2016) (June 30, 2016) A-1

APPENDIX B - Opinion of U.S. District Court, Eastern District of Louisiana, 40 F. Supp. 3d 744 (Aug. 22, 2014)..... B-1

APPENDIX C – Order of U.S. Court of Appeals, Fifth Circuit Denying En Banc Review, and Dissent from Denial, 848 F.3d 635 (5th Cir. 2016) (Feb. 13, 2017) C-1

TABLE OF CONTENTS - Continued

Page

APPENDIX D – Complaint for Declaratory and Injunctive Relief, filed in U.S. District Court, Eastern District of Louisiana (Feb. 7, 2013) D-1

APPENDIX E – Excerpts from Mar. 12, 2012, Public Comment on Behalf of P&F Lumber, Etc. E-1

APPENDIX F – Excerpts from Nov. 23, 2011, Public Comment on Behalf of P&F Lumber, Etc. F-1

TABLE OF AUTHORITIES

Page

CASES

Alabama-Tombigbee Rivers Coal. v. Kempthorne,
477 F.3d 1250 (11th Cir. 2007) 36

All. for Wild Rockies v. Lyder,
728 F. Supp. 2d 1126 (D. Mont. 2010) 27

Am. Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 27-28

Arizona Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 27

Bennett v. Spear, 540 U.S. 154 (1997)..... 5, 29-32, 40

Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 12, 28

Ctr. for Biological Diversity v. Kelly,
93 F. Supp. 3d 1193 (D. Idaho 2015) 27

Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 37

GDF Realty Invs. v. Norton,
326 F.3d 622 (5th Cir. 2003) 36

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 36

Home Builders Ass'n of N. California v. United States Fish and Wildlife Service,
616 F.3d 983 (9th Cir. 2010) 27

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 20

TABLE OF AUTHORITIES - Continued

Page

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 21, 22

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
40 F. Supp. 3d 744 (E.D. La. 2014)..... 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
827 F.3d 452 (5th Cir. 2016) 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
848 F.3d 635 (5th Cir. 2016) 1

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 22

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins., 463 U.S. 29 (1983) 32

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997) 36

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 38

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,
469 U.S. 189 (1985) 21

Pittston Coal Grp. v. Sebben,
488 U.S. 105 (1988) 22

Rancho Viejo, LLC v. Norton,
323 F.3d 1062 (D.C. Cir. 2003) 36

TABLE OF AUTHORITIES - Continued

Page

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) 36

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 37-40

United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) 20, 21

United States v. Bass, 404 U.S. 336 (1971)..... 39

United States v. Lopez, 514 U.S. 549 (1995) 38

United States v. Morrison, 529 U.S. 528 (2000) 37

FEDERAL STATUTES

16 U.S.C. § 1532(5)(A)(i)–(ii) 2, 19

§ 1532(5)(A)(ii) 22

§ 1533(a)(3)(A)(i)–(ii) 3, 20, 22

§ 1533(b)(2) 3, 11, 30

§ 1536(a)(2) 12

U.S. CONSTITUTION

U.S. Const., amend. X..... 2

U.S. Const., art. I, § 8, cl. 3..... 2

RULE OF COURT

Sup. Ct. Rule 13.3 1

TABLE OF AUTHORITIES - Continued

Page

FEDERAL REGULATIONS

50 C.F.R. § 402.01(a)..... 21
§ 424.12(b) 8
66 Fed. Reg. 62993 (Dec. 4, 2001) 5
75 Fed. Reg. 31389 (June 3, 2010) 6
75 Fed. Reg. 39396 (July 8, 2010) 13
76 Fed. Reg. 59774 (Sept. 27, 2011) 7
77 Fed. Reg. 35118 (June 12, 2012) 8
81 Fed. Reg. 7414 (Feb. 11, 2016) 35

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2014) 19
Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) 11, 12, 13
Index Map, Critical Habitat for the Dusky Gopher Frog 10
The Random House Dictionary of the English Language (1969) 18
Webster's Third New International Dictionary (1961)..... 18

PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

> The term "critical habitat" for a threatened or endangered species means:
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

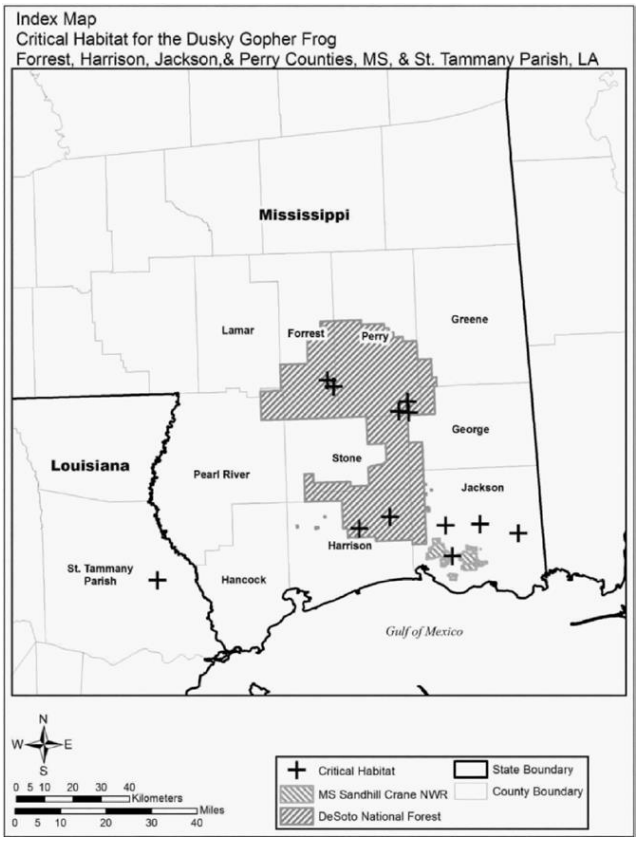
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

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

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

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

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

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

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id*. at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id*. at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id*. at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id*. at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*. In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id*. Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id*.

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id*., Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id.* On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id*. § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id*. Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id*. (citing *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

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

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id*. at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id*. Unit 1 does not contain the upland features necessary for the frog's survival. *Id*.

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id*. at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id*. at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

> species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any

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

16 U.S.C. § 1533(b)(2) (emphasis added).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

has not been for more than fifty years." *Id*. at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id*. at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id*. at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id*. at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id*. at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id*. at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id*. Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id*. Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id*. In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id*.

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id*. at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id*. at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id*. *See United States v. Morrison*, 529 U.S. 598, 613

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id*. at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

DATED: July 2017.

Respectfully submitted,

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Appendix A-1

United States of Appeals
Fifth Circuit
FILED
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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix A-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private

property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open canopied pine forests.[2] They migrate to isolated,

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[1] *Se* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi go*e*pher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you

ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531– 1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review

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hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the

designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross- motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen- suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory

explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly defines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437

U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III

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[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing. [9]*See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development— is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that

"considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so

speculative fear" that the government would imminently target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen

immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court— that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of- interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone- of-interests test. We thus conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical-Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131

determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical- habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding

that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mississippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts

agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35,124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35,133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1

provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35,124.

Finally, in addition to ephemeral ponds, dusky gopher frogs alsorequire upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35,131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35,134. This value, which was based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

> Altogether, the Service concluded:
> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports

> metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's determination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that, when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that

the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument.

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra* note 20

There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F. Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not

demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habitat if these areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The statute defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation

goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii),

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

(b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into

> arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in effect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider

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account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective

designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any more "necessary" to a

given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental- take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

conservation of the dusky gopher frog.[19]

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the

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[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field essential for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C.

situation here, and the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

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§ 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that in this case, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. See, e.g., Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them.

Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." See 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat designation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . . ." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We

thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical

> habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical- habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, at *7–8 (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which

is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05- 0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit 1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832)). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the

conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in Michigan, the ESA explicitly mandates "consideration" of "economic impact."16 U.S.C.§ 1533(b)(2); see Bennett, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. See Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number

of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. See Bldg. Indus. Ass'n of Bay Area, 2015 WL 4080761, at *5–6. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the

critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is intrastate (not interstate) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." Markle Interests, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." Id.

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third Lopez prong. See United States v. Morrison, 529 U.S. 598, 609– 12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." Id. at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to

instances that "have an explicit connection with or effect on interstate commerce." Id. at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. Id. at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. Id. The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in Morrison. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the "take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff–developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species)

in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. See GDF Realty, 326

F.3d at 639 ("ESA's protection of endangered species is economic in nature."); id. at 640 ("ESA is an economic regulatory scheme . . . ."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. See id. § 1538(a)(1)(E)–(F); GDF Realty, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical- habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic activity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress

has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 214 F.3d

483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C.§ 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habitat—one that the Service has already found to be essential for the conservation of the species—to escape designation

would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted))

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the

regulation of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical- habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical- habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177– 78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect[ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will

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(1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in nature, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under

NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of- interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact- statement requirement

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district Court

PRISCILLA R. OWEN, Circuit Judge, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species" [1]because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3]to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] Id.

[3] Id.

play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one

feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A)

[6] 77 Fed. Reg. at 35,118

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the

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[10] *Id.* at 35,133

[11] *Id.* at 35,135

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . . . However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.")

[13] *Id.* (noting "we hope to work with the landowners").

habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then replaced with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

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[14] *Id.* at 35,129.

[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171-75 (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the endangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example,

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[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

[21] *Ante* at 19.

sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species. [22]The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" To the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24] In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C.§ 203(a) required long-distance communications common carriers to file tariffs with the Federal

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[22] *Bear Valley*, 790 F.3d at 994.

[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long- distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[31] The same can be said of the Service's, and the majority opinions, construction of the Endangered Species Act in the present case. It may be a good idea to

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[25] *Id*. at 220

[26] *Id*. at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id*. at 220.

[28] *Id*. at 228.

[29] *Id*. at 229-31.

[30] *Id*. at 231.

[31] *Id*. at 231-32.

permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation goes beyond the meaning that the statute can bear.[32] That court was fully cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges. This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI*

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[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[34] Sw. Bell Corp., 43 F.3d at 1521 (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)).

[35] Id.

[36] *Id.;* see also id. ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

Telecommunications Corp. is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of."[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the

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[37] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will

be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[s] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not *when the species will be conserved*, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation. The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species. [42]The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

[42]*See* ante at 22

to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species"

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[43] Id.

requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habitat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists

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[44] *See ante* at 22 n.17; 24 n.18.

[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24

and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that uninhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the

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[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant

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[51] *Ante* at 24-25.

[physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat,

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[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] See also ante at 20

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

[56] *See ante* at 25 n.19.

[57] *Id.*

the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[] that virtually *any* part of the United States could be designated as 'critical habitat' for any given

> endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging

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[58] *Id.* (citation omitted).
[59] *Id.*

that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that

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[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[61] *Id.*

are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

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[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id*. (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population)

[64] Ante at 13-14 (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)).

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation of the species" is therefore not supported by substantial evidence, and the

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[65] See 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . . .").

designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However, the Service found that Unit 1 has only one of the three

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[66] 77 Fed. Reg. at 35,131.

[67] Id.

[68] *Id.*

[69] *Id.*

primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed- canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The Service

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.; see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded:

> Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover;

found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact

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(3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] Id. at 35,140.

depended on the extent to which it might be developed,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The Service

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[77] *Id*.

[78] *Id*.

[79] *Id*.

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id*. at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no

reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results

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Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact

[84] *Id*. at 35,140-41:

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to

in development on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to

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section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

Appendix B-1

Filed
August 22, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	CIVIL ACTION
v.	NO. 13-234
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL 13-413	c/w 13-362 and (Pertains to all cases)
	SECTION "F"

ORDER AND REASONS

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross- motion.

Additionally before the Court are two motions to strike extra- record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases -- landowners and a lessee of a tree farm in Louisiana -- challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately-owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

Appendix B-3

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species ... to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16

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[1]Technically, administration responsibilities are divided between the Department of Interior and the Department of Commerce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine...."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. §, 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A)("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable ... (i) shall concurrently with making a [listing] determination ... designate any habitat of such species...."). Like its listing duty, FWS's habitat designation duty is mandatory;[2]the designation must

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[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001)("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'"). It is incumbent on the Secretary -- "to the maximum extent prudent and determinable" -- to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later designation. *See* 16 U.S.C. § 1532(a)(3)(B)("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established...."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii)(if "critical habitat of [listed] species is not ... determinable [at the time of listing], the Secretary ... may extend the one-year

be based on "the best scientific data available ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines ... that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Id.

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means–
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> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary

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period specified in paragraph (A) by not more than one additional year....") and 50 C.F.R. § 424.17(b)(2).

> that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical occupied habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3]50 C.F.R. § 424.12(b). FWS may designate as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat...." 16 U.S.C. § 1536(a)(2).[4] If

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival andrecovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442-43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and*

FWS or the consulting federal agency determines that a contemplated action "may affect ... critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (Rana Sevosa) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129 - 35131. They travel to small, isolated

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survival of a species imposes a higher threshold than the statutory language permits.")(emphasis in original).

[5] Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking

[7] Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Id. at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. Id. at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

species. FWS determined that the frog was endangered due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

historical breeding sites for the frog. Based on the comments, FWS re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana.[11] FWS identified additional critical habitat in Mississippi and Louisiana[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetica scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9

[11] FWS was not able to identify critical habitat in Alabama.

million").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

land in Unit 1 is owned by Weyerhaeuser Company, which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaueuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531, et seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-record

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for Supplementing, or challenging, the administrative record; no party requested to supplement the record.

evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions,

to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed.R.Civ.P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA -- in particular, a final rule designating critical habitat -- the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174-75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)(Courts must be particularly deferential to agency determinations

made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent

Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001)(citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985))("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February

8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County*, 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record; (2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA, U.S,* 133 S.Ct. 1138, 1146 (2013). "One element of the case-

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545
(5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See S*ummers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); see also *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)(citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[19]

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but

The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. V. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C.Cir. 2006)(an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as

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in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C.Cir. 2005)(firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation ... has immediately devalued the land within Unit 1 for commercial purposes by bringing increased ... regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they

in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117-18 (D.D.C. 2004)(business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

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submit that the designation "limits the usability and saleability of the property" to their detriment.

[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser ... periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce... among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. See *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008)(vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-Lopez Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. V. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. V. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend Lopez, which dealt with a

challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United State*s, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" GDF, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally

valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640-41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n. 9 (1984)("[T]he

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining

that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which

> likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on recovery of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat because Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

occupied habitat must contain all of the relevant PCEs. See 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide. Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere

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[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010)(rejecting argument that FWS must first identify the point at which the endangered species is considered

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008)("While tempting in its logical simplicity...the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), aff'd, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), cert. denied, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly rebutted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument -- to the extent it is reviewable (see *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010)(Service's decision not to

exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map…[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." Id. FWS "chose the value of 621 m...by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog…and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use...." Id. FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." Id. With respect to Unit 1, FWS explained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. Id. at 35123-25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. See *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010("Where an agency's particular technical expertise is

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa*, will be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List...to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants

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involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

acceptance as its own species...and the scientific name for the species was changed to *Rana sevosa."* 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30]And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama Tombigee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position...on the question and is supported by...peer review[,] and by the opinion of the Service's own experts.")

Wyerhaeuser, a co- owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why -- (assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies -- FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the

landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat ... on the basis of the best scientific data available and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. See 16 U.S.C. § 1533(b)(2)(the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)(citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D.Ariz. 2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations' economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens imposed by simply listing the frog) are treated as part of the regulatory baseline and are not

factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation... to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results

million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion -- its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered -- is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

these economic impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013)(*quoting Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. Id. To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

environment."

U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003)(NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed.

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities

Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436-39 (10th Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. Id. Unlike the critical habitat designation in that case -- where the environmental impact of the critical habitat designation "will be immediate and disastrous" -- the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. Douglas County v. Babbitt, 48 F.3d 1495, 1501-08 (9th Cir. 1995)(considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. Id. Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain

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such as timber management lack a federal nexus and are therefore exempt.

terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009)(setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

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Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 202 F. Supp. 2d 594, 646-48 (W.D.Tex. 2002) (citations omitted).

[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

New Orleans, Louisiana, August 22, 2014.

s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse -- contrary to the express terms and scope of the statute -- a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

Appendix C-1

United States Courts of Appeals
Fifth Circuit
FILED
February 13, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix C-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

Opinion June 30, 2016, 827 F.3d 452)

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

ENTERED FOR THE COURT:

S/ STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." See 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied)

Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the

> species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

> Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012.

Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii)

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plantations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical- habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and

benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." [1]*Id.* at 472 n.20. Finally, the panel majority held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

> The ESA states that the Service
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> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* … and ... may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical"

portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species ... and habitat of such species that has designated as critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant[.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the

species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical*.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This

predecessor provision, like the current consultation requirements, refers to the destruction or modification of "habitat of such species which is determined by the Secretary. . . to be critical."[3] From the very beginning, Congress rooted the concept of

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . . . I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . . . While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . . . In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

critical habitat in the relevant species' actual habitat.

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation. [4]As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be*

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

habitat. A diagram explains this statutory plan:

Figure 1: Under the ESA, a species critical habitat is necessarily a subset of the species habitat

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit decision. Neither of these objections should be persuasive. The first objection—that this textualist argument was waived—is easily disposed of. Throughout this

litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement exists,[5] but a reviewing court could not cite the same context and related regulations to say a

[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

habitability requirement does in fact exist. This objection is meritless

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. the Ninth Circuit appeared to assume that critical- habitat designation of those unoccupied, uninhabitable areas was the only means

of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally

live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)-(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by

chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features* . . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas*. . . [that] are essential for the

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose.[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conservation would be a more substantial

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions.[9] Mirroring the respective Houses' proposals, [10]Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied"

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat");

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional

purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of *unoccupied* critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to

the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious concern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species' occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally

limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical- habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472 n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity ofa Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to articulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances

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[12] *Markle Interests*, 827 F.3d at 471.

merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one

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[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no

would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C. § 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the

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support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent . . . .").

panel majority's one- feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

"unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non- Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical

> habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best

expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary." The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [] economic impact is not reviewable."*Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it— "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Cheney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the ESA's permissive language: "[t]he Secretary

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed,

and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard. The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

Appendix D-1

Filed
February 7, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO.

MARKLE INTERESTS, LLC,

Plaintiff,
v.

UNITED STATES FISH AND WILDLIFESERVICE, DANIEL M. ASHE, Director of United States Fish and Wildlife Service, in his official capacity; United States DEPARTMENT OF INTERIOR; and, KENNETH SALAZAR, Secretary of the Department of Interior, in his official capacity

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIE

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against Defendants for violating federal statutes and the U.S. Constitution. By final rule, dated June 12, 2012, 77 Fed. Reg. 35118, *et seq.*, Defendants, through the U.S. Fish and Wildlife

Service, designated critical habitat for the dusky gopher frog (previously Mississippi Gopher Frog) in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., in that the designation erroneously includes large areas of private land that do not contain the physical and biological features essential to the conservation of the species and the economic analysis is invalid for failing to properly consider the cumulative effects of the designation. Moreover, the designation was issued without the environmental review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*., and in excess of constitutional authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Defendants‟ actions are contrary to law and must be set aside.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (actions arising under the citizen suit provision of the Endangered Species Act); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

3. Plaintiff, Markle Interests, LLC (Markle), satisfied the notice requirement of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(2). More than 60 days ago, by letter dated September 27, 2012, Markle provided Defendants written notice of the violations that are the subject of this complaint in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as

Exhibit 1 and is incorporated herein by reference. Defendants have not responded to this notice or taken any action to withdraw the final rule at issue here, or to otherwise remedy their violations of law.

4. An actual, justiciable controversy now exists between Markle and Defendants. Relief is proper under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

5. The federal government has waived sovereign immunity in this action under 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

6. Markle has exhausted all administrative remedies.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in this district.

PARTIES

Plaintiff

8. Markle Interests, LLC, is a limited liability company that owns an undivided interest in forested property identified in the final rule as Unit 1 in St. Tammany Parish, Louisiana, and included as critical habitat for the dusky gopher frog. This designation imposes significant regulatory burdens on the property such that costly federal approval may be required for any activity deemed to affect the species, including adverse habitat modification. In addition to

these regulatory burdens, the destination of Unit 1 as critical habitat results in a drastic reduction in value and limits the usability and saleability of the property.

Defendants

9. Defendant United States Department of Interior (Department) is an agency of the United States. Congress has charged the Department with administering the Endangered Species Act for certain species, including the dusky gopher frog.

10. Defendant Kenneth Salazar is Secretary of the United States Department of Interior (Secretary). He oversees the Department‟s administration of the Endangered Species Act and is sued in his official capacity.

11. Defendant United States Fish and Wildlife Service (Service) is an agency of the United States Department of Interior. The Service has been delegated responsibility by the Secretary for day-to-day administration of the Endangered Species Act, including the designation of critical habitat.

12. Defendant Daniel M. Ashe is Director of the United States Fish and Wildlife Service. He oversees the Service‟s administration of the Endangered Species Act and is sued in his official capacity.

13. All of these Defendants are responsible for the violations alleged in this complaint.

LEGAL FRAMEWORK

Listing of Threatened or Endangered Species

14. Under Section 4 of the Endangered Species Act, Defendants must list a species as "threatened" or "endangered" based on certain factors relating to habitat, overutilization, disease or predation, existing regulatory mechanisms, or other factors. *See* 16 U.S.C. § 1532(20).

15. An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

16. Endangered species are specifically protected by Section 9 of the Endangered Species Act, which, among other things, makes it unlawful for any person to "take" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, hunt, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," and may include habitat modification. 16 U.S.C. § 1532(19)

Critical Habitat Designation

17. Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, Defendants must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

18. Critical habitat is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> ….
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

16 U.S.C. § 1532(5)(A)-(C).

19. "The statute thus differentiates between „occupied" and „unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Grower's Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

20. The term "conservation" means the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at

which the protections of the Act are no longer required. 16 U.S.C. § 1532(3).

21. The Secretary must

> [d]esignate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

Consultation

22. Private property designated as critical habitat is subject to federal regulation.

23. In consultation with the Secretary, federal agencies are required to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

24. Section 7 of the Endangered Species Act also requires a federal agency to consult with the

Secretary at the request of a permit applicant, if the applicant "has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

25. Under Section 7, the Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If it is determined that the project is likely to jeopardize the species" "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.*

26. If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action will not" jeopardize the species" continued existence or result in the destruction or adverse modification of critical habitat of such species, a written "incidental take statement" must be issued that (1) specifies the impact of such incidental taking on the species; (2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3), sets forth the terms and conditions with which the agency or applicant must comply to implement the specified measures. 16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv).

National Environmental Policy Act

27. The National Environmental Policy Act requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency‟s decision making. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

28. An environmental impact statement must include:

> (i) The environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man‟s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

29. The NEPA implementing regulations provide federal agencies with the opportunity to prepare an "environmental assessment" that either determines that an environmental impact statement is required or concludes with a "finding of no

significant impact," which terminates the agency's NEPA obligations. 40 C.F.R. § 1508.9.

Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act, a court must set aside agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D).

31. Section 704 of the Administrative Procedure Act states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

U. S. Constitution

32. Commerce Clause enactments, like the Endangered Species Act, are subject to the limits of that power. "The Constitution grants Congress the power to „*regulate* commerce." Art. 1, § 8, cl. 3. (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012).

FACTUAL ALLEGATIONS

Listing and Critical Habitat Designation

33. On December 4, 2001, the U.S. Fish and Wildlife Service listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*.

34. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq*.

35. Although critical habitat may only include those areas "essential to the conservation of the species," the Service made no finding as to the quantity or location of habitat necessary to conserve the gopher frog or identify "the point" at which the protections of the ESA are no longer required.

36. The critical habitat designation covers 6,477 acres in two states, including 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1. *Id.* at 35118.

37. Unit 1 is private land in which the Plaintiff, Markle, owns an undivided interest. *Id.* at 35134-35135.

38. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35134-35135.

39. Unit 1 is not suitable for gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. *Id.* at 35135.

40. Unit 1 cannot be made suitable for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site. *Id.* at 35129-35130.

41. Unit 1 landowners submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123.

42. The Service acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35126.

43. The Service did not show how Unit 1—which is unoccupied and unsuitable as habitat for the gopher frog—is essential to the conservation of the species.

Economic Impacts Analysis

44. In conjunction with the critical habitat designation, the Service completed an economic impacts analysis mandated by Section 4 of the Endangered Species Act. *See id.* at 35140-35141.

45. That analysis showed that designating Unit 1 as critical habitat could have an adverse impact on the landowners as high as $33.9 million. *See id.* at 35141.

46. On the record, the Service did not conduct a balancing analysis that weighed the economic impact on the landowners of Unit 1 against the benefit of including Unit 1 in the critical habitat designation.

47. Notwithstanding the fact that Unit 1 is unsuitable for gopher frog habitat, the Service concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

48. The Service relied on the "baseline approach" and did not consider the *quantitative* economic impacts of the critical habitat designation coextensively (or cumulatively) with the listing of the gopher frog as an endangered species. *Id.* at 35140-35142.

NEPA Compliance

49. The government admitted that it did not subject the critical habitat designation for the dusky gopher frog to review under the National Environmental Policy Act. *See id.* at 35144.

APA Compliance

50. The rule designating critical habitat for the dusky gopher frog, 77 Fed. Reg. 35118, *et seq.*, is the culmination of the Service‟s decision making and constitutes final agency action.

Constitutional Compliance

51. The Service made no finding that the designation of Unit 1 as critical habitat constitutes the regulation of existing commercial activity as the Constitution and U.S. Supreme Court precedent require. *See United States v. Lopez*, 514 U.S. 549 (1995).

INJUNCTIVE RELIEF ALLEGATIONS

52. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 51 as though fully set forth herein.

53. If an injunction does not issue enjoining Defendants from enforcing the critical habitat designation for the dusky gopher frog, Markle will be irreparably harmed.

54. Markle has no plain, speedy, and adequate remedy at law.

55. If not enjoined by this Court, Defendants will continue to enforce or rely on the critical habitat designations in derogation of Markle‟s rights.

56. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

57. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 as though fully set forth herein.

58. An actual and substantial controversy exists between Markle and Defendants as to their legal rights and duties with respect to the ESA, NEPA, the APA, and the U.S. Constitution in the designation of critical habitat for the dusky gopher frog.

59. This case is presently justiciable because Defendants‟ failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Markle. Markle has a vital interest in knowing whether the critical habitat designation, to which Markle is subject, is statutorily and constitutionally valid.

60. Declaratory relief is therefore appropriate to resolve this controversy.

CLAIMS FOR RELIEF

First Claim for Relief

Failure to Make Threshold Determination for Designating Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(e); Alternatively, APA, 5 U.S.C. § 706)

61. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 60 as though fully set forth herein.

62. The Endangered Species Act defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5). In turn, the Act defines "conservation" to mean the use of all methods and procedures necessary to bring a "threatened" or "endangered" species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3). The Act does not define "essential" but it is axiomatic that to determine what is "essential to the conservation of the species," the Service must first identify "the point" when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. However, those threshold determinations are entirely missing from the final rule.

63. The effect of the Service‟s failure to determine a viable population and minimum habitat

size is that the Service is logically incapable of ascertaining which areas are "essential to the conservation of the species" and whether the designation of any particular unoccupied area is required. *See* 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). In this case, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area. Without the foundational underpinning of a viable population, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

64. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); federal regulation, 50 C.F.R. § 424.12(e); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Second Claim for Relief

Failure to Apply Correct Standard to Determine Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); Alternatively, APA, 5 U.S.C. § 706)

65. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. The Secretary does not have unfettered discretion to designate unoccupied areas as critical

habitat. Such areas must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(ii). Logically, this would include areas that at least contain those physical and biological features that are themselves "essential to the conservation of the species." The Service has identified such features as Primary Constituent Elements (or PCEs). For the dusky gopher frog, there are three: (1) ephemeral wetland habitat; (2) upland forested nonbreeding habitat; and (3) upland connectivity habitat. *See* 77 Fed. Reg. 35131. The Service maintains that all of these PCEs are essential to the conservation of the species. However, the Service admits that Unit 1 does not contain all these PCEs. *See id.* at. 35135. In fact, Unit 1 contains none of the PCEs essential to the conservation of the species. Therefore, Unit 1 is currently not suitable habitat for the dusky gopher frog at all, let alone critical habitat.

67. Nevertheless, the Secretary included this unoccupied area in the designation. In effect, the Secretary designated Unit 1 as critical habitat on the premise that the area would be essential for the conservation of the species, if it ever did contain the requisite PCEs. *See id.* But it doesn"t now and likely never will. The private owners have no intent to convert their property to conservation purposes and, according to the Service, they can"t be compelled to do so.

68. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Third Claim for Relief
Inadequate Economic Analysis
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

69. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 68 as though fully set forth herein.

70. The Economic Analysis (EA) adopts the "baseline" approach whereby the Service only considers the *qualitative* impacts that occur "without critical habitat," such as those impacts caused by listing of the species, whereas the incremental impacts occurring "with critical habitat" are given a *quantitative* analysis. *See* 77 Fed. Reg. at 35140-35141. The result of this approach is that neither the Service nor the public are ever provided a meaningful cumulative economic impacts analysis. This "baseline" approach was rejected by the Tenth Circuit in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). According to the Tenth Circuit, the "baseline" approach is meaningless and inconsistent with the language of the Act and the intent of Congress. Therefore, that Circuit held the Economic Analysis must consider all of the impacts of critical habitat designation, including those impacts co-extensive with the listing. In other words, the EA must consider the cumulative impacts of the listing and the critical habitat designation together, not just the incremental impacts of the designation. (For a contrary view see *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir 2010).) In *Home Builders Association of Northern California v. Norton*, 293 F.

Supp. 2d 1 (D.D.C. 2002), the Service appears to have represented to the court that it would follow the *New Mexico Cattle Growers'* co-extensive approach in all future critical habitat designations. But it has not done so here.

71. Moreover, the EA failed to quantify economic and other impacts of the designation on oil and gas exploration, forestry, and those impacts resulting from conservation activities such as controlled burns.

72. By these acts or omissions Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fourth Claim for Relief
Failure to Exclude
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

73. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The Service acknowledged, as it must, that Unit 1 will only become suitable habitat if the land is managed to develop the requisite PCEs. *See* 77 Fed. Reg. 35135. The Service also acknowledged that Unit 1 is comprised entirely of private land, *id.* at 35134-35135, and that private landowners cannot be compelled to manage the land for recovery purposes, *id.* at 35126. In fact, because Unit 1 is unoccupied and used for timber harvesting and has the potential for

development of oil and gas exploration, that the Service valued at approximately $34 million, the private owners have no intent to convert their property to conservation purposes. Not only do these facts compel a finding that Unit 1 is not "essential for the conservation of the species," but they also compel a finding that the benefits of exclusion outweigh the benefits of inclusion under Section 4(b)(2) of the Act. The Service‟s unsupported conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," 77 Fed. Reg. 35141, is arbitrary and irrational. *See Natural Resources Defense Council v. U.S. Department of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) ("Essentially, we must ask „whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.‟" (citation omitted)).

75. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fifth Claim for Relief
Failure to Conduct NEPA Review
(Violation of NEPA, 42 U.S.C. § 4321, *et seq.*;
Alternatively, APA, 5 U.S.C. § 706)

76. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. In its final rule designating critical habitat for the dusky gopher frog, the Service stated

categorically that the National Environmental Policy Act does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35121. But the better argument is to the contrary.

78. Neither the Endangered Species Act nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Preservation Alliance v. U. S. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), have held that critical habitat designations are subject to review under NEPA. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit parted ways with the Tenth Circuit and held that NEPA review was not required for critical habitat designations where there is no physical change to the environment. However, this case is different.

79. Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for human interference with the environment through management of the habitat by, among other things, regular controlled burns. Frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog"s aquatic and terrestrial habitat. *See* 77 Fed. Reg. 35129-35130. These burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and habitat for other species. But the critical habitat designation does not discuss these effects. That can only be done

through the NEPA review process. Therefore, notwithstanding the Ninth Circuit decision, and in accordance with the Tenth Circuit decision, NEPA review should have been undertaken here.

80. By these acts or omissions Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.*; and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Sixth Claim for Relief
U.S. Constitutional Violation
(Commerce Clause, Article 1, Section 8, Clause 3, and APA, 5 U.S.C. § 706)

81. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. The Service cites a long list of cases that have upheld the agency‟s authority to regulate intrastate, noncommercial species under the commerce power. *See* 77 Fed. Reg. at 35120. However, those cases do not address whether the agency has authority under the Commerce Clause to regulate private land that has no connection to the protected species other than through the critical habitat designation itself. The designation of Unit 1 as critical habitat for the dusky gopher frog is contrary to U.S. Supreme Court precedent not only because the frog is not a regulable entity but also because the critical habitat designation creates, rather than regulates, the putative economic activity. *See United States v. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); and, more recently, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573-74 (2012) ("This

Court‟s precedent reflects this understanding: As expansive as this Court‟s cases construing the scope of the commerce power have been, they uniformly describe the power as reaching „activity.‟ *E.g.*, *United States v. Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626. The [challenged provision], however, does not regulate existing commercial activity.”). Simply put, the uncontested facts show that the Service is not regulating existing commercial activity. The regulation of Unit 1 as critical habitat is unconstitutional because the land does not contain the listed species or any usable habitat and any activity on the land cannot affect the species or its habitat.

83. By these acts or omissions Defendants violated art. 1, § 8, cl. 3, of the U.S. Constitution and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

PRAYER FOR RELIEF

Wherefore, Markle prays:

As to the First Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to make the threshold determination as to the quality and location of habitat essential to the conservation of the species in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or alternatively, that the final rule is void under the APA, U.S.C. § 706.

As to the Second Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to apply the proper standard for designating critical habitat in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Third Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because the economic analysis was inadequate in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fourth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants‟ failure to exclude Unit 1 was arbitrary and irrational in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fifth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to comply with NEPA, 42 U.S.C. § 4321, *et seq.*, and the final rule is void under the APA, 5 U.S.C. § 706.

As to the Sixth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid under the Commerce Clause, U.S. Constitution, art. 1, § 8, cl. 3, and the final rule is void under the APA, 5 U.S.C. § 706.

As to all Claims for Relief:

That this Court:

(a) issue a judgment and order enjoining Defendants from enforcing or otherwise acting pursuant to the final rule, vacating the rule, and remanding the rule for redesignation of critical habitat in accordance with ESA, NEPA, the APA, and the U.S. Constitution;

(b) award Plaintiff attorneys‟ fees and costs to the extent permitted by law; and

(c) grant such other relief as the Court shall deem just and proper.

DATED: February 7, 2013.

Respectfully submitted,

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Appendix E-1

Excerpts from Mar. 12, 2012
Public Comment on Behalf of
P&F Lumber, Etc.

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16,
and Weyerhaeuser's comments of November 28, 2011 at page

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed bums would be necessary")

the only known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,201 I at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23,2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also sec proposed Rule at page 59777.

In *United States v. Lopez,* 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel,* 301 U.S. **1,** 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is

absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Commerce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist-- and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any

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Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?,* 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

Appendix F-1

Excerpts from Nov. 23, 2011 Public Comment on Behalf of P&F Lumber, Etc.

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands-- and, indeed, the FWS in the

Proposed Rule concludes that (by its own investigation on the Lands) the MGF does not now actually occupy the Lands-- it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both

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[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

the St. Tammany Parish Planning and Zoning Commission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish..

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million' dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

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[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

Appendix F-5

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.

Nos. 17-71, 17-74

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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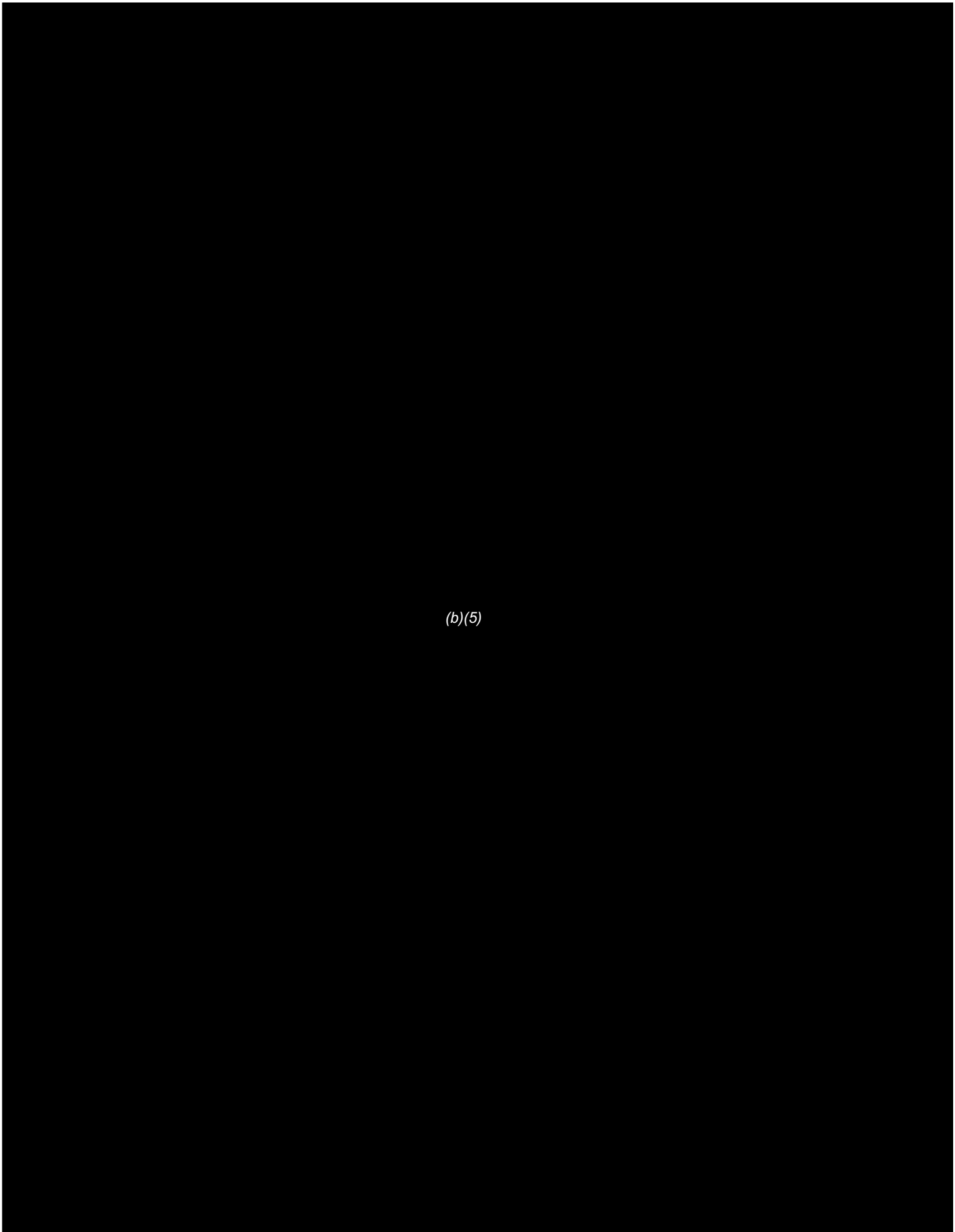
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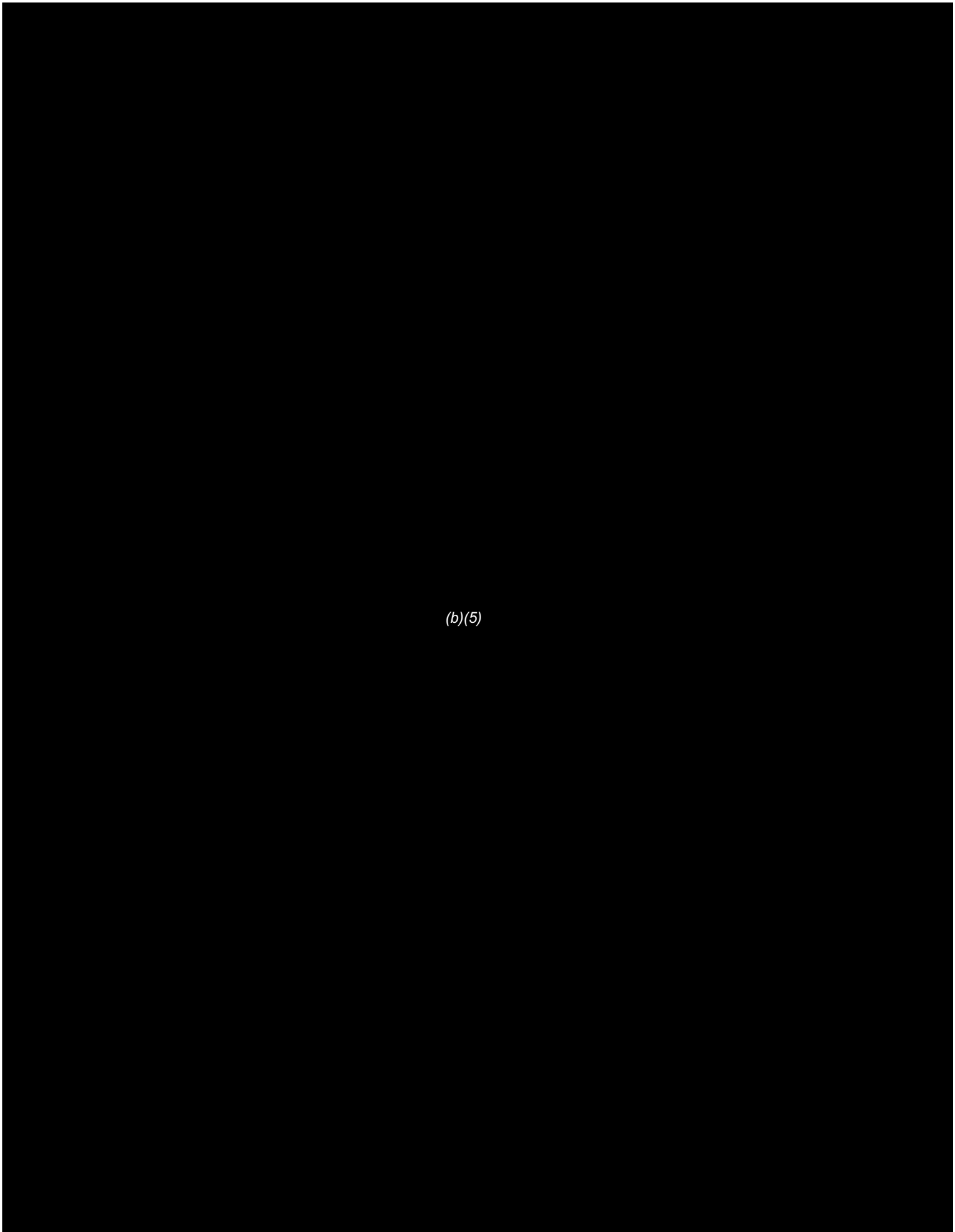
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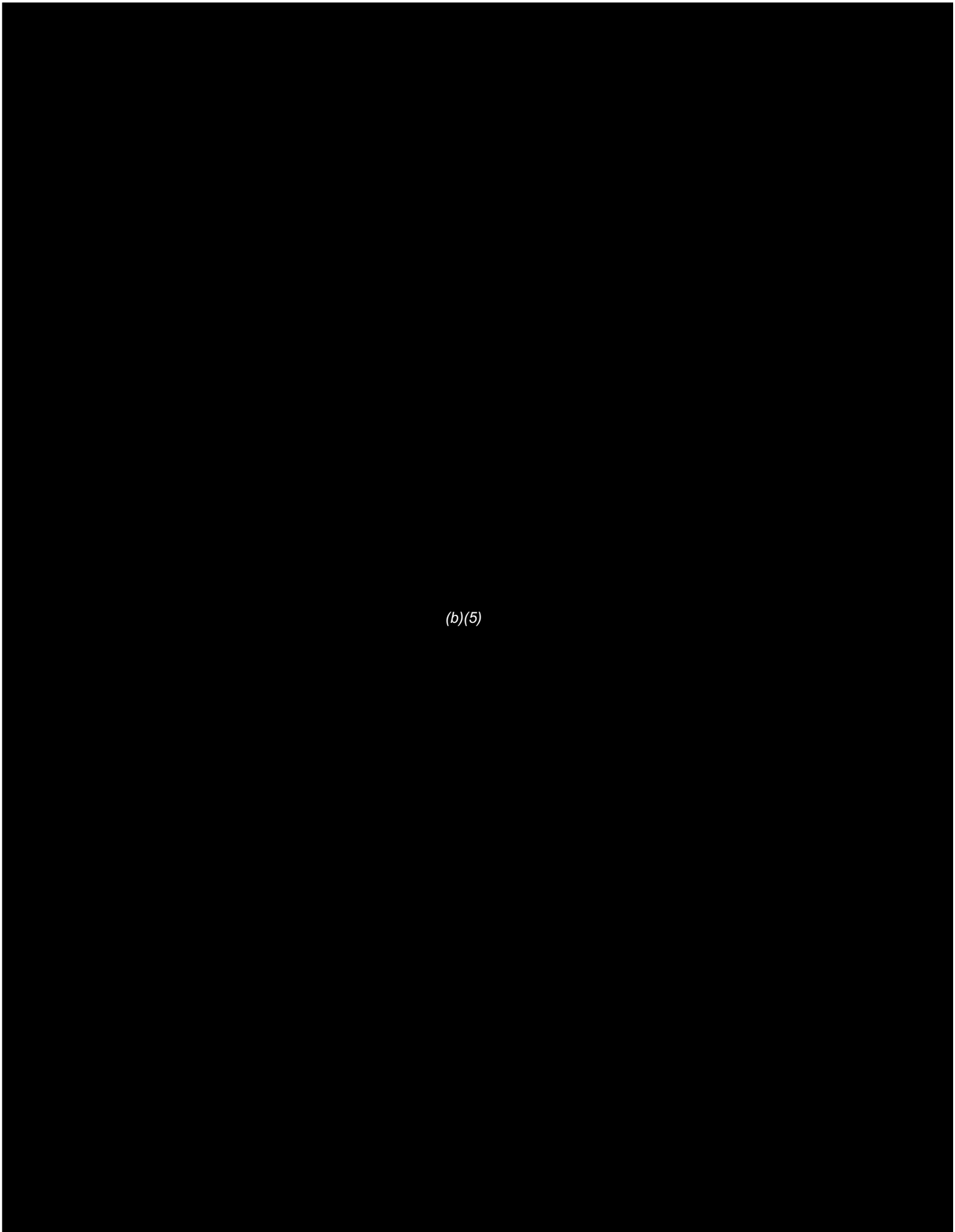
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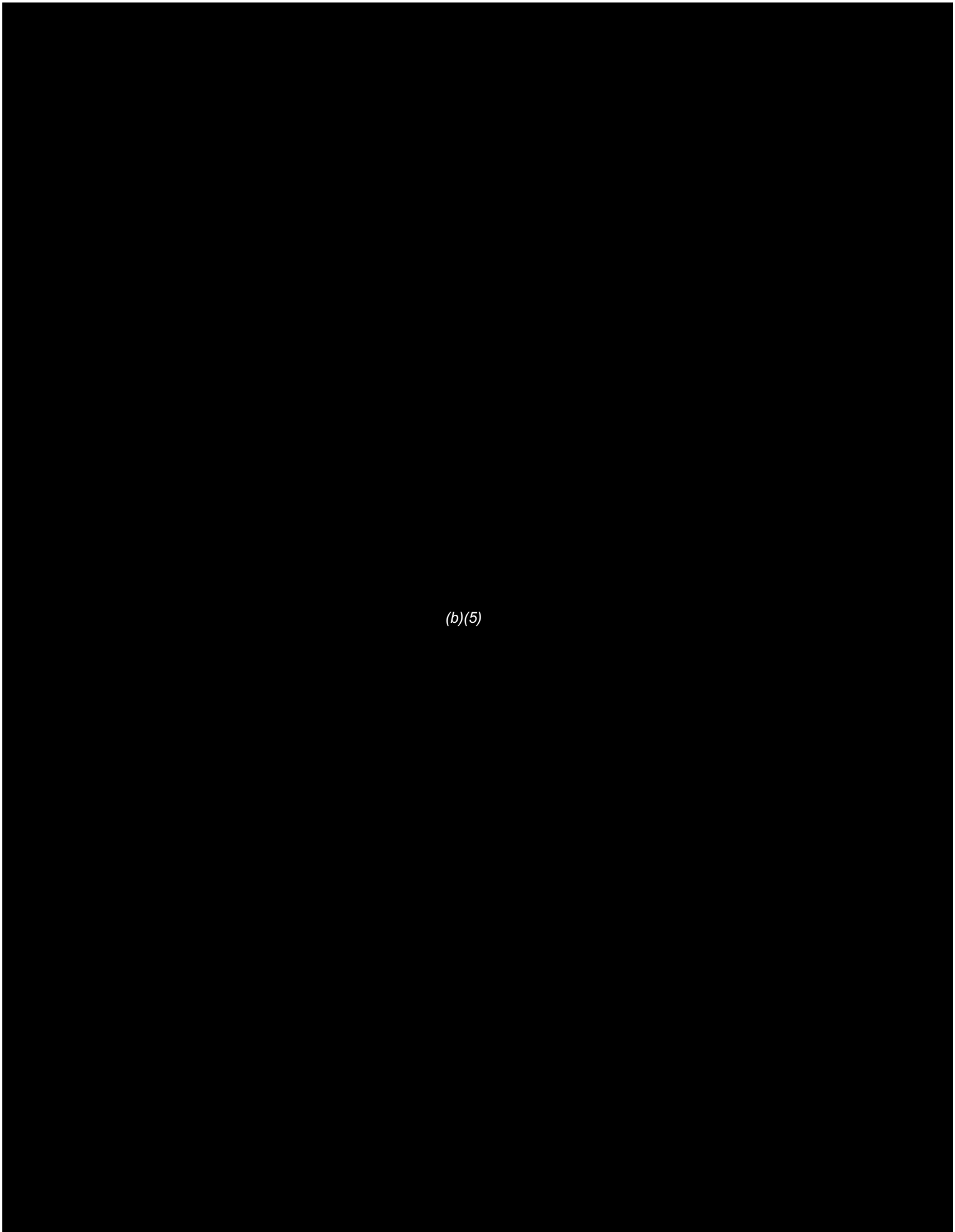
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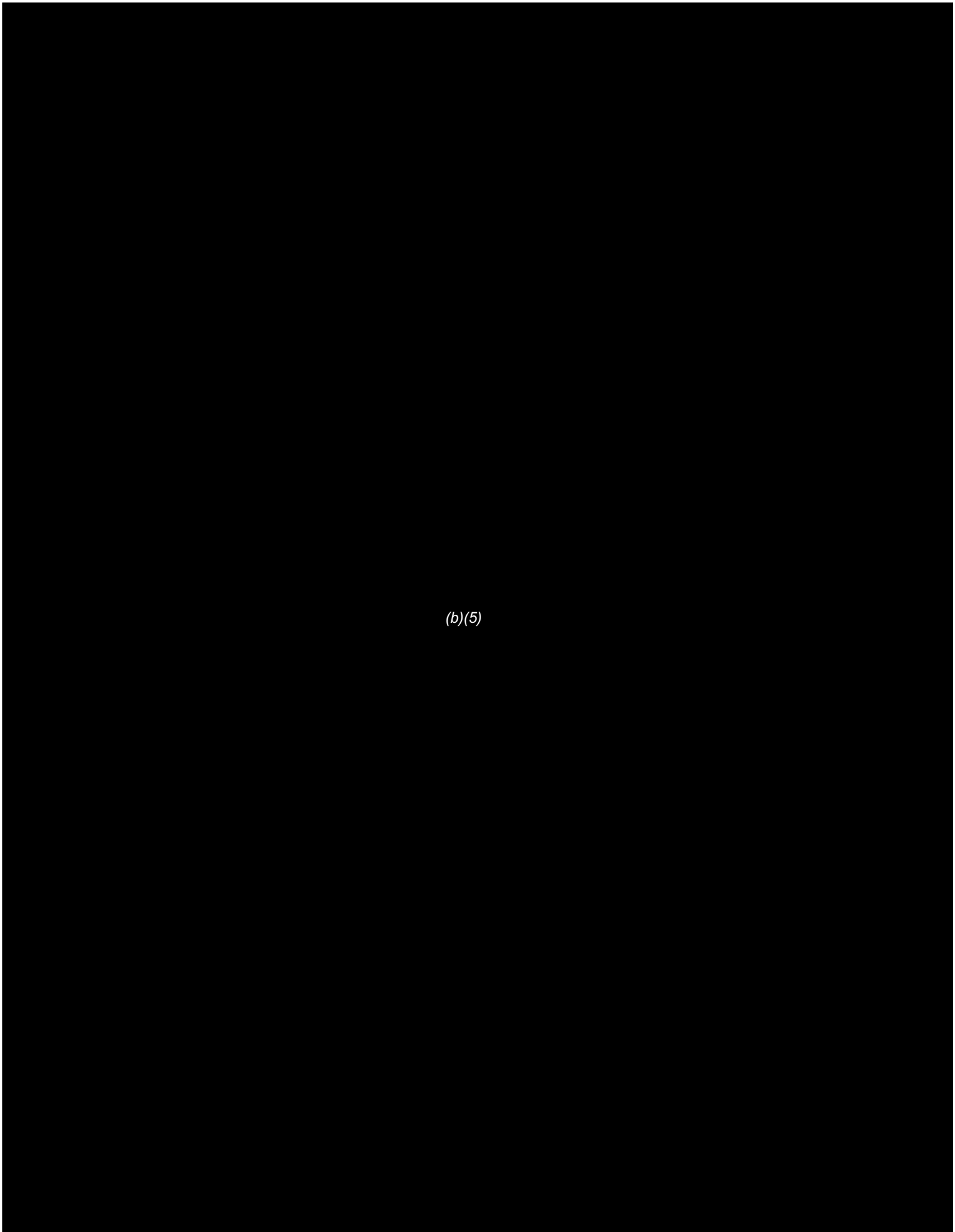
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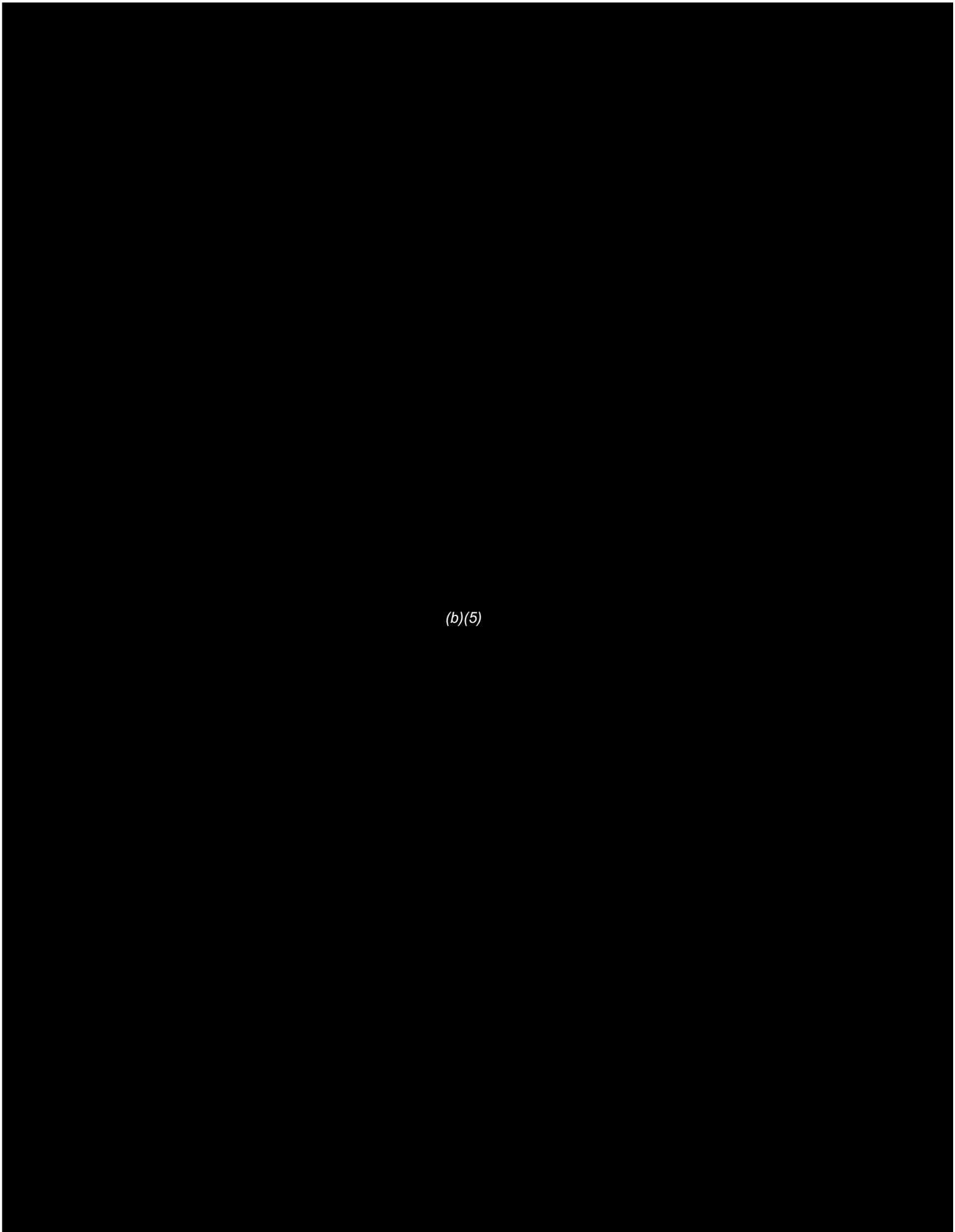
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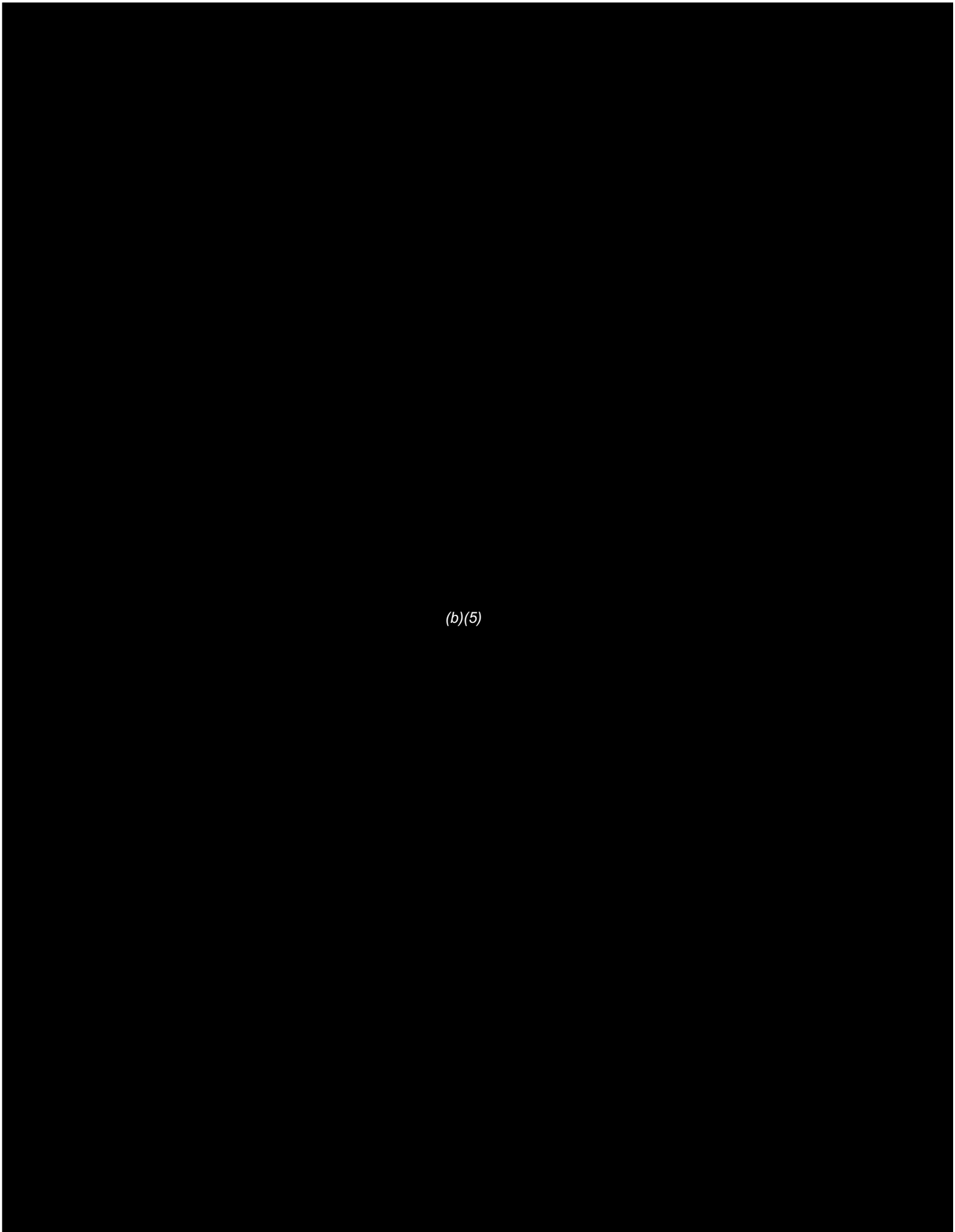
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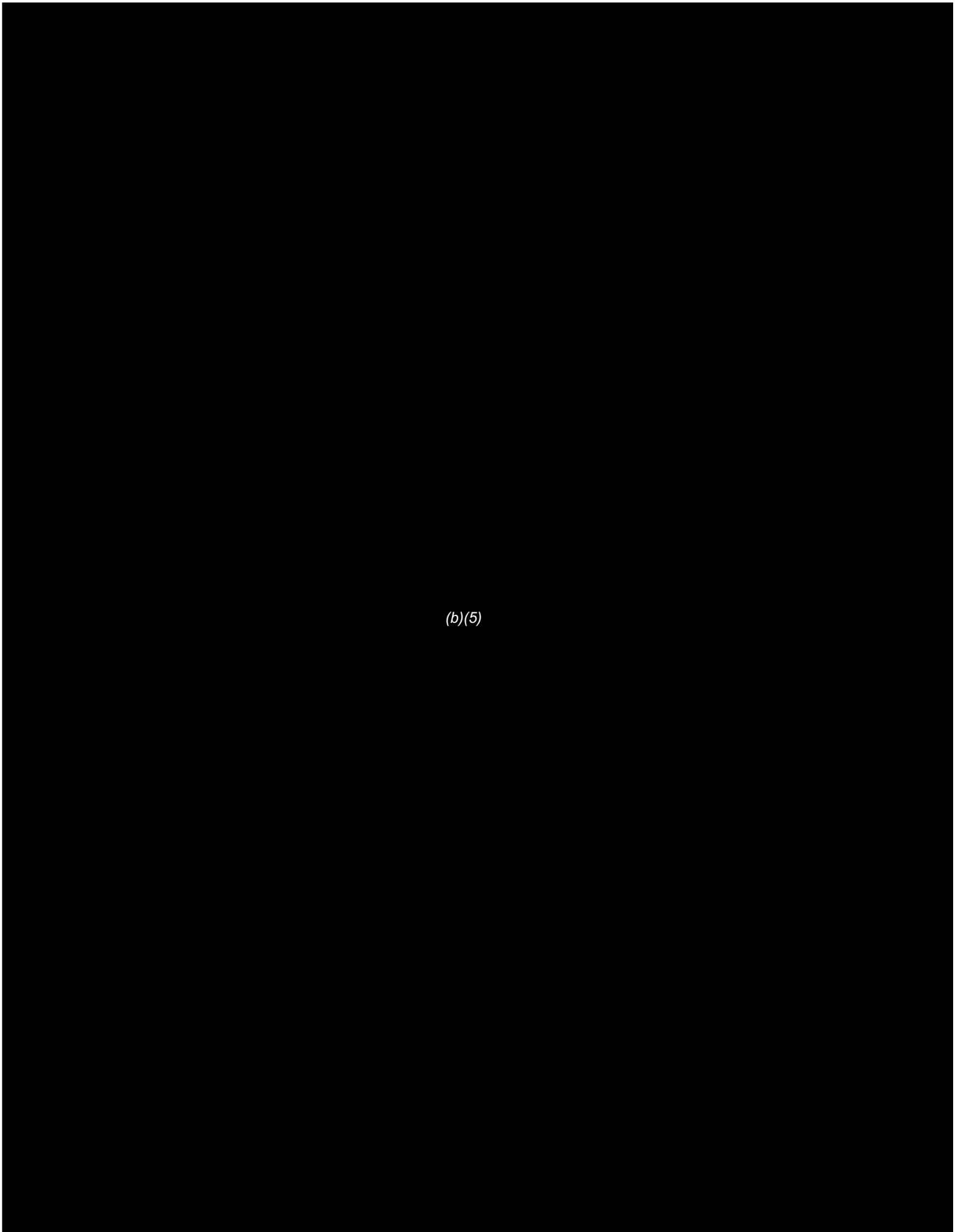
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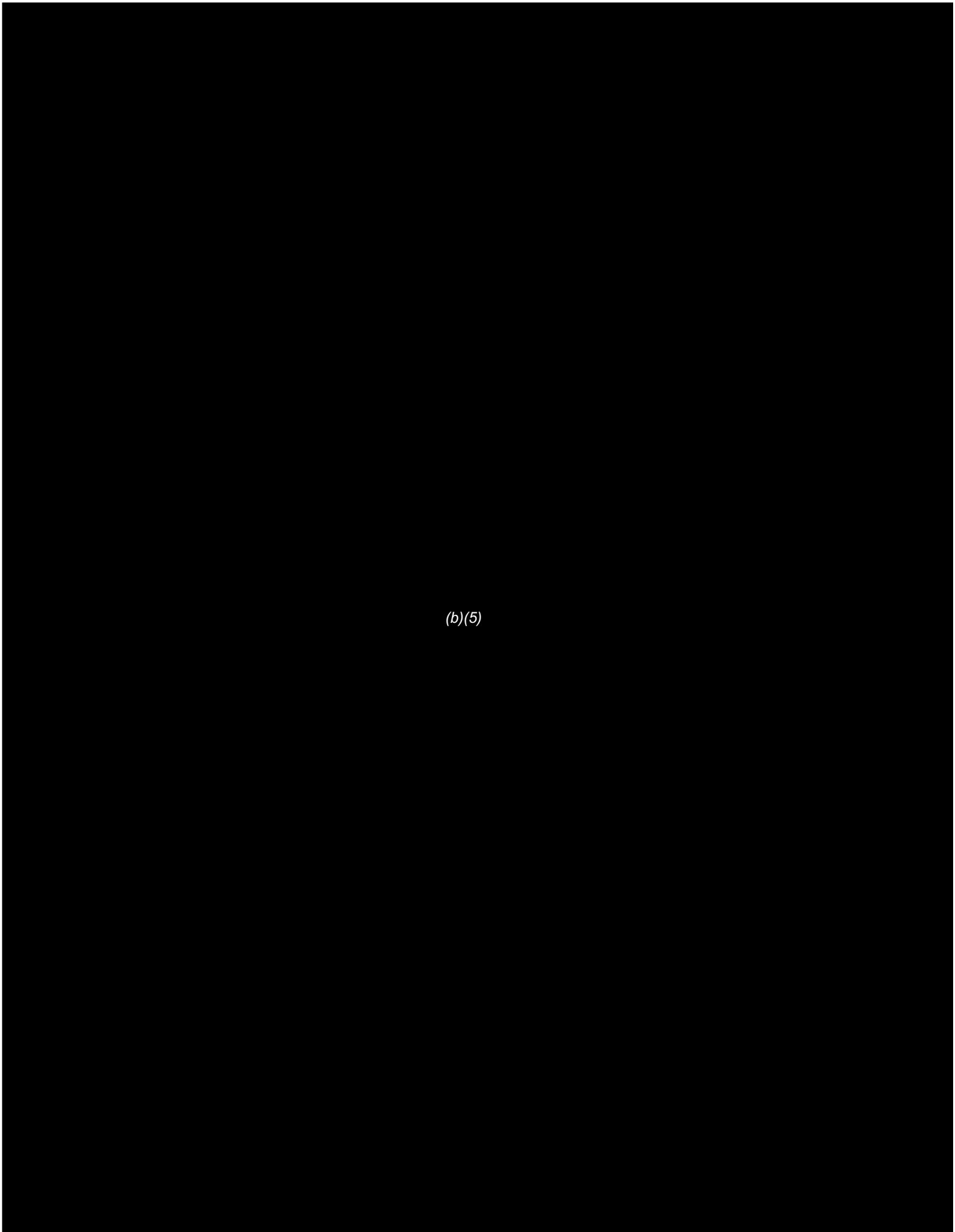
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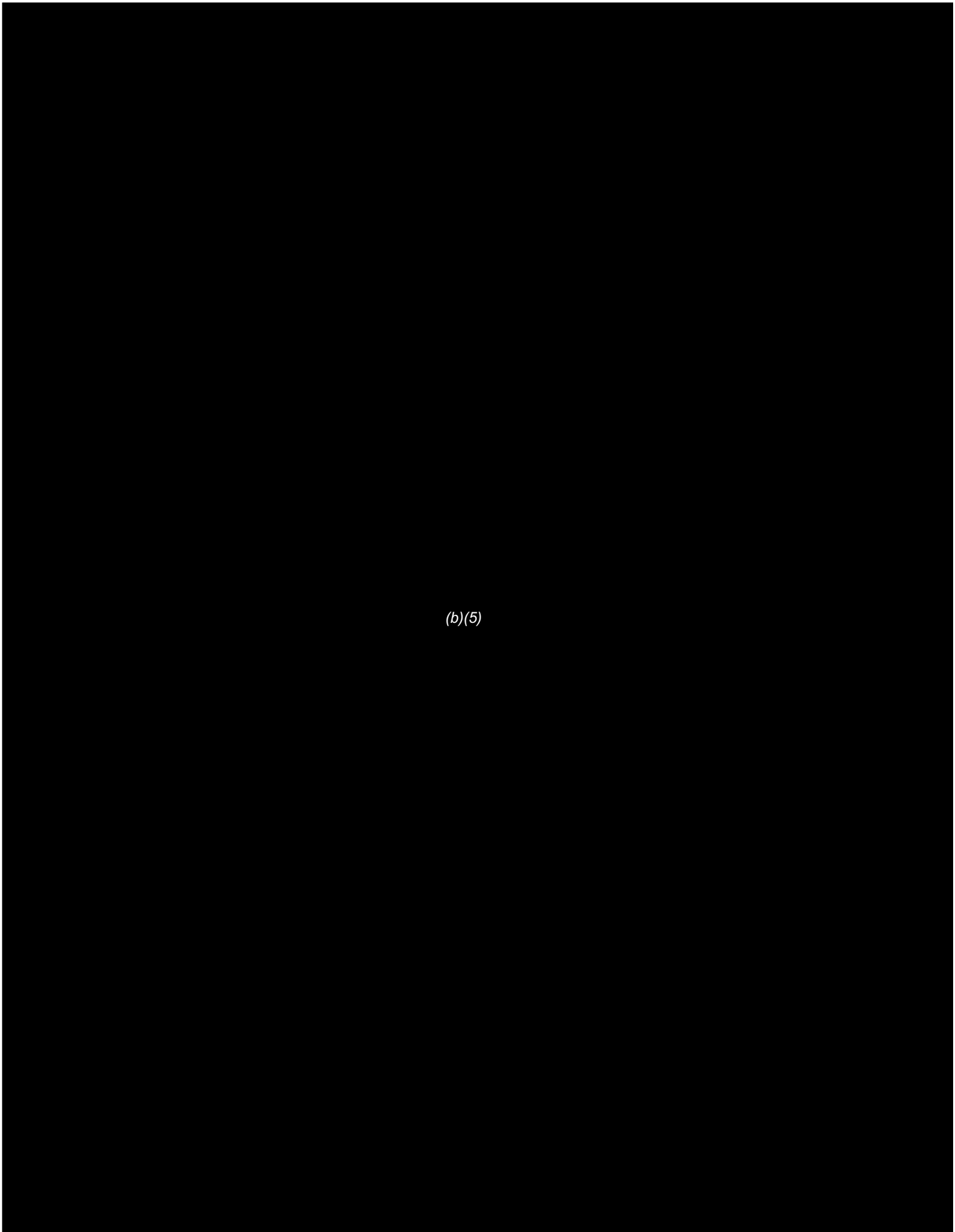
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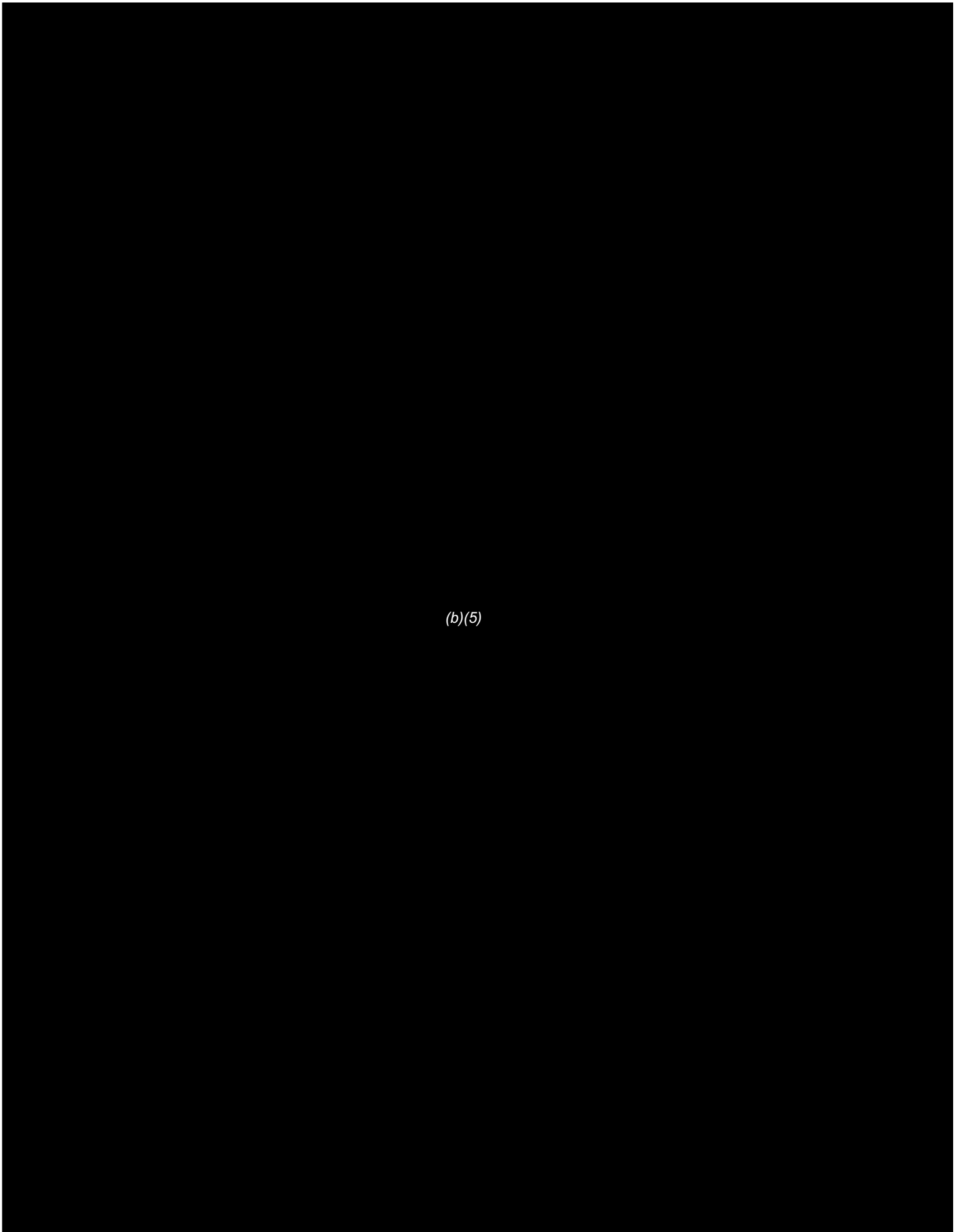
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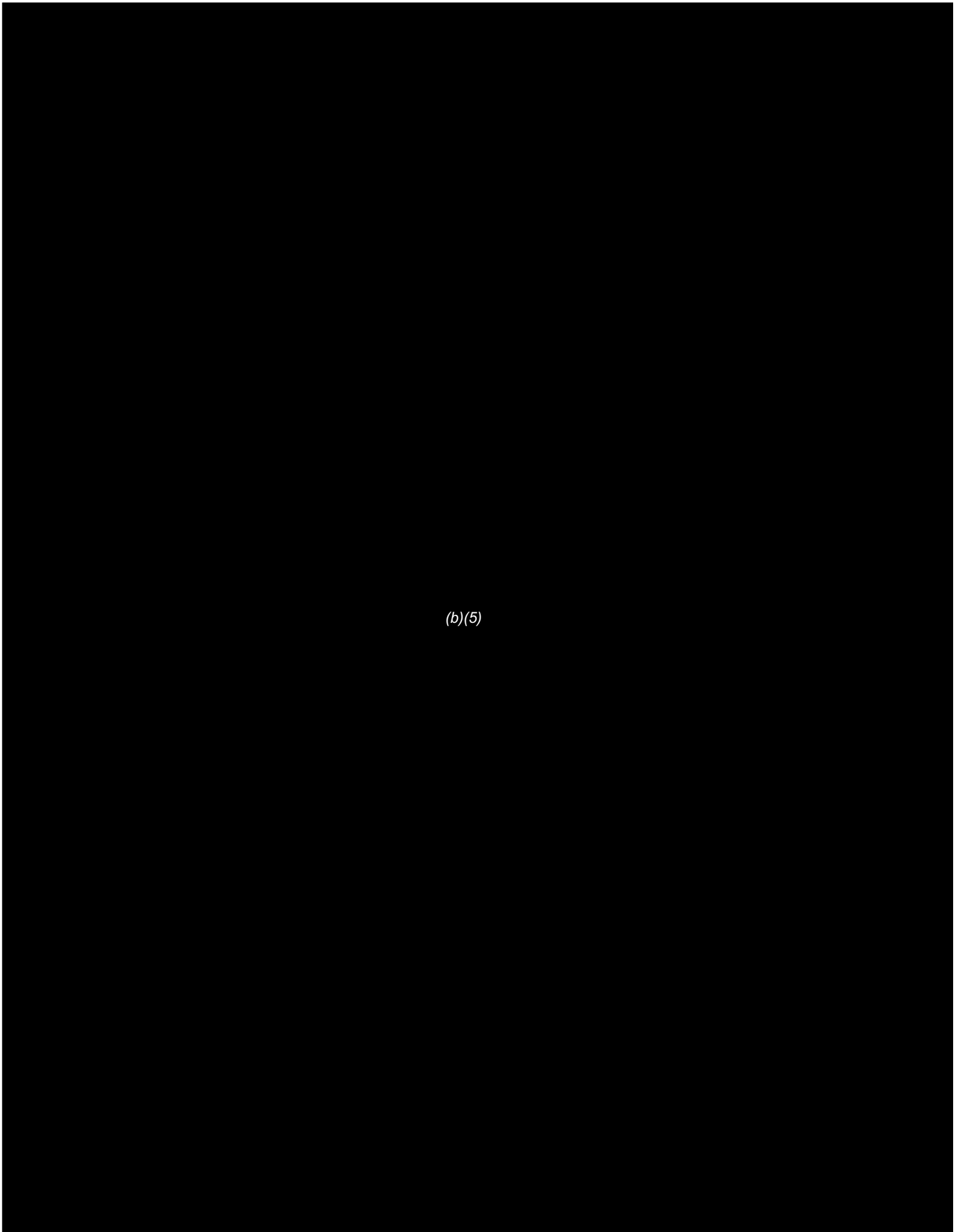
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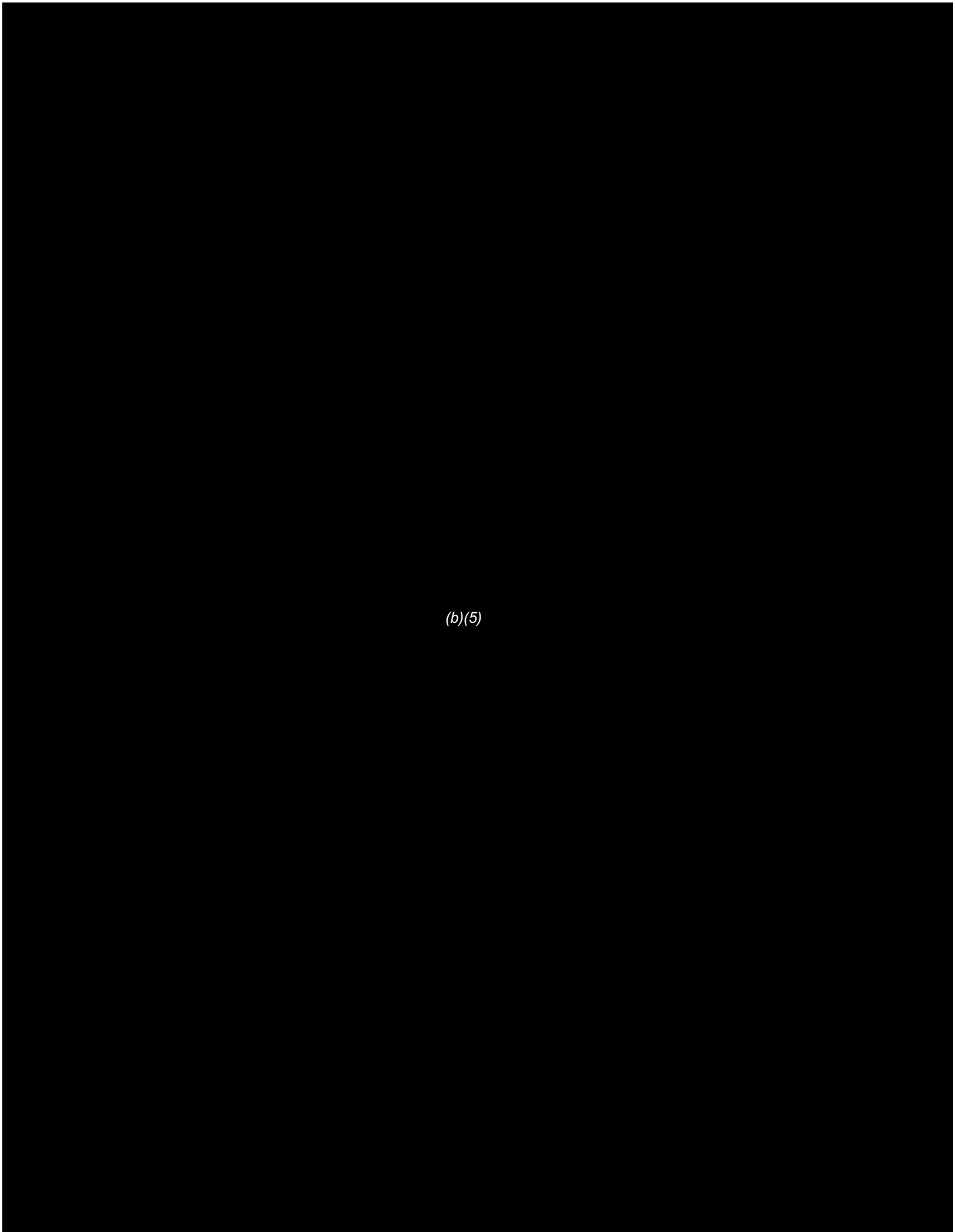
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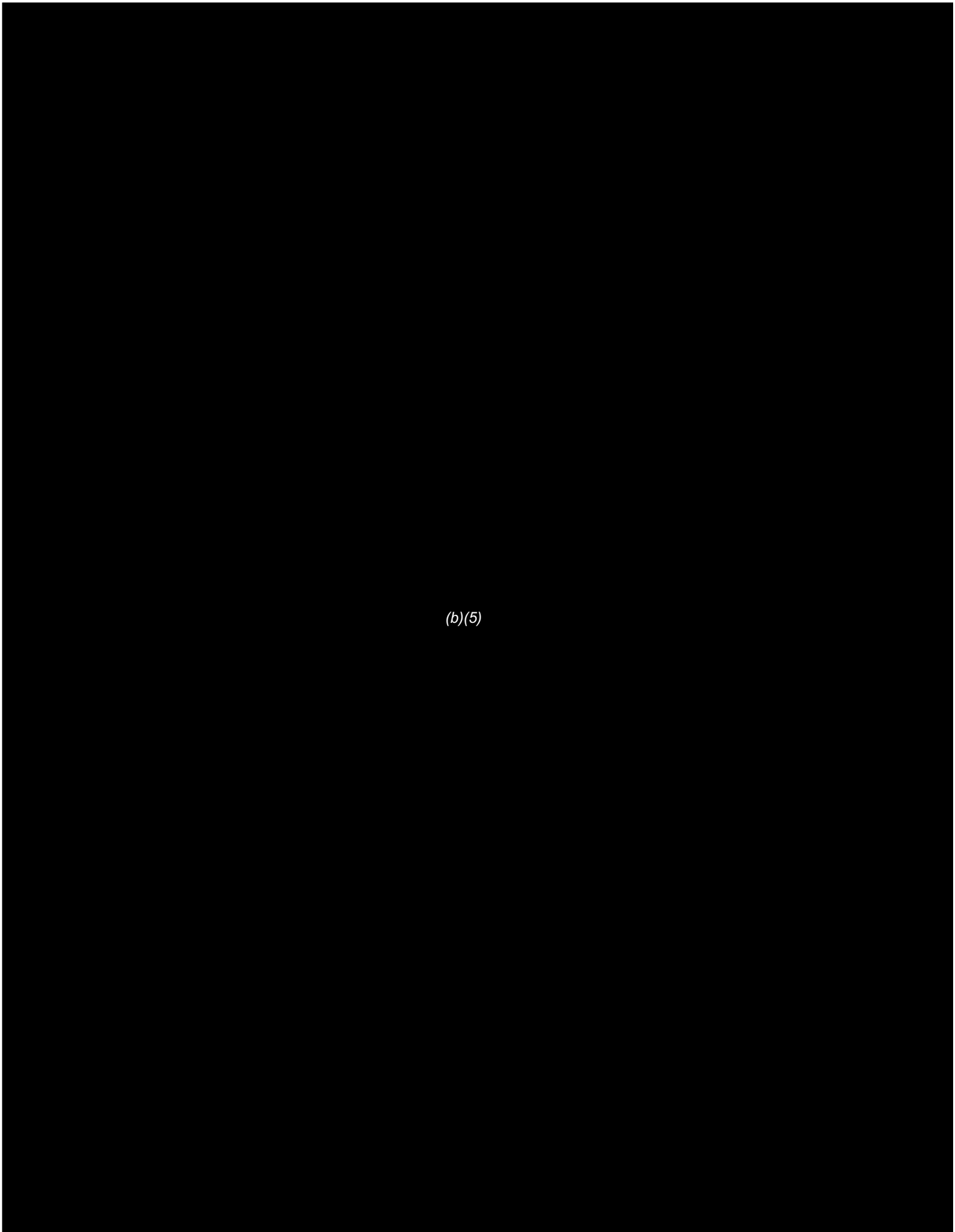
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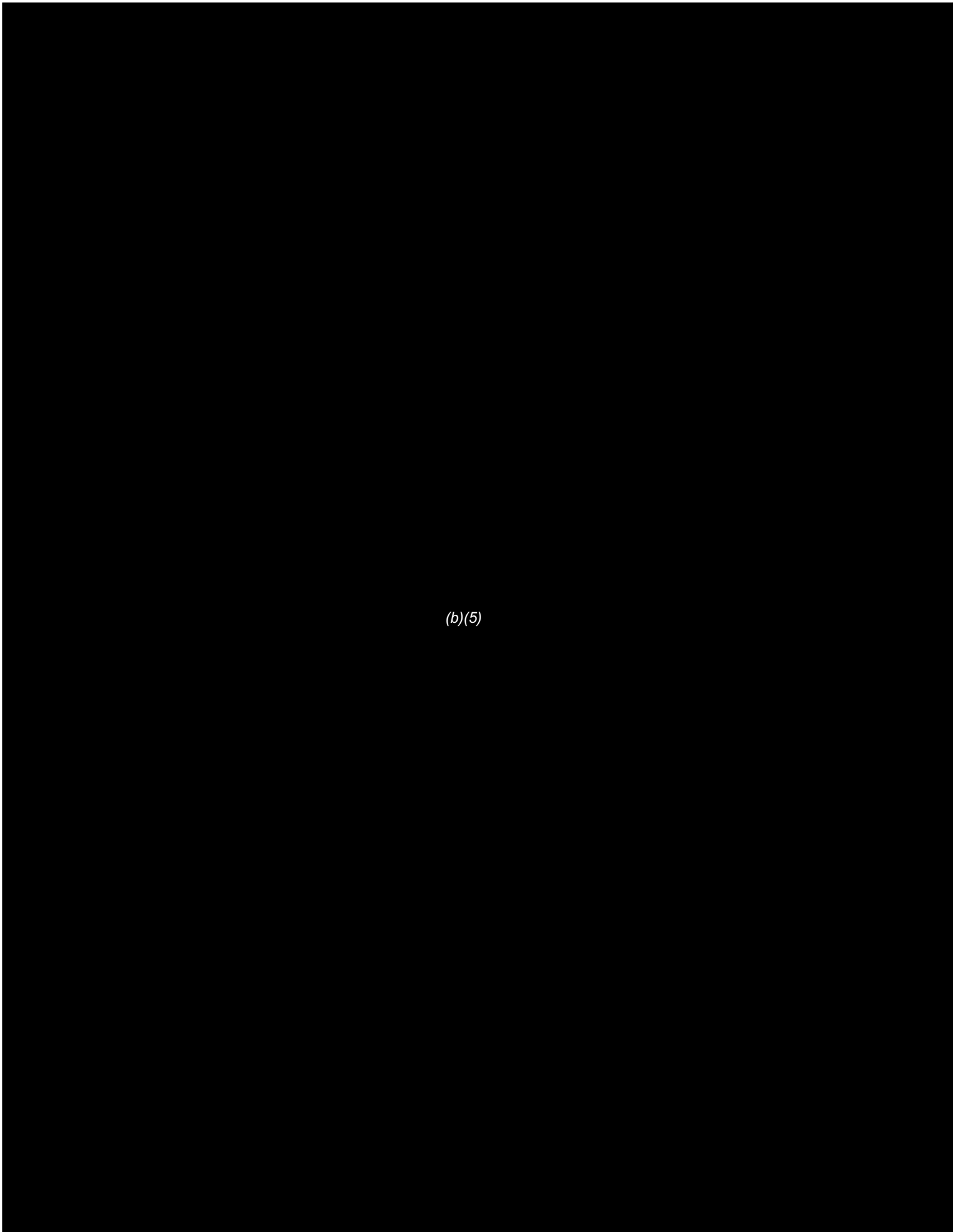
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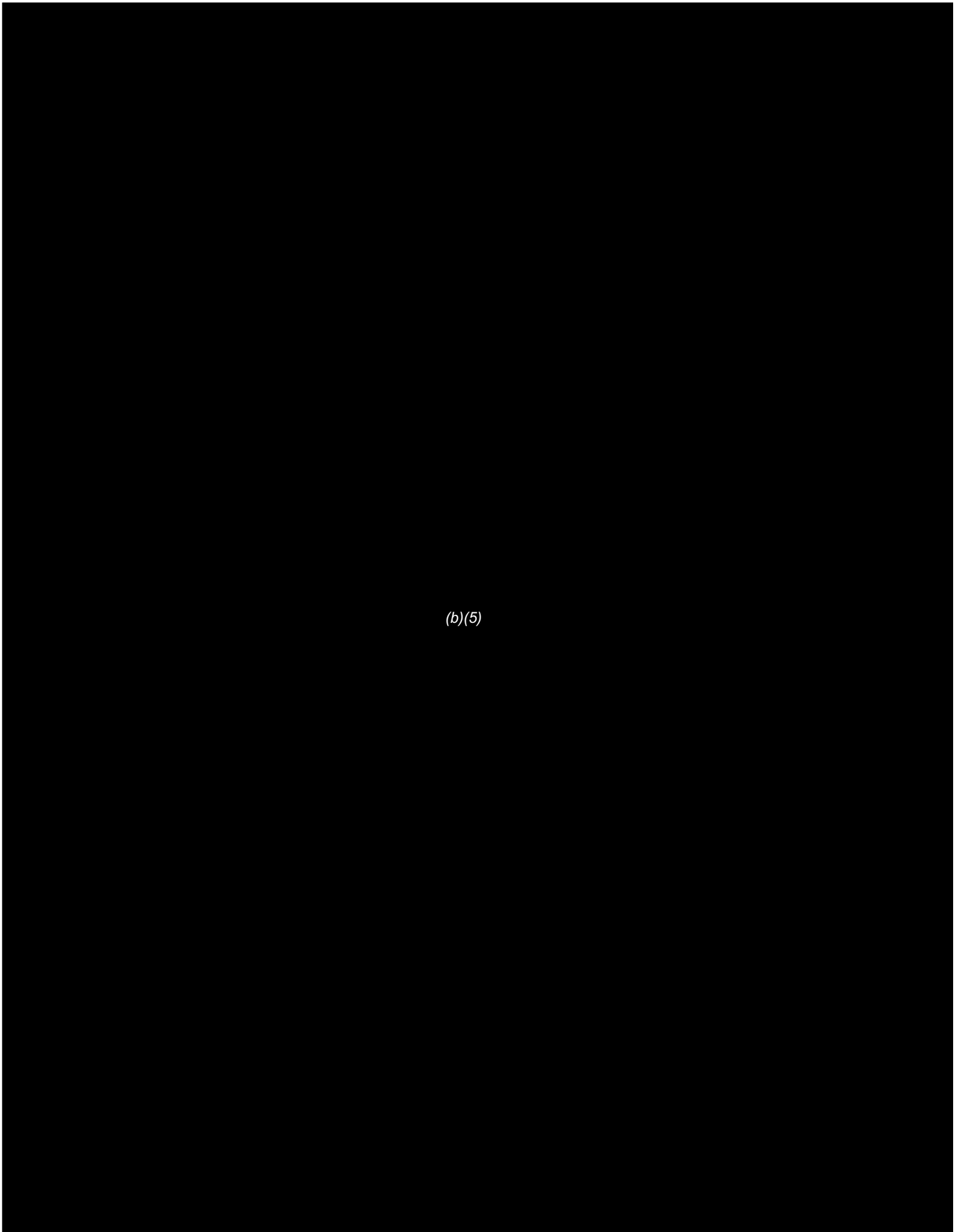
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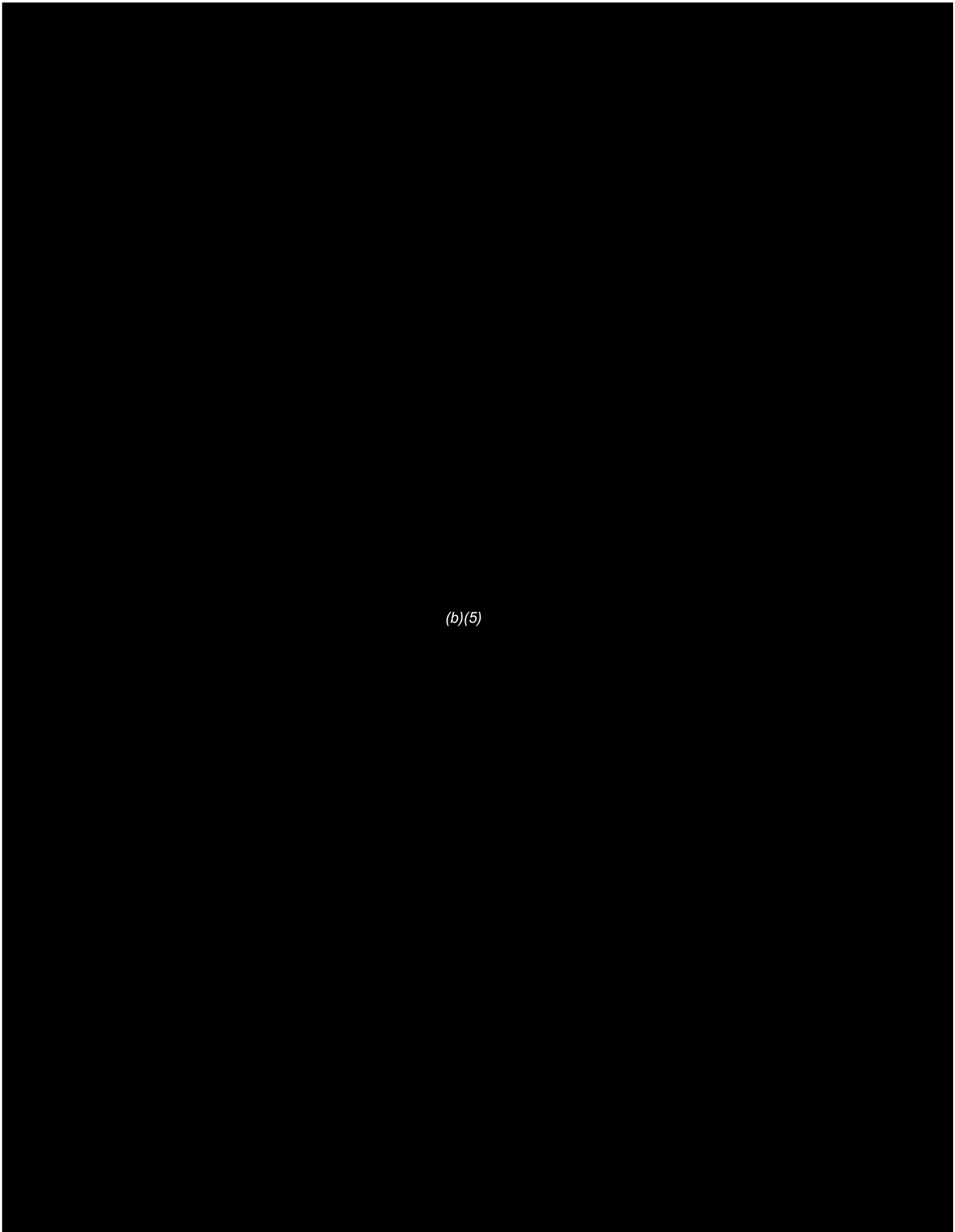
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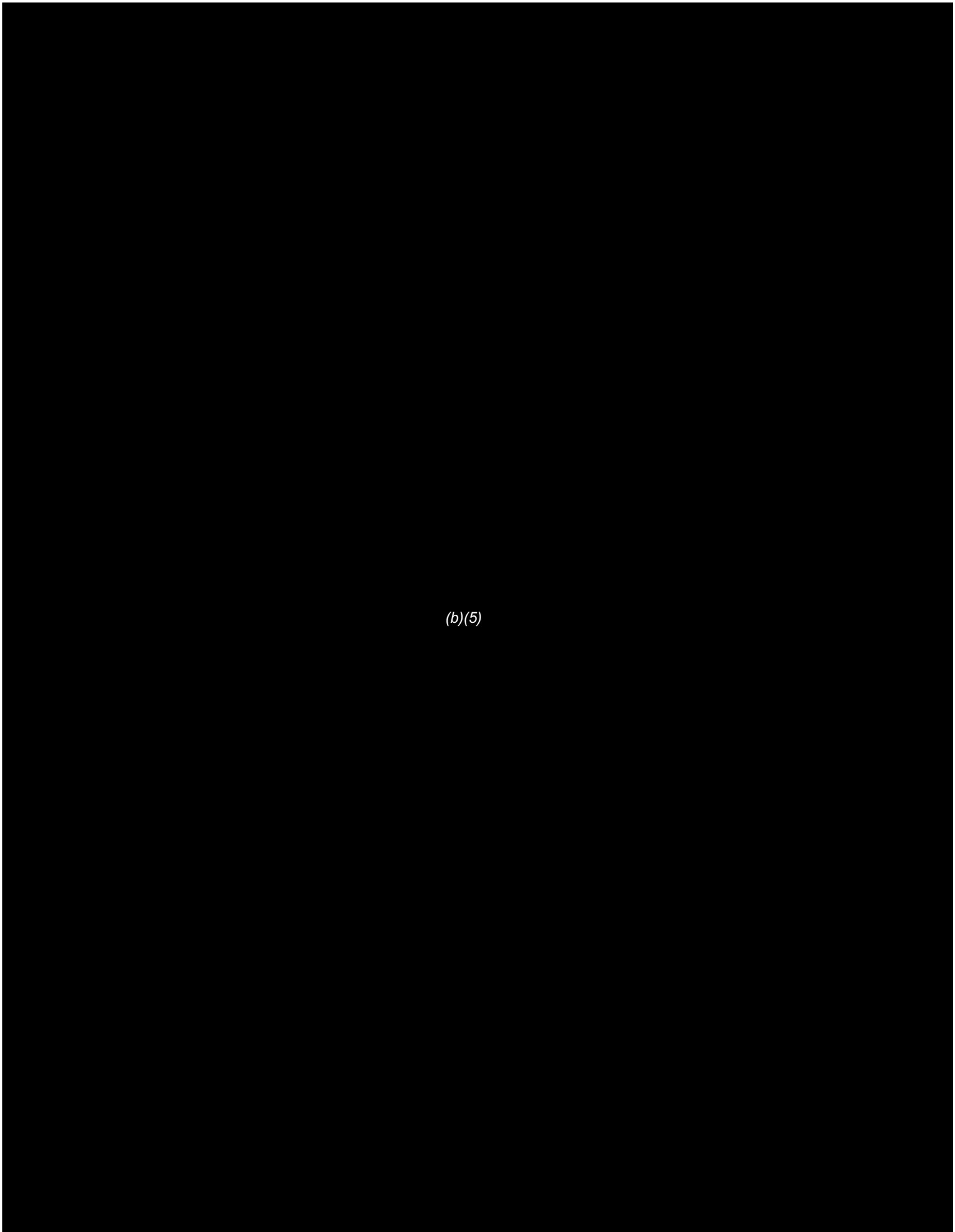
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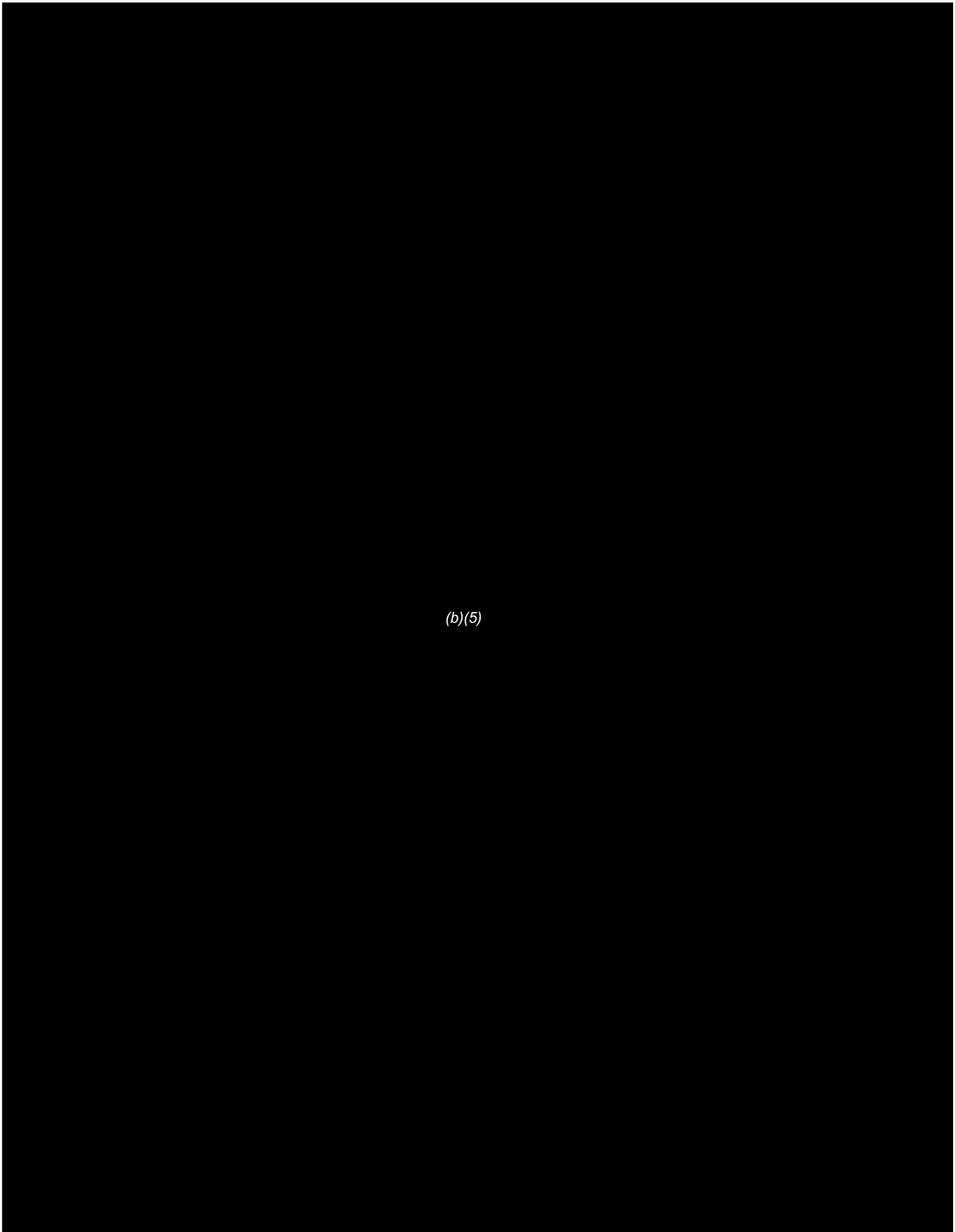
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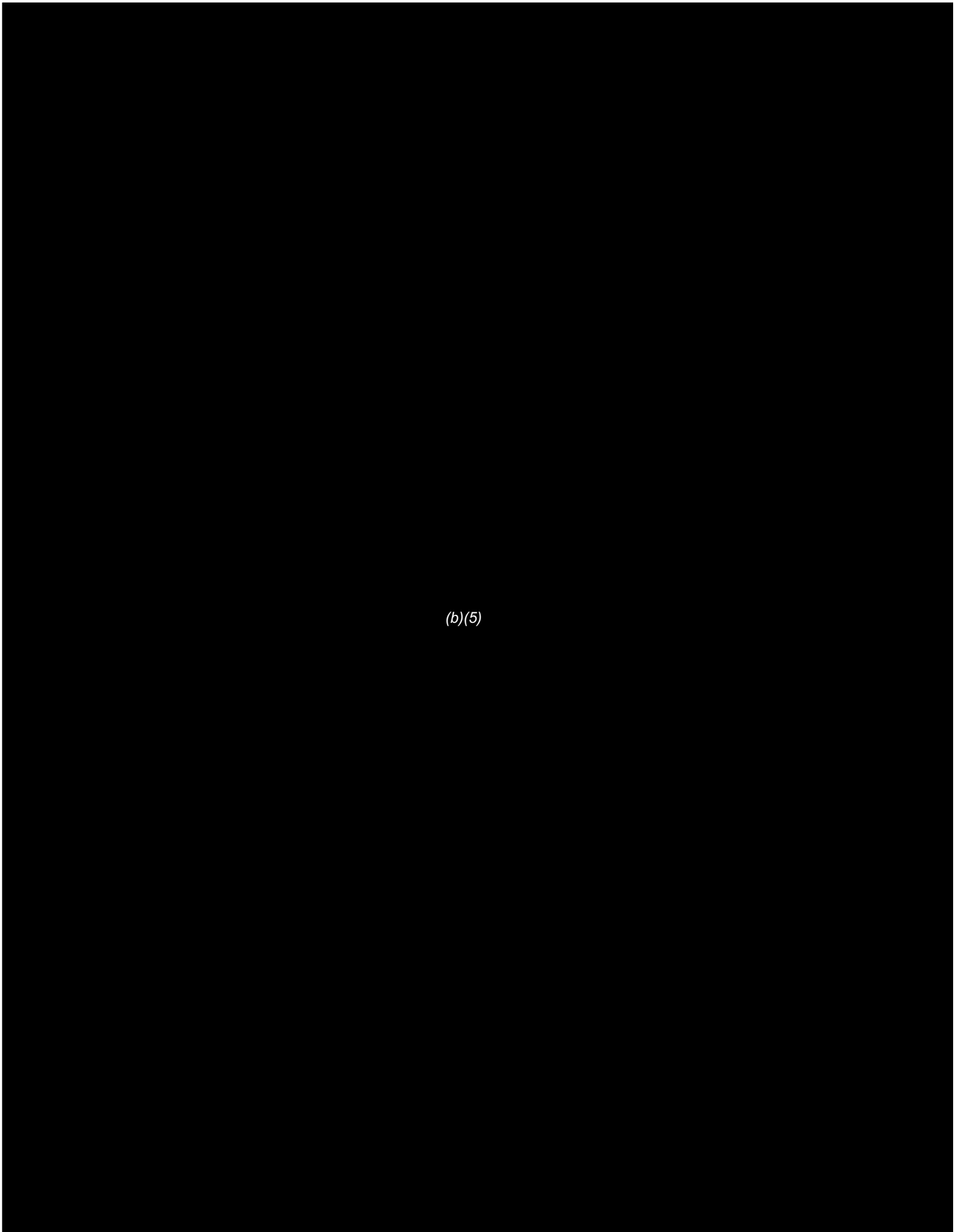
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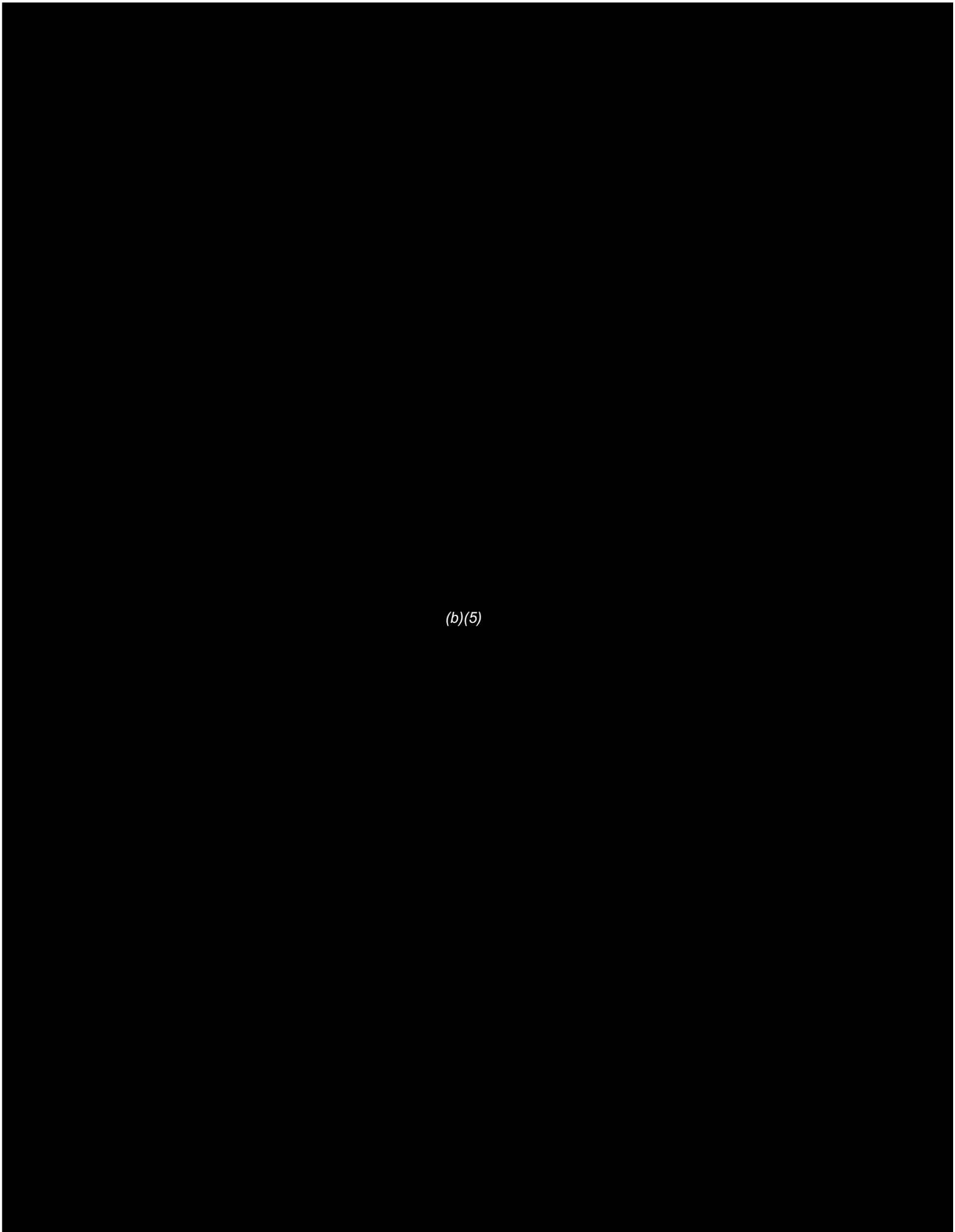
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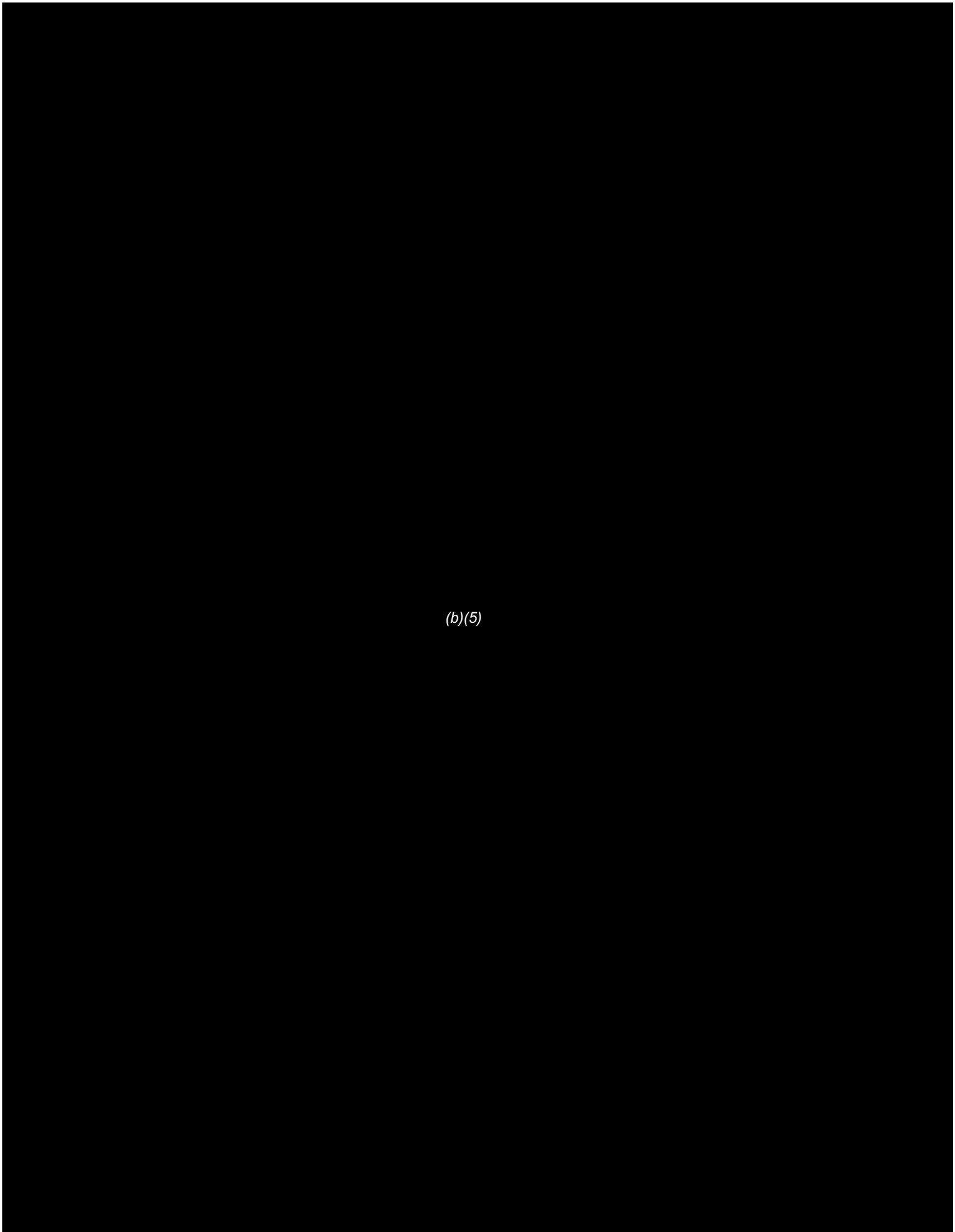
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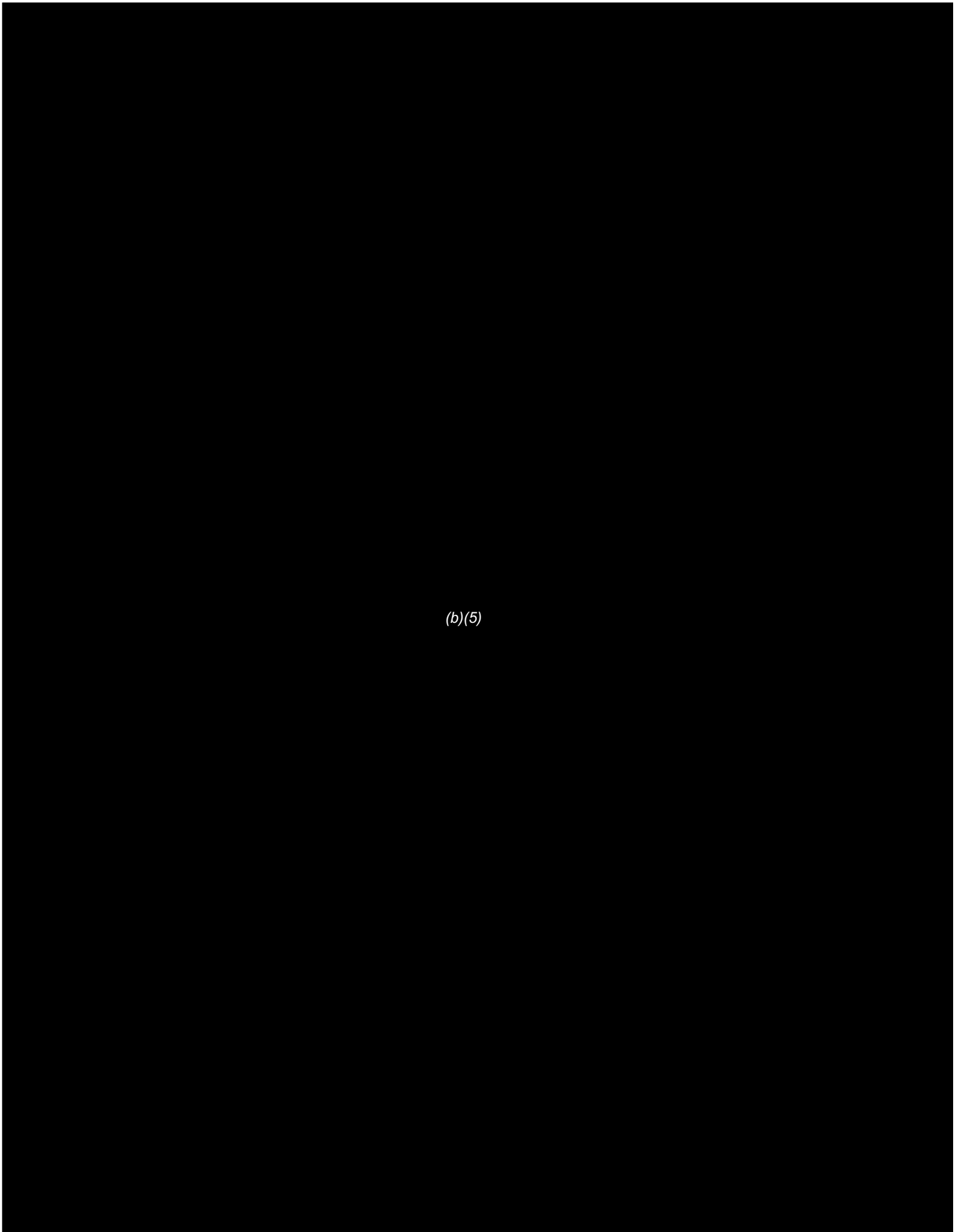
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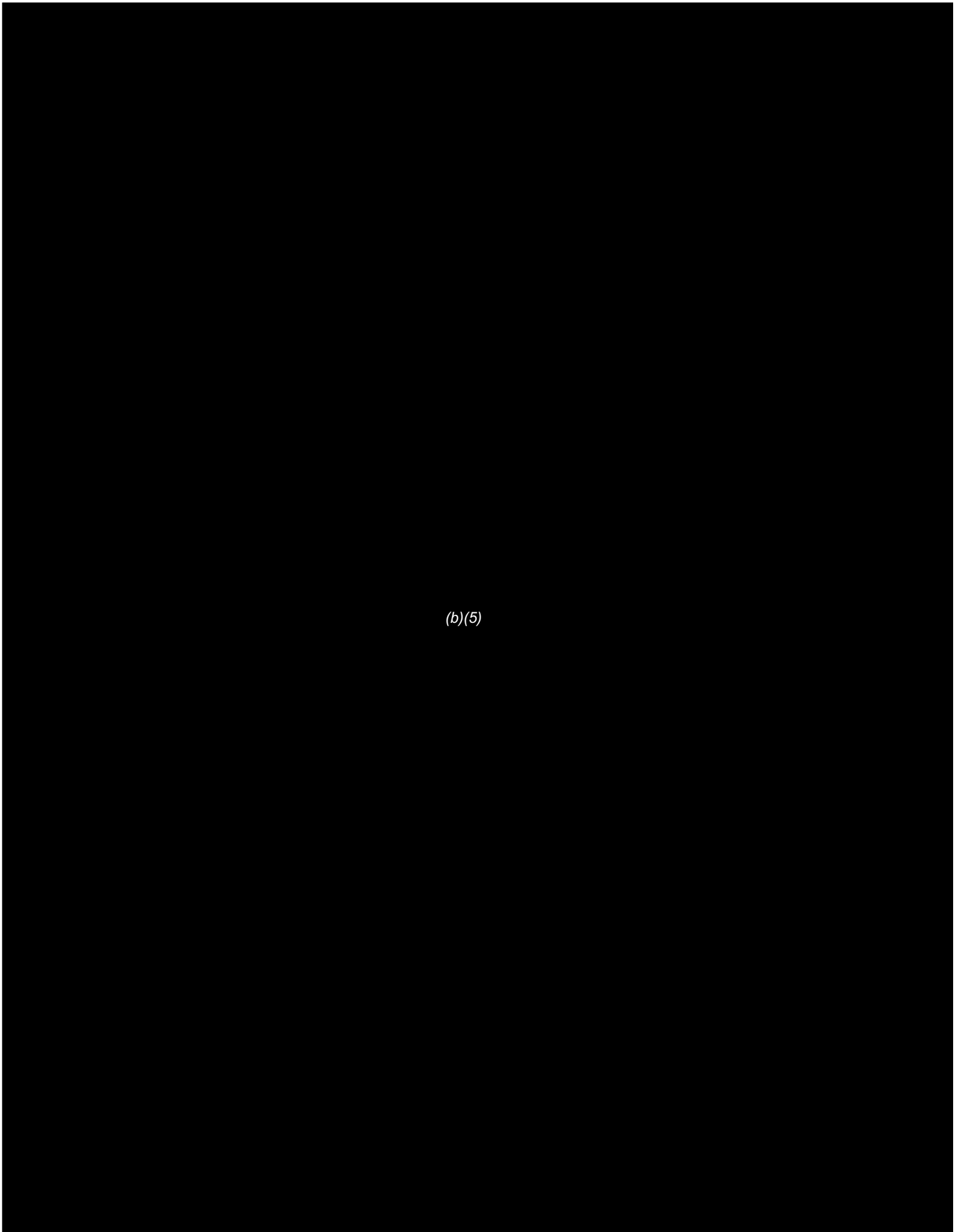
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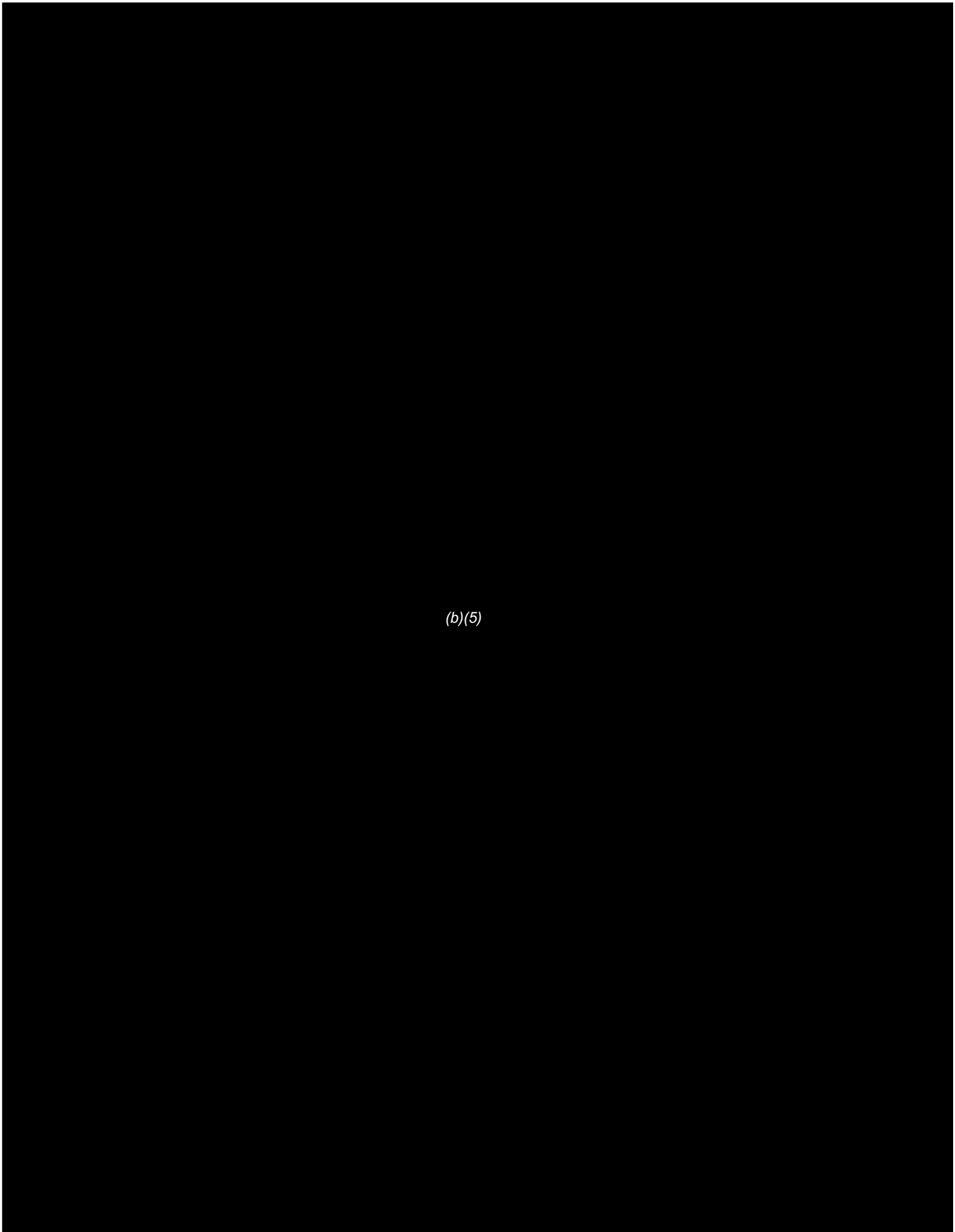
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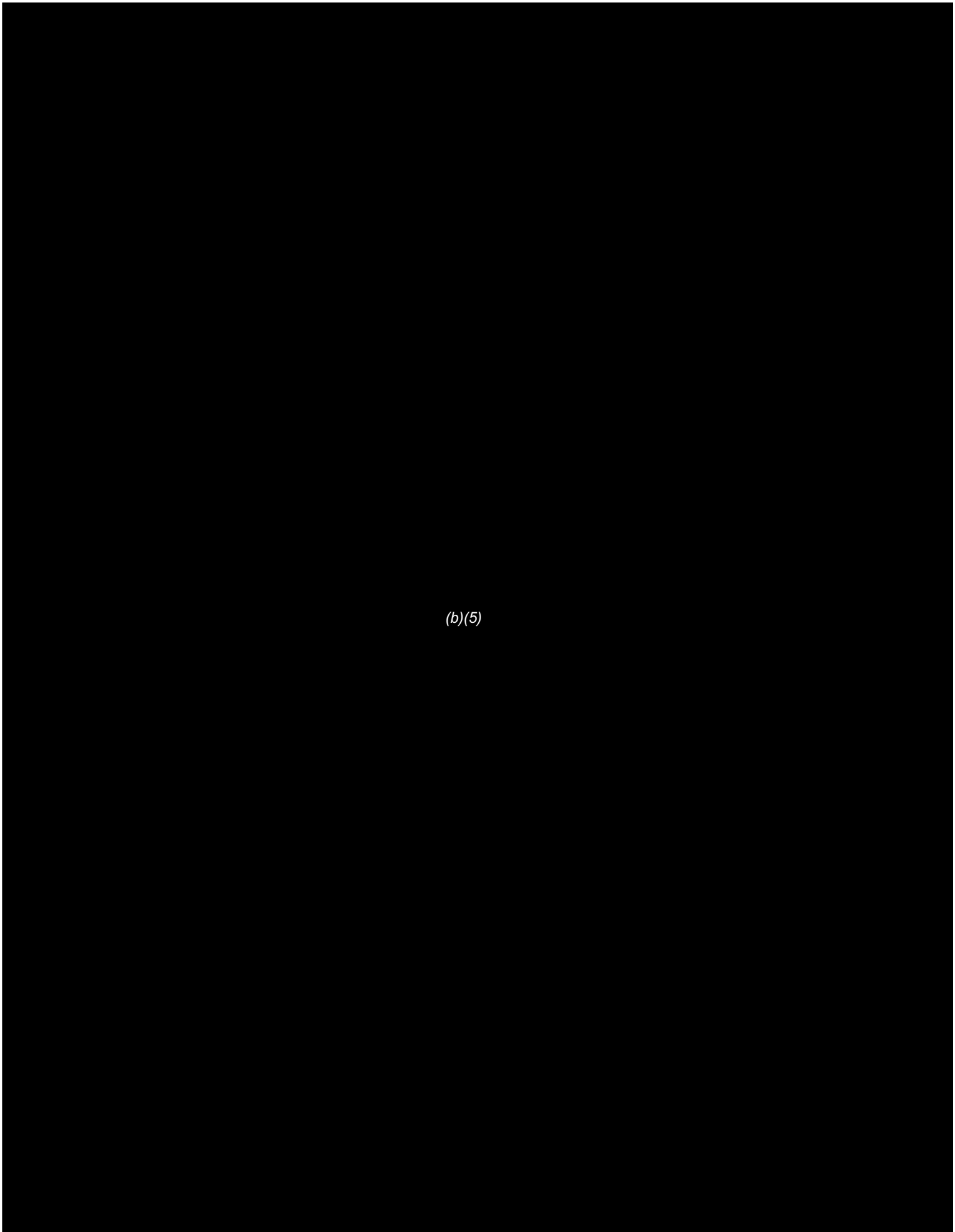
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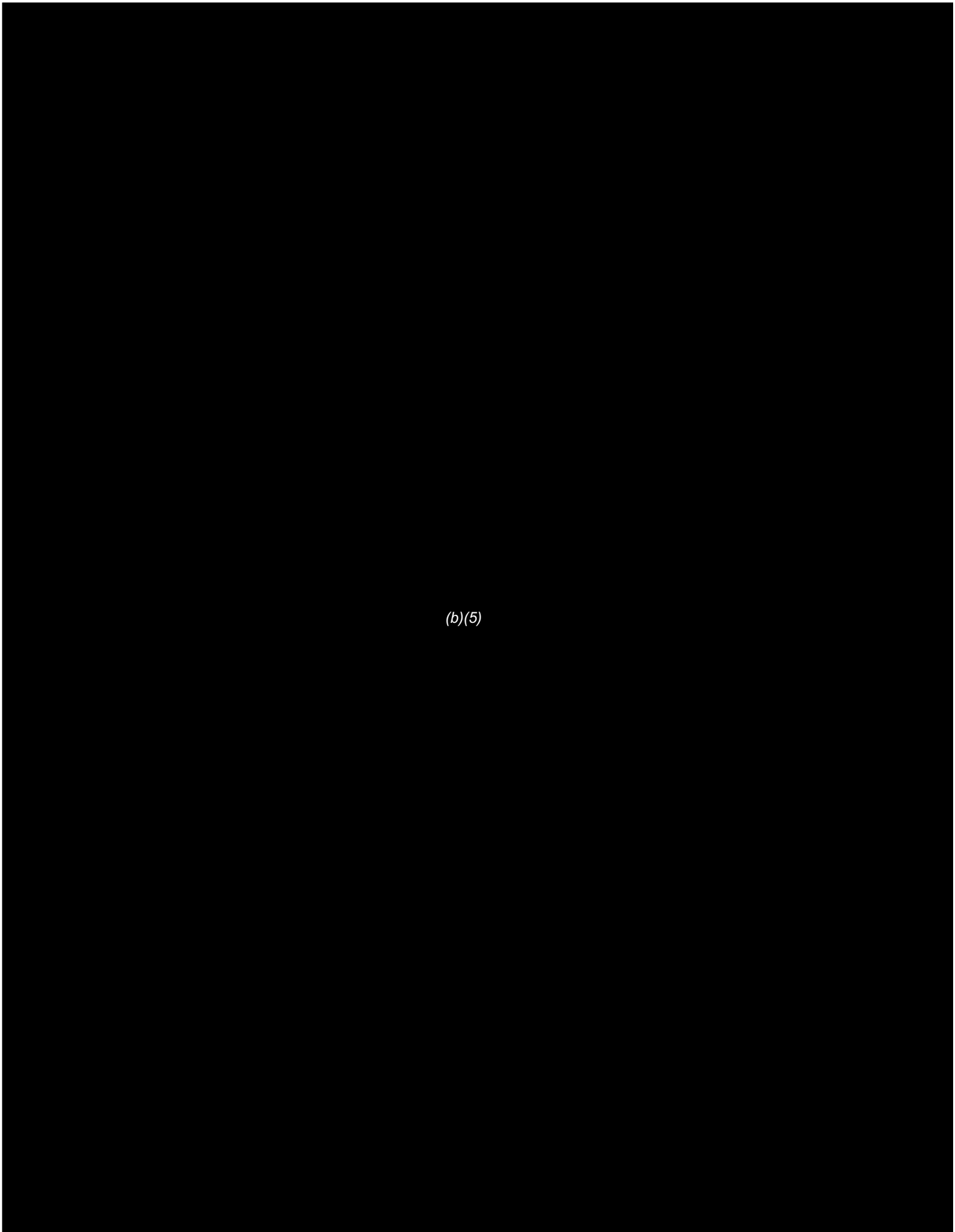
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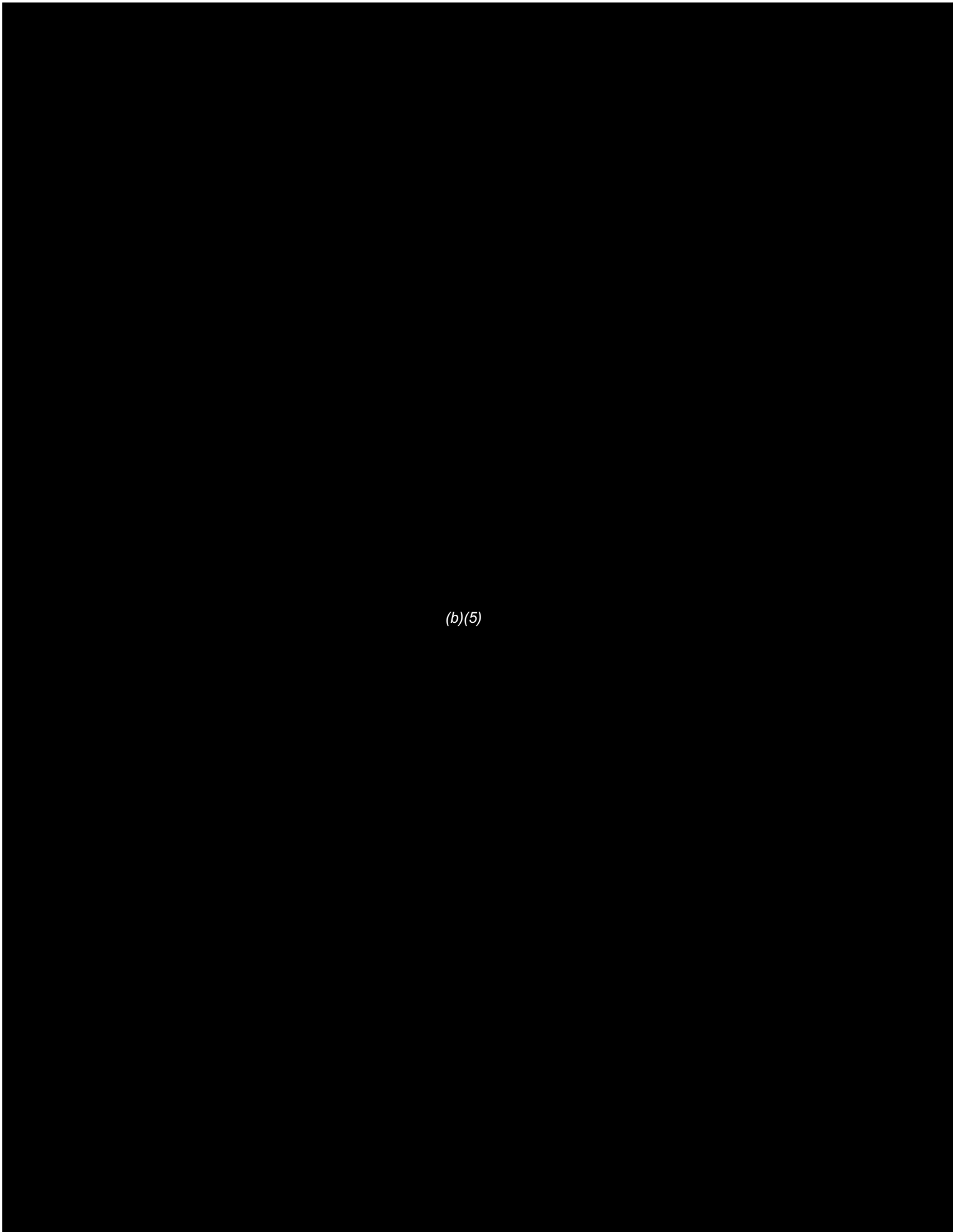
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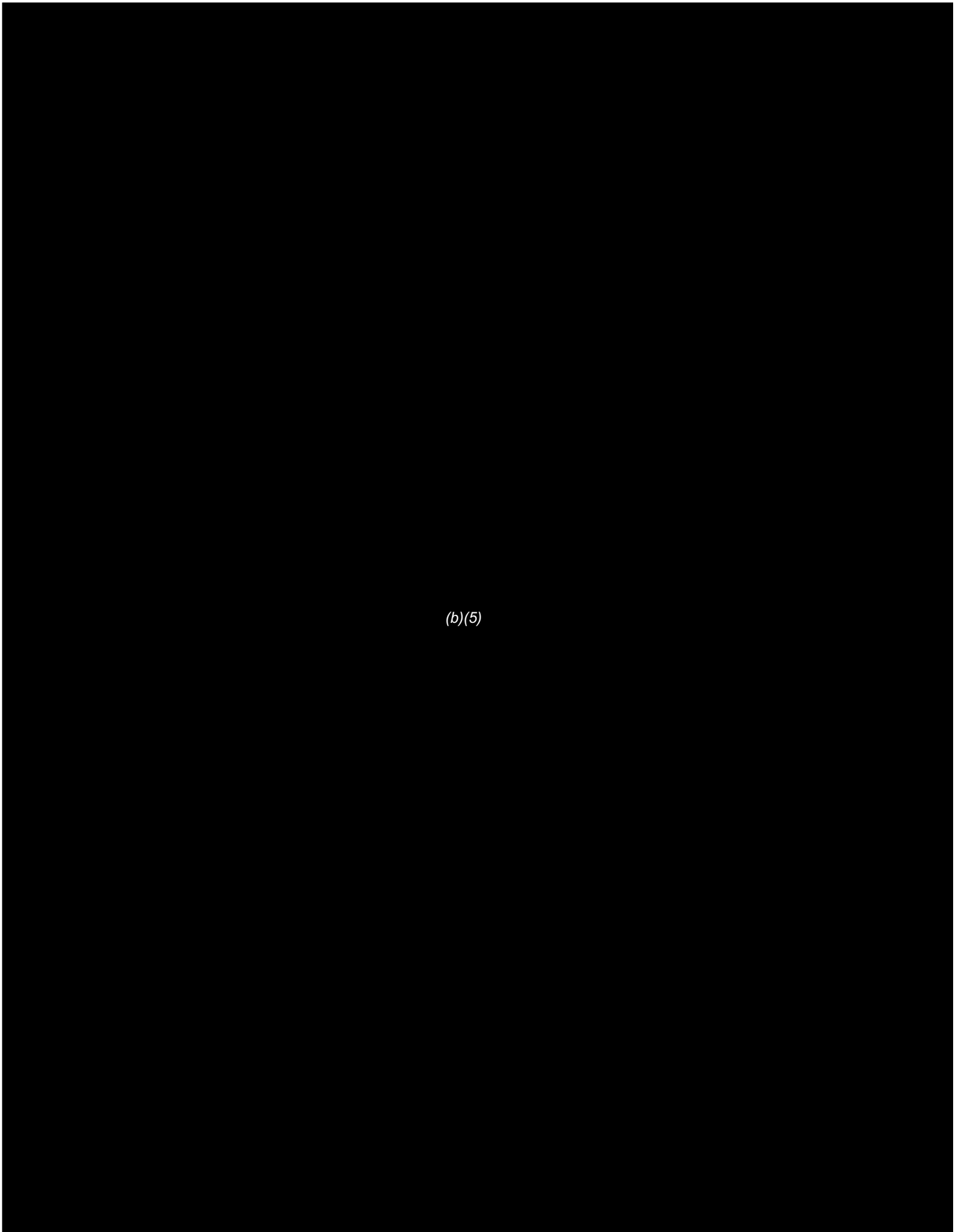
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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Importance: Normal
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Gentlemen:
Rick may have already sent this to you, but out of abundance of caution here is the draft brief from Appellate on the cert. petition in the dusky gopher frog critical habitat case.

Ben
---------- Forwarded message ----------
From: **Shilton, David (ENRD)** <David.Shilton@usdoj.gov>
Date: Fri, Aug 4, 2017 at 12:41 PM
Subject: RE: Markle Interests v. FWS (Sup. Ct.)
To: "Hollingsworth, Mary (ENRD)" <Mary.Hollingsworth@usdoj.gov>, "Jesup, Benjamin" <benjamin.jesup@sol.doi.gov>, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, "Stevens, Michael" <mike.stevens@sol.doi.gov>, "Romanik, Peg" <peg.romanik@sol.doi.gov>
Cc: "kristen.l.gustafson@noaa.gov" <kristen.l.gustafson@noaa.gov>, "Barsky, Seth (ENRD)" <Seth.Barsky@usdoj.gov>

Colleagues,

Attached is a draft brief in opposition to cert. for your review. I would like to get comments by COB Tuesday, so I can get a reviewed version to our front office on Wednesday. I'm also attaching the two petitions. Let me know if you have questions. Thanks, David

David C. Shilton

Senior Litigation Counsel, Appellate Section

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Ben Jesup
Assistant Solicitor for Fish and Wildlife
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No.

In the Supreme Court of the United States

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Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceedings Below ii
Corporate Disclosure Statement ii
Opinions Below.....1
Jurisdiction.....1
Statutes and Regulations Involved 1
Statement 2
A. The Statutory And Regulatory Scheme.....5
B. The ESA's Critical Habitat Provisions 6
C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog 9
D. The District Court Decision 12
E. The Fifth Circuit's Divided Panel Decision And En Banc Vote 13
Reasons For Granting The Petition.....14
I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.....14
A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat. 15
B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit. 24
II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance. 26
A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.....26

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review. 30
III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law" 31
Conclusion 33
Appendix A — Opinion of the court of appeals (June 30, 2016) 1a
Appendix B — Opinion of the district court (Aug. 22, 2014) 78a
Appendix C — Order denying rehearing en banc (Feb. 13, 2017) 123a
Appendix D — Statutes Involved 163a
Appendix E — Regulations Involved 166a

TABLE OF AUTHORITIES

Page(s)

Cases

All. for Wild Rockies v. *Lyder*,
728 F.Supp.2d 1126 (D. Mont. 2010).....25

Am. Forest Res. Council v. *Ashe*,
946 F. Supp. 2d 1 (D.D.C. 2013), *aff'd*,
601 F. App'x 1 (D.C. Cir. 2015).....25

Arizona Cattle Growers' Ass'n v. *Salazar*,
606 F.3d 1160 (9th Cir. 2010).....4, 24

Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*,
515 U.S. 687 (1995).....6, 20

Bennett v. *Spear*,
520 U.S. 154 (1997).....5, 6, 14, 32, 33

Cape Hatteras Access Pres. All. v. *U.S. Dep't of Interior*,
344 F.Supp.2d 108 (D.D.C. 2004).....25

Chevron, U.S.A., Inc. v. *N.R.D.C.*,
467 U.S. 837 (1984).....18

Clark v. *Martinez*,
543 U.S. 371 (2005).....21

Ctr. for Biological Diversity v. *Kelly*,
93 F.Supp.3d 1193 (D. Idaho 2015).....25

Esquivel-Quintana v. *Sessions*,
137 S. Ct. 1562 (2017) 18

Home Builders Ass'n of N. Cal. v. *U.S. Fish & Wildlife Services*,
616 F.3d 983 (9th Cir. 2010) 24

Mach Mining, LLC v. *EEOC*,
135 S. Ct. 1645 (2015) 32

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 32, 33

Nat'l Ass'n of Home Builders v. *Babbitt*,
130 F.3d 1041 (D.C. Cir. 1997) 22

Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*,
551 U.S. 644 (2007) 6, 18

Nat'l Fed. of Indep. Business v. *Sebelius*,
567 U.S. 519 (2012) 22

Rapanos v. *United States*,
547 U.S. 715 (2006) 4, 22, 23

Solid Waste Agency of N. Cook Cty. v. *Army Corps*,
531 U.S. 159 (2001) 5, 21, 22, 23

Tenn. Valley Auth. v. *Hill*,
437 U.S. 153 (1978) 6, 7

Util. Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014) 20

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

Statutes, Rules, and Regulations

15 U.S.C. § 1536(a)(2) 18

16 U.S.C.
§ 1531 1
§ 1531(c)(2) 23
§ 1532(5)(A) 7, 17
§ 1532(5)(A)(i) 17
§ 1532(5)(A)(ii) 3, 8
§ 1532(5)(C) 7, 19
§ 1532(6) 20
§ 1533(a) 5, 15
§ 1533(a)(1)(A) 20
§ 1533(a)(3)(A) 7
§ 1533(a)(3)(A)(i) 3, 15
§ 1533(b)(2) 11, 32
§ 1533(b)(5)(A)(ii) 20
§ 1533(c)(1) 19, 20
§ 1534 20
§ 1535(c)(1)(A)-(E) 20
§ 1535(d)(1)(C) 20
§ 1536(a)(2) 5, 19
§ 1536(a)(3) 6
§ 1536(b)(3) 6
§ 1536(b)(4) 6

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1344 6

50 C.F.R.
§ 424.12 (2011) 2, 30
§ 424.12(b) (2012) 8
§ 424.12(e) 8

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

62 Fed. Reg. 39129 (July 22, 1997).....28

68 Fed. Reg. 46684 (Aug. 6, 2003) 28

75 Fed. Reg. 31387 (June 3, 2010).....10

76 Fed. Reg. 59774 (Sept. 27, 2011) 10, 20

77 Fed. Reg. 35118 (June 12, 2012)..... *passim*

81 Fed. Reg. 7414 (Feb.11, 2016).....8, 30, 31

Miscellaneous

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) 16, 19

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BLACK'S LAW DICTIONARY (5th ed. 1979) 17

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H.R. Rep. No. 95-1625 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453.....4, 7, 8, 21

IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* (Apr. 6, 2012).....11, 23

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

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OXFORD ENGLISH DICTIONARY (2d ed. 1989).....19

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St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).....11

S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980 (COMM. PRINT 1982).....8, 21

Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE (10th ed. 2013).....16

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

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WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) 16, 18

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra.* Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

> Under the arbitrary-and-capricious standard,
>
> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20*.

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity–of–Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

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

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

17-01174_017702;17-01174_017702;17-01174_017703;17-01174_017704;17-01174_017705;17-01174_017706;1...

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

* * *

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill,* 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.,* 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club,* 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.,* 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson,* 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear,* 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor,* 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler,* 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA,* 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft,* 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA,*—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour,* 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior,* 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA,* 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson,* 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York,* 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.,* 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin,* 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar,* 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior,* 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton,* 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez,* 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez,* which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States,* 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF,* 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez,* 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service,* 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar,* 606 F.3d 1160 (2010), *cert. denied,* 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne,* 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.,* 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.,* 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White,* 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436–39 (10th

[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall,* 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant
v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

tionate costs that are likely to result from the designation." *Id*. at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id. See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non–Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

> (A) the present or threatened destruction, modification, or curtailment of its habitat or range;
>
> (B) overutilization for commercial, recreational, scientific, or educational purposes;
>
> (C) disease or predation;
>
> (D) the inadequacy of existing regulatory mechanisms; or
>
> (E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

Nos. 17-71, 17-74

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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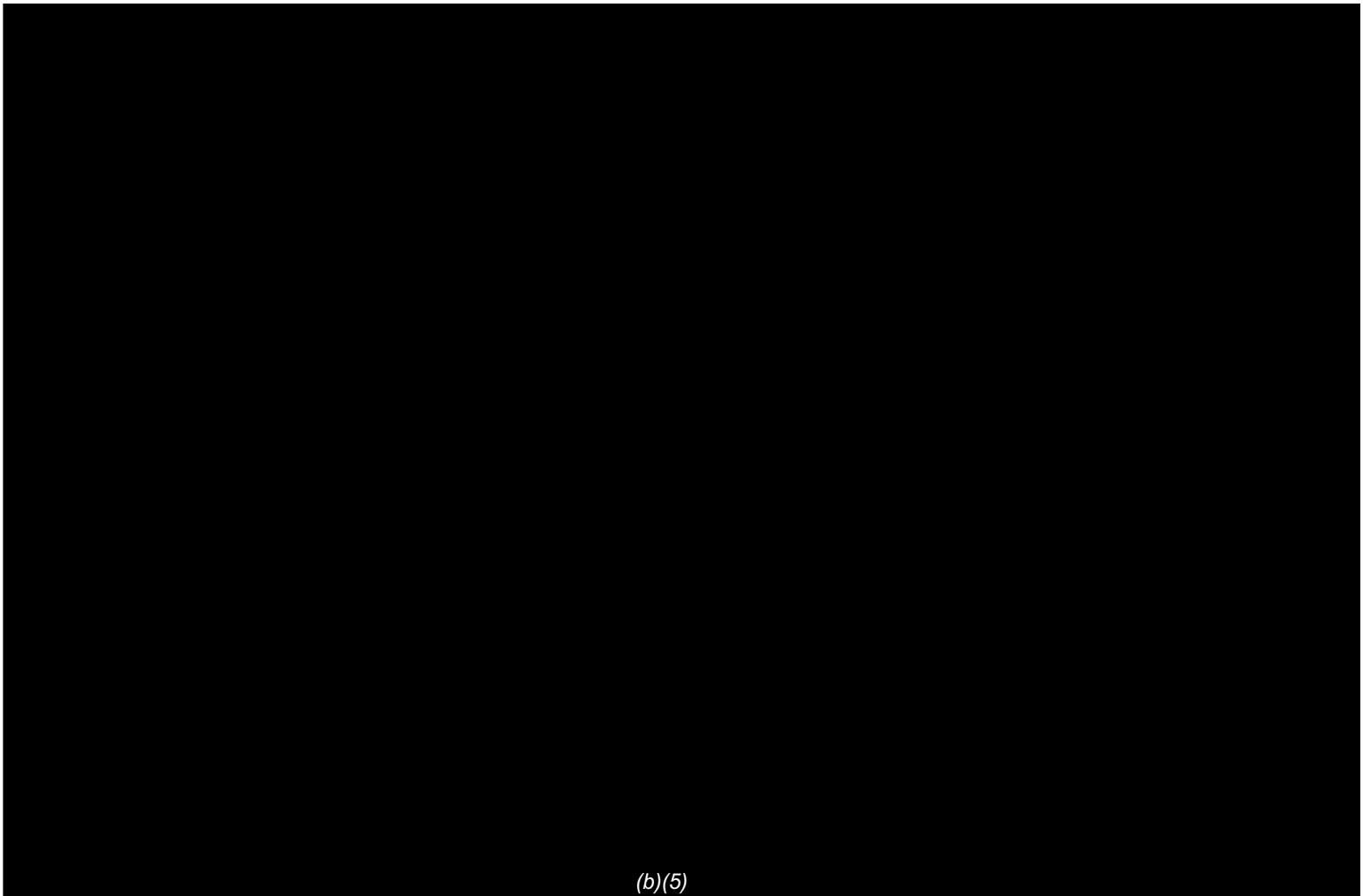
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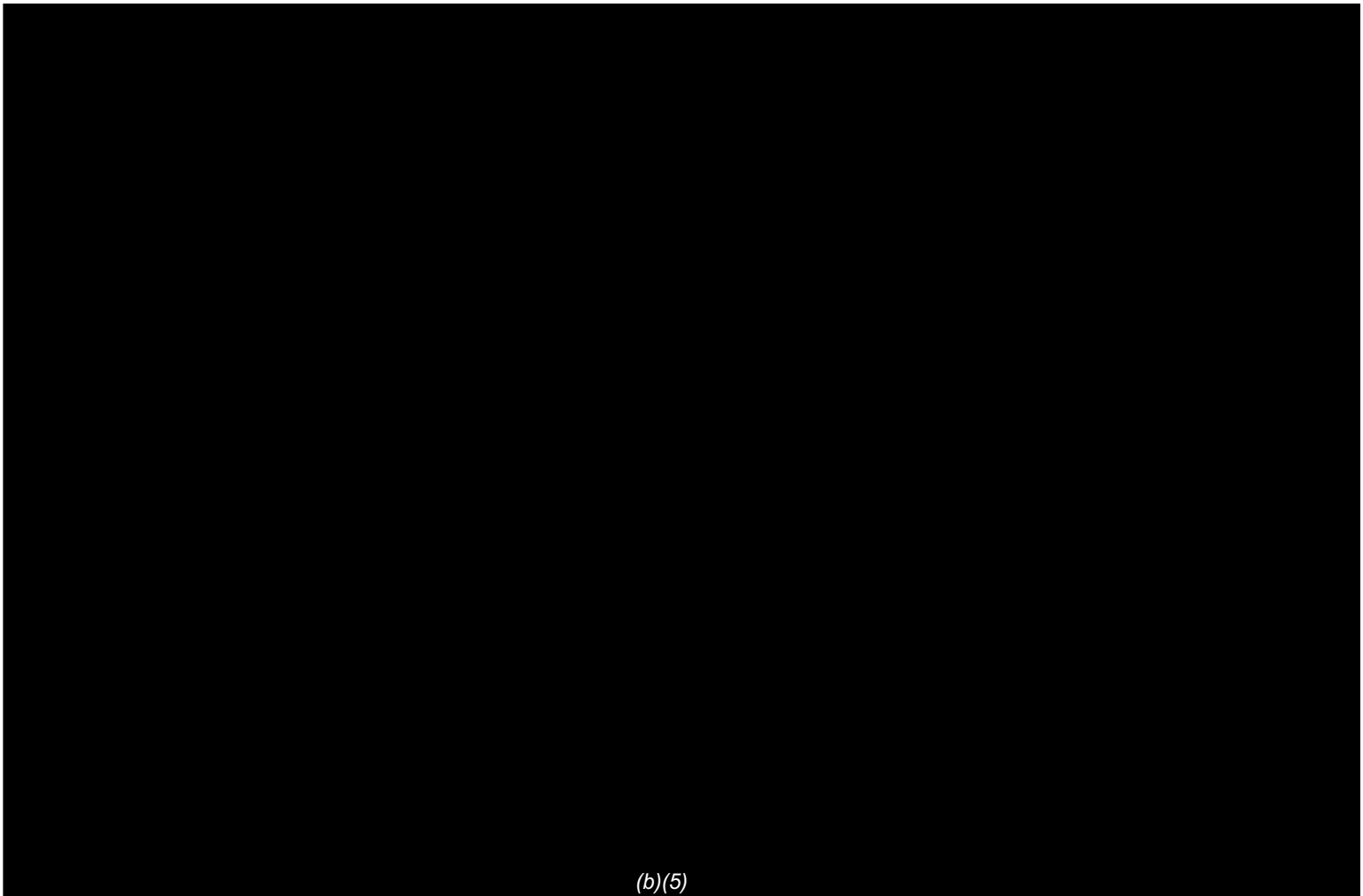
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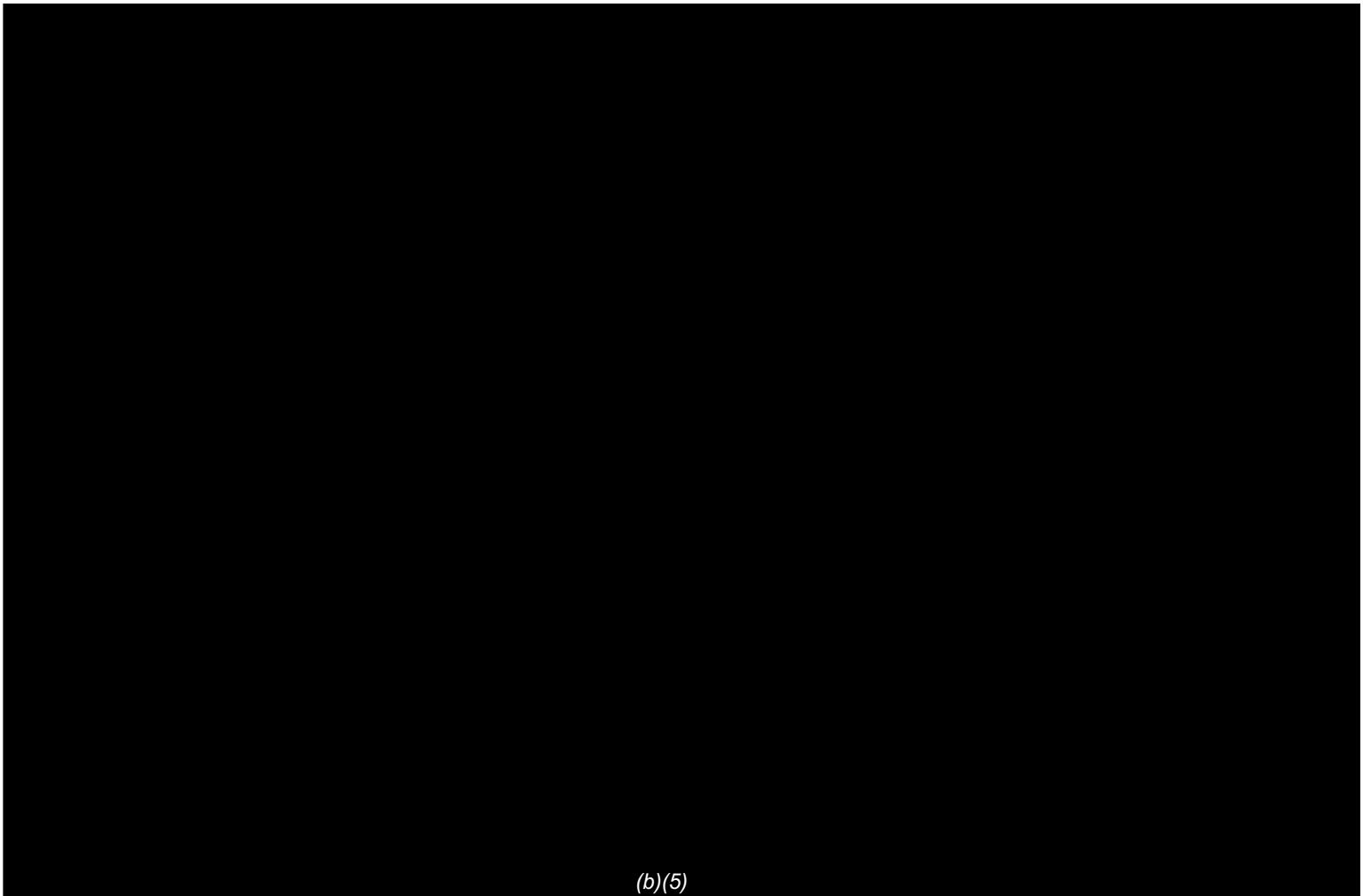
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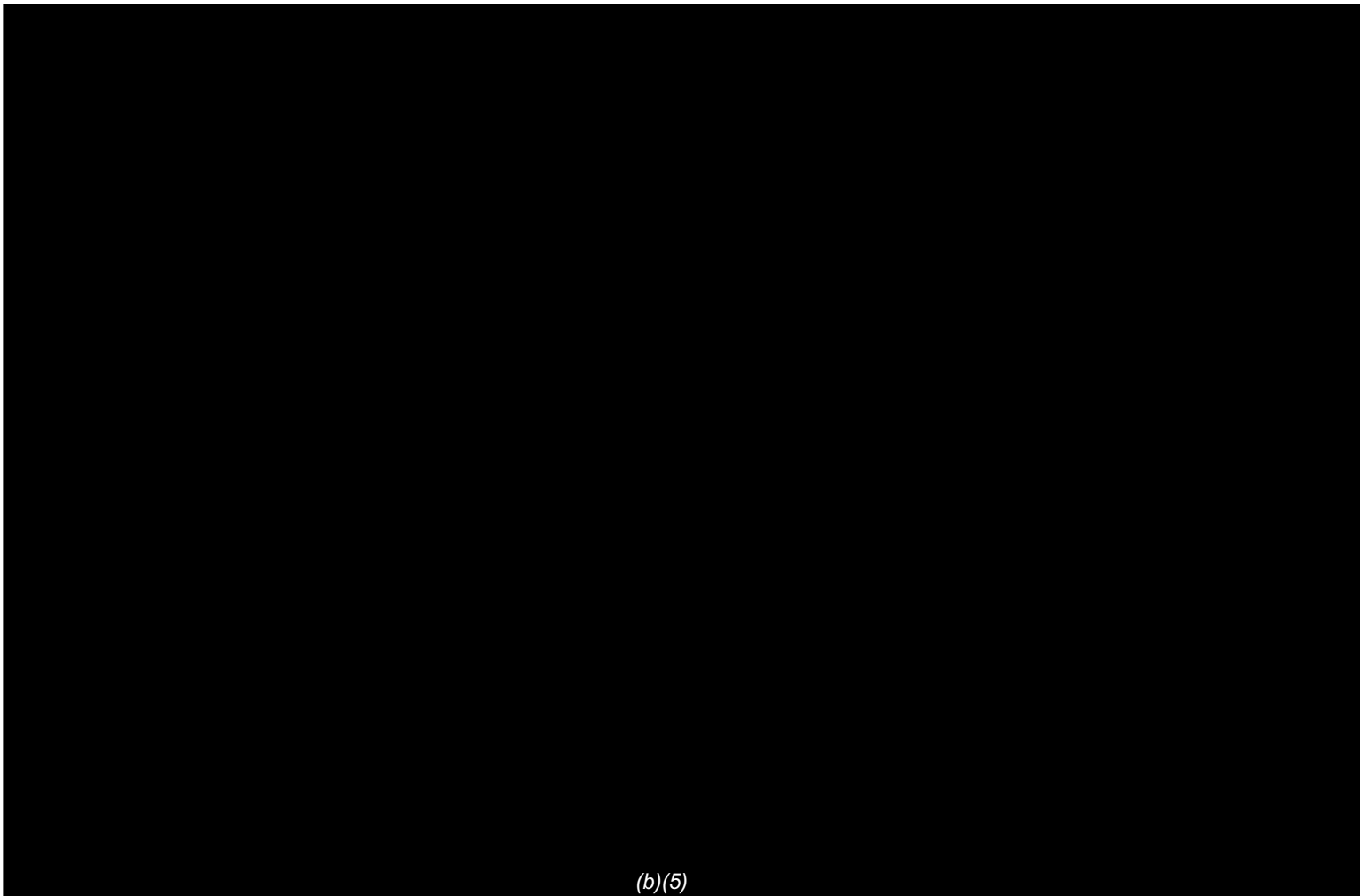
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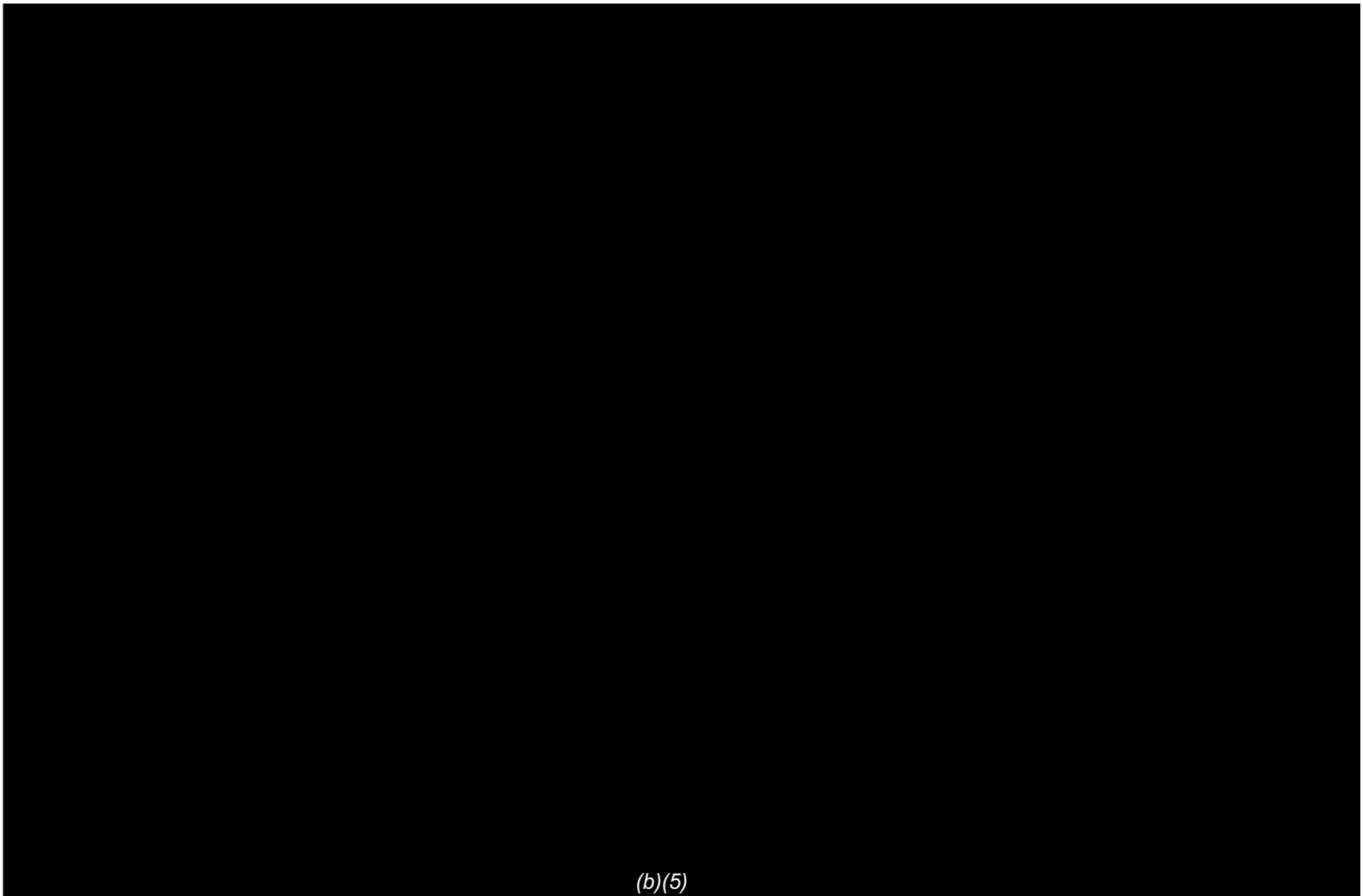
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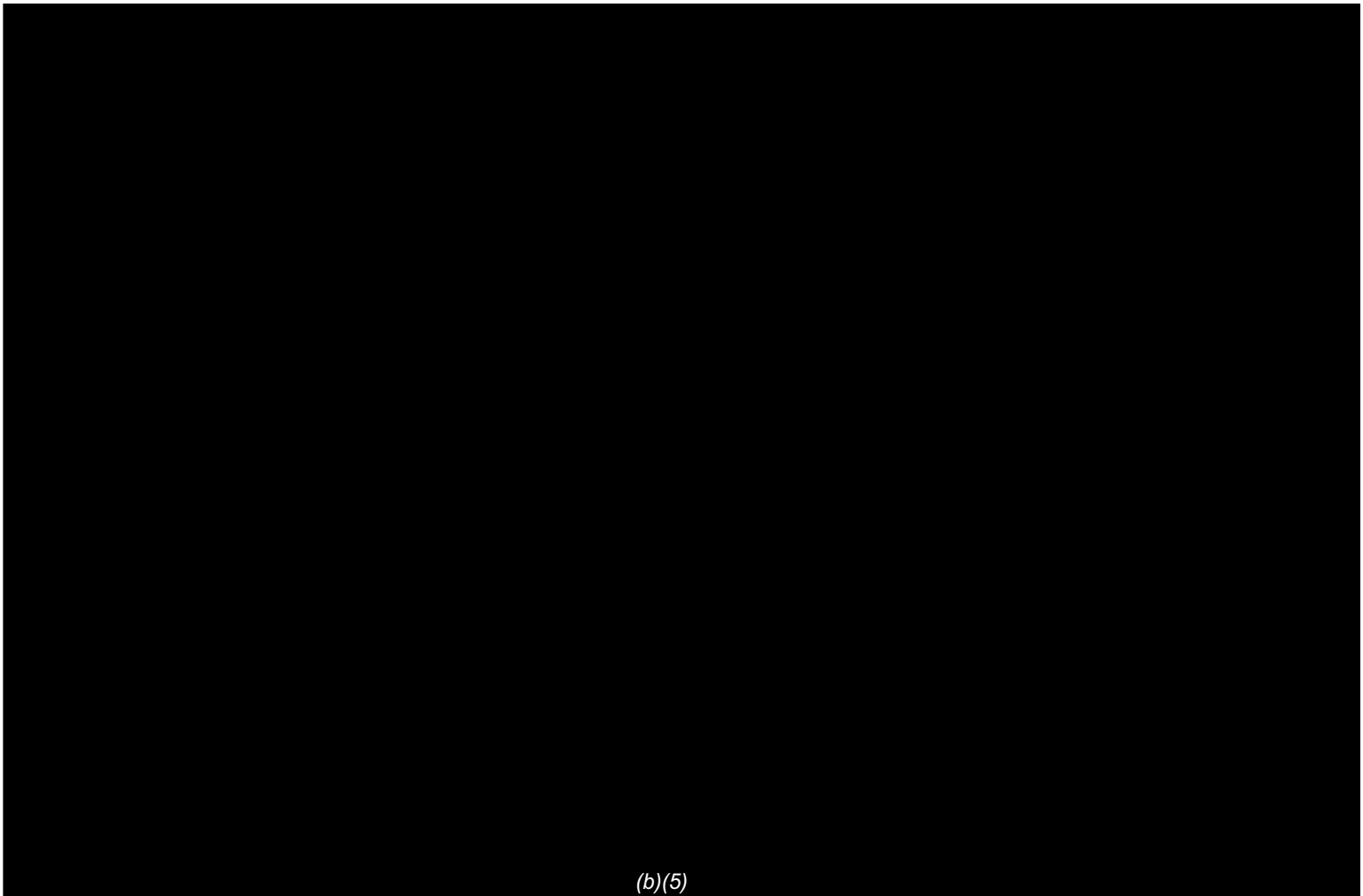
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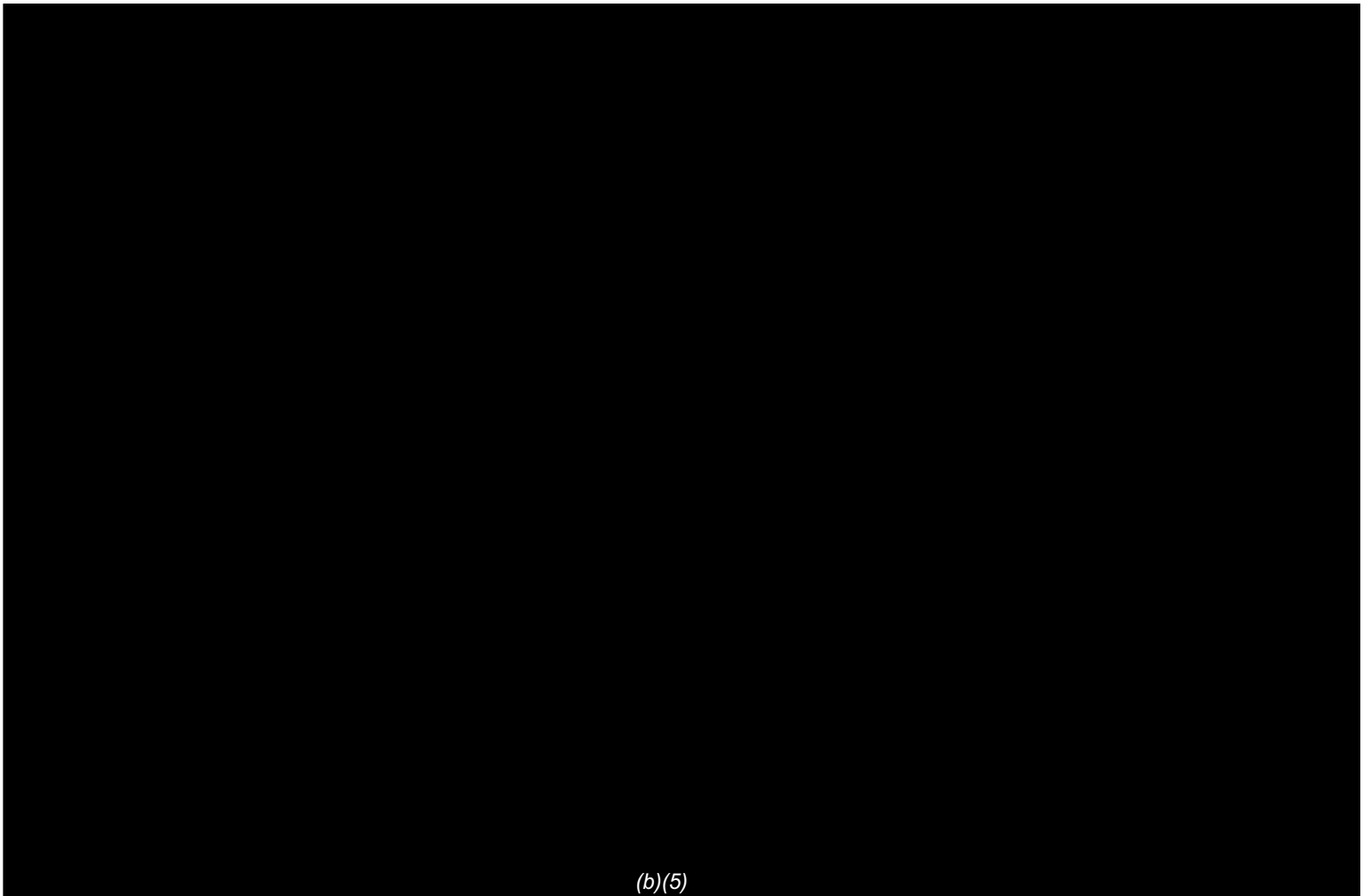
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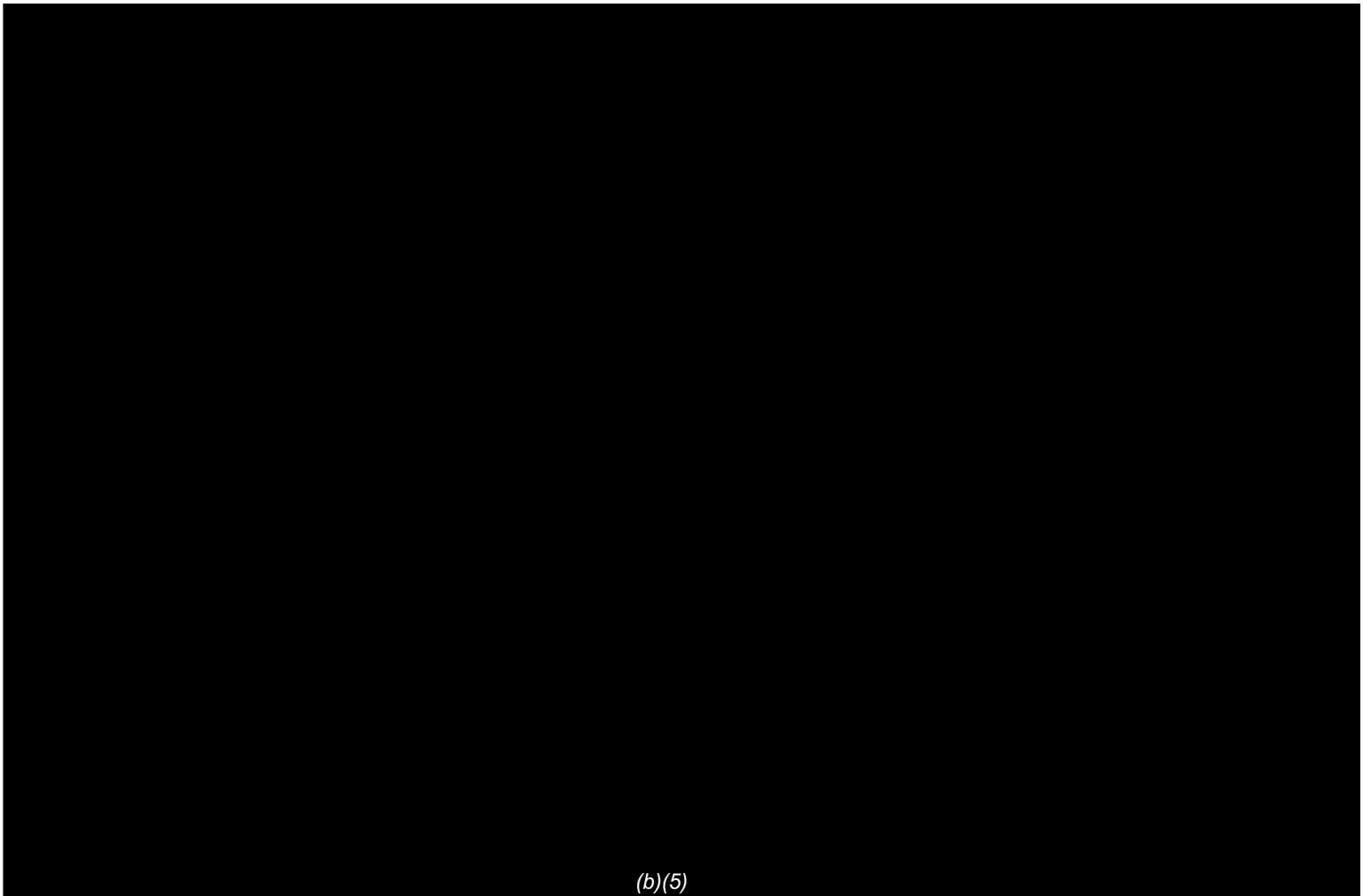
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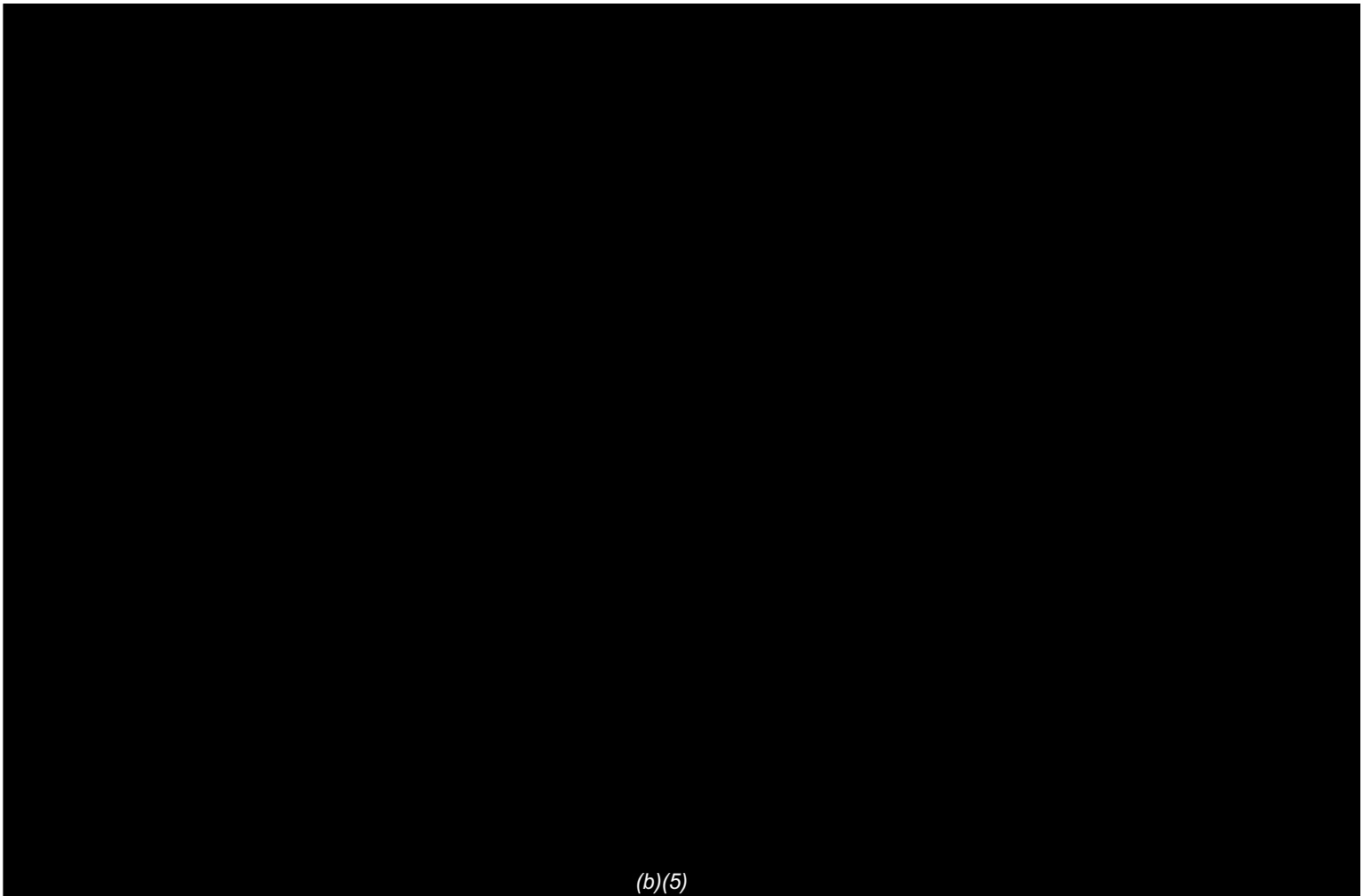
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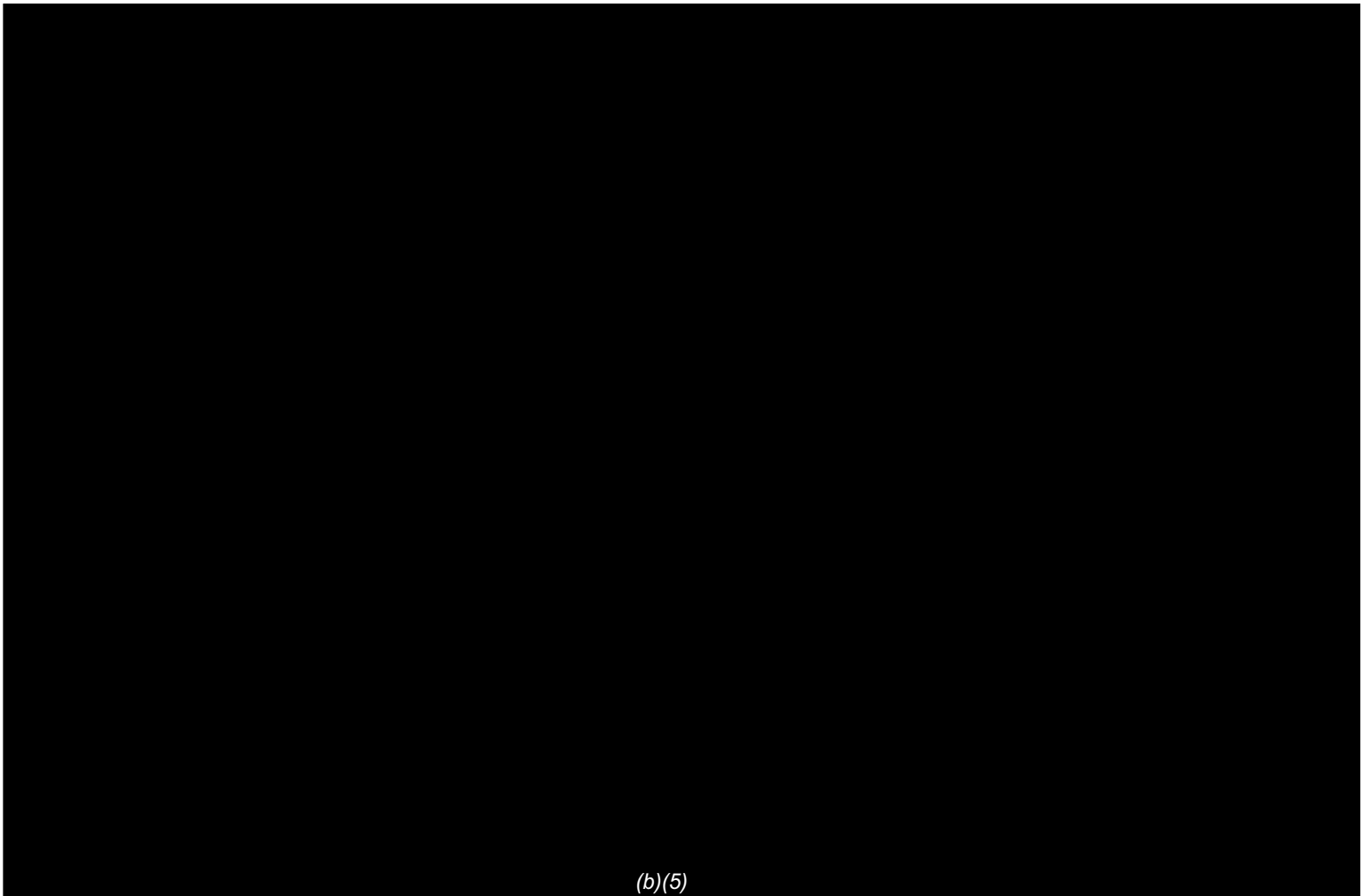
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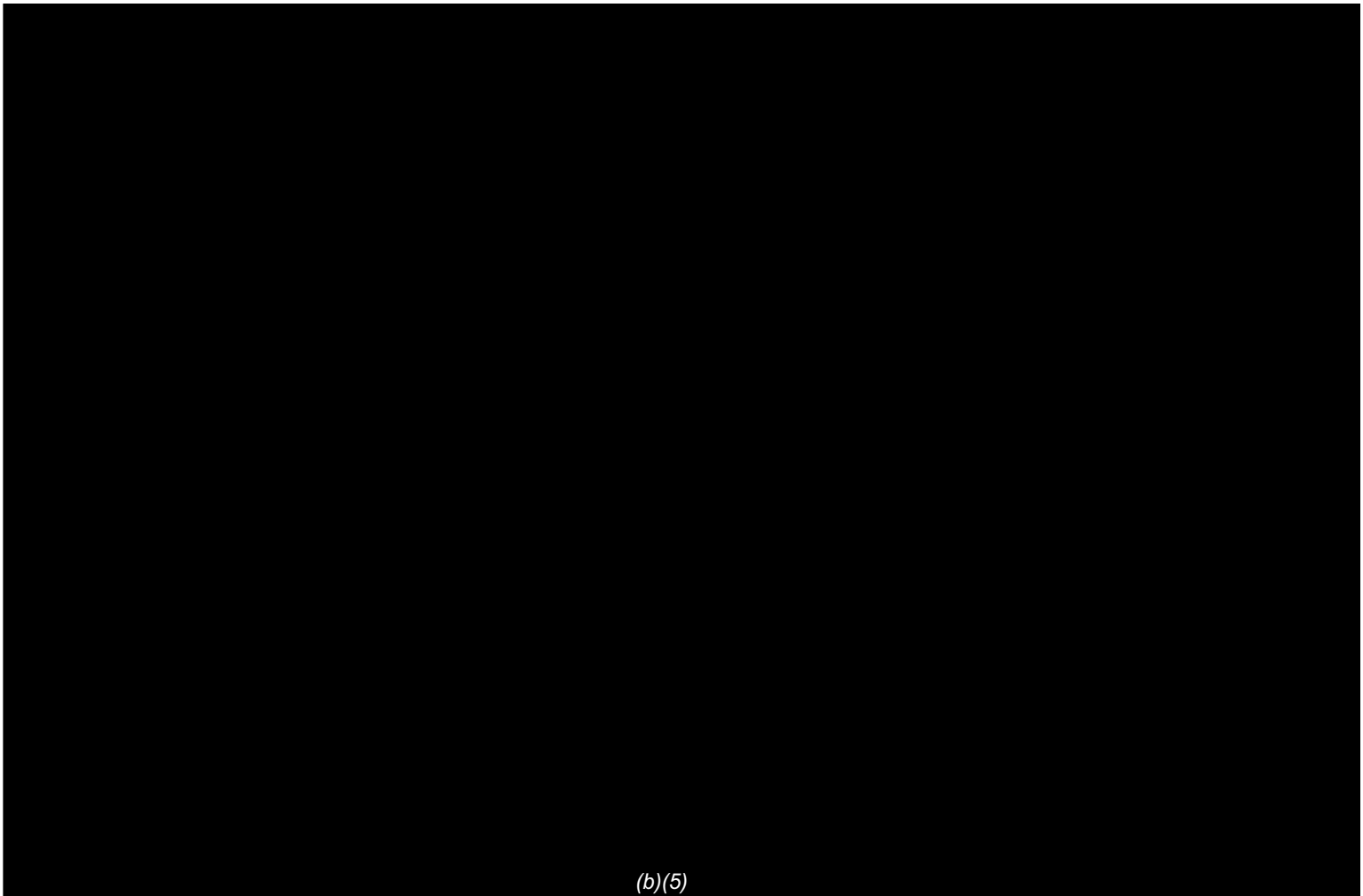
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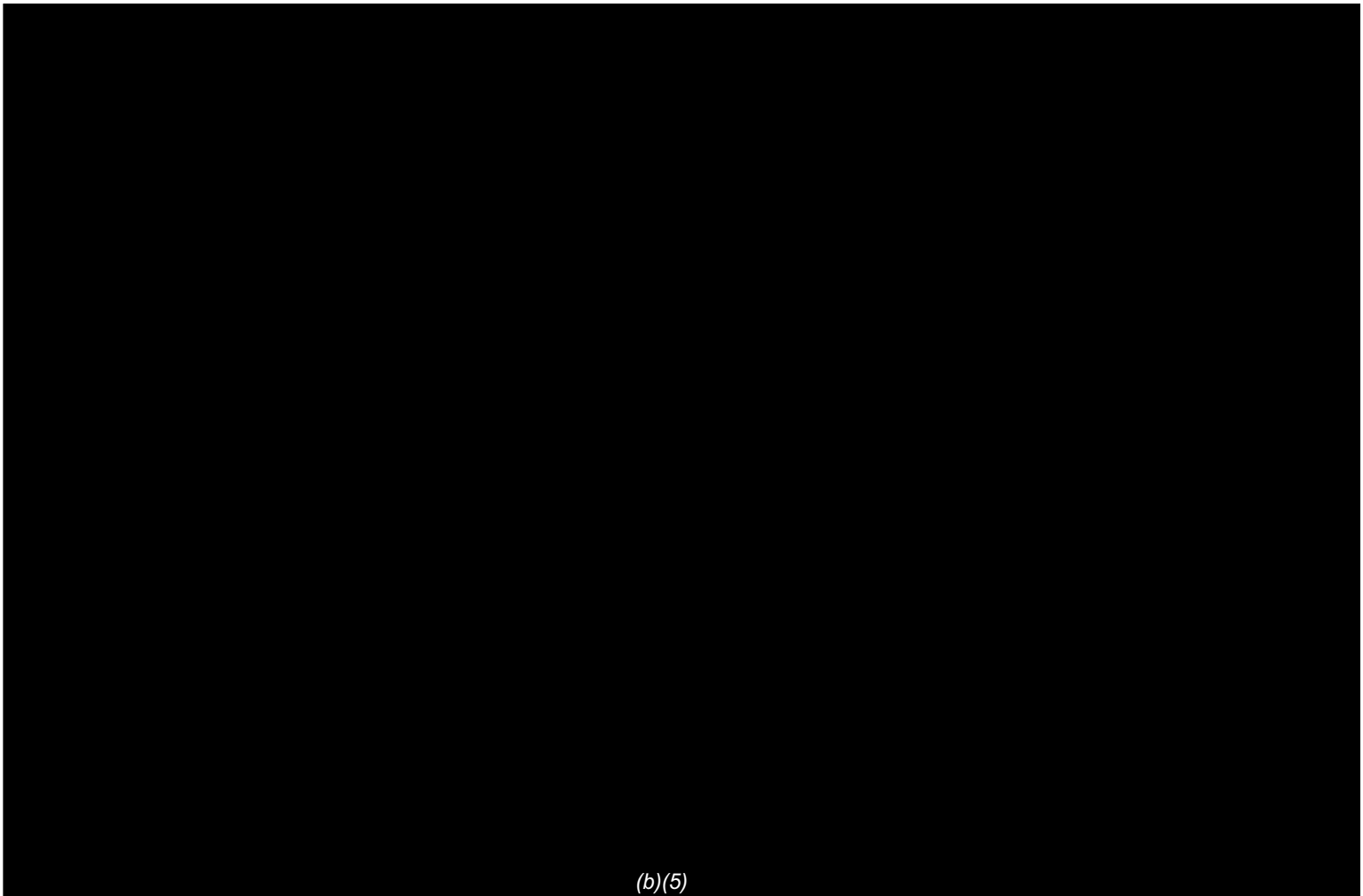
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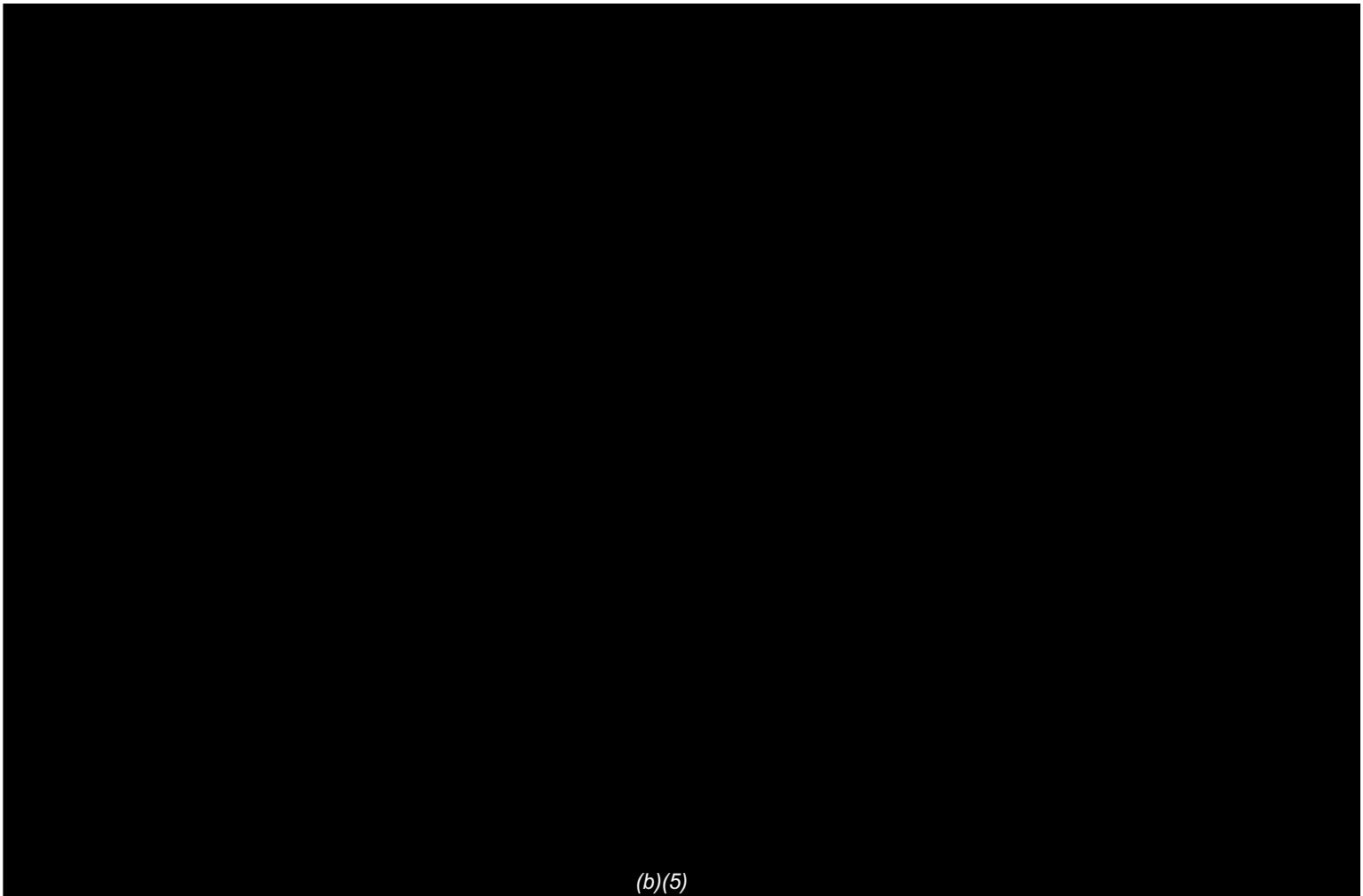
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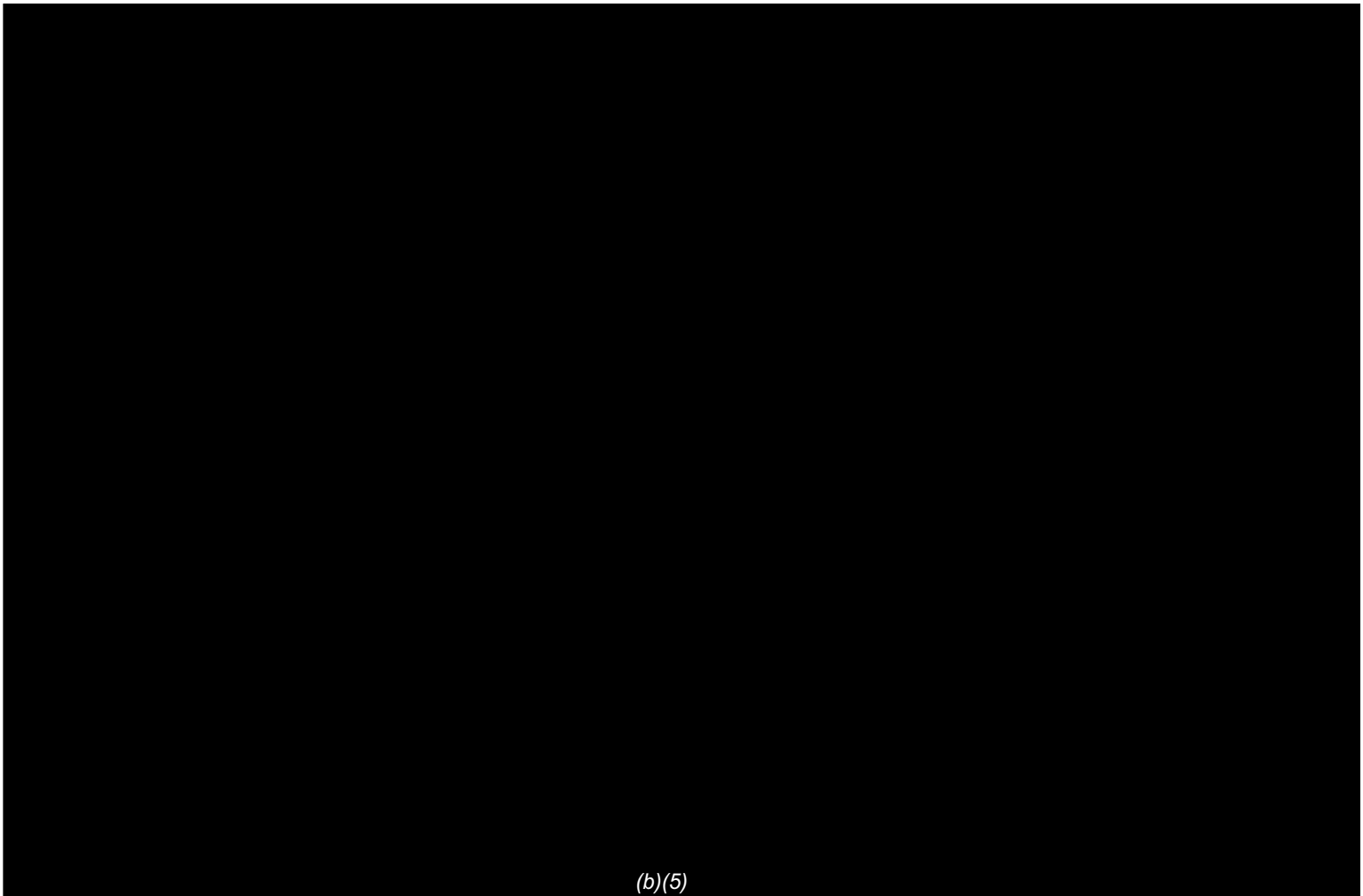
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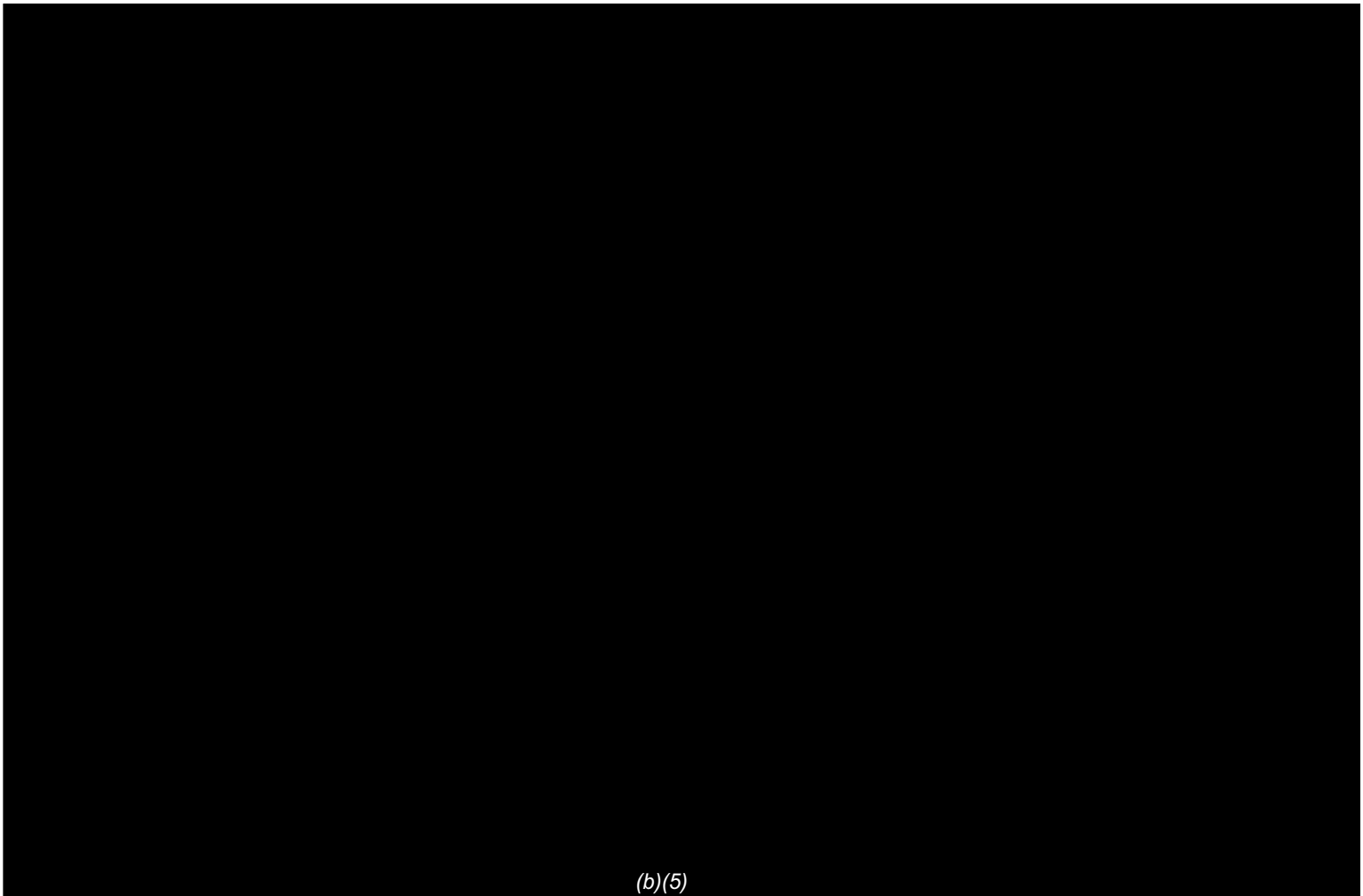
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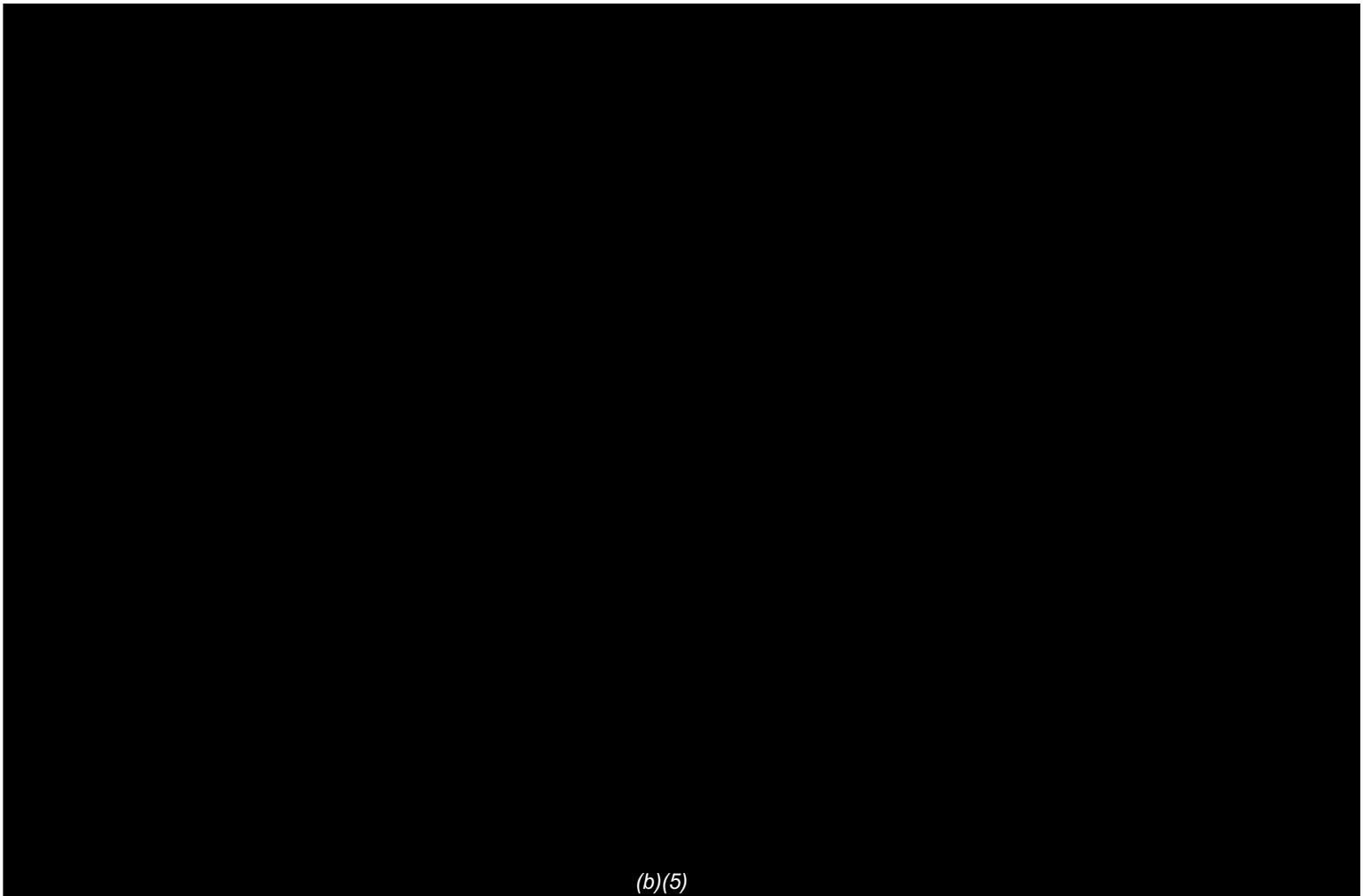
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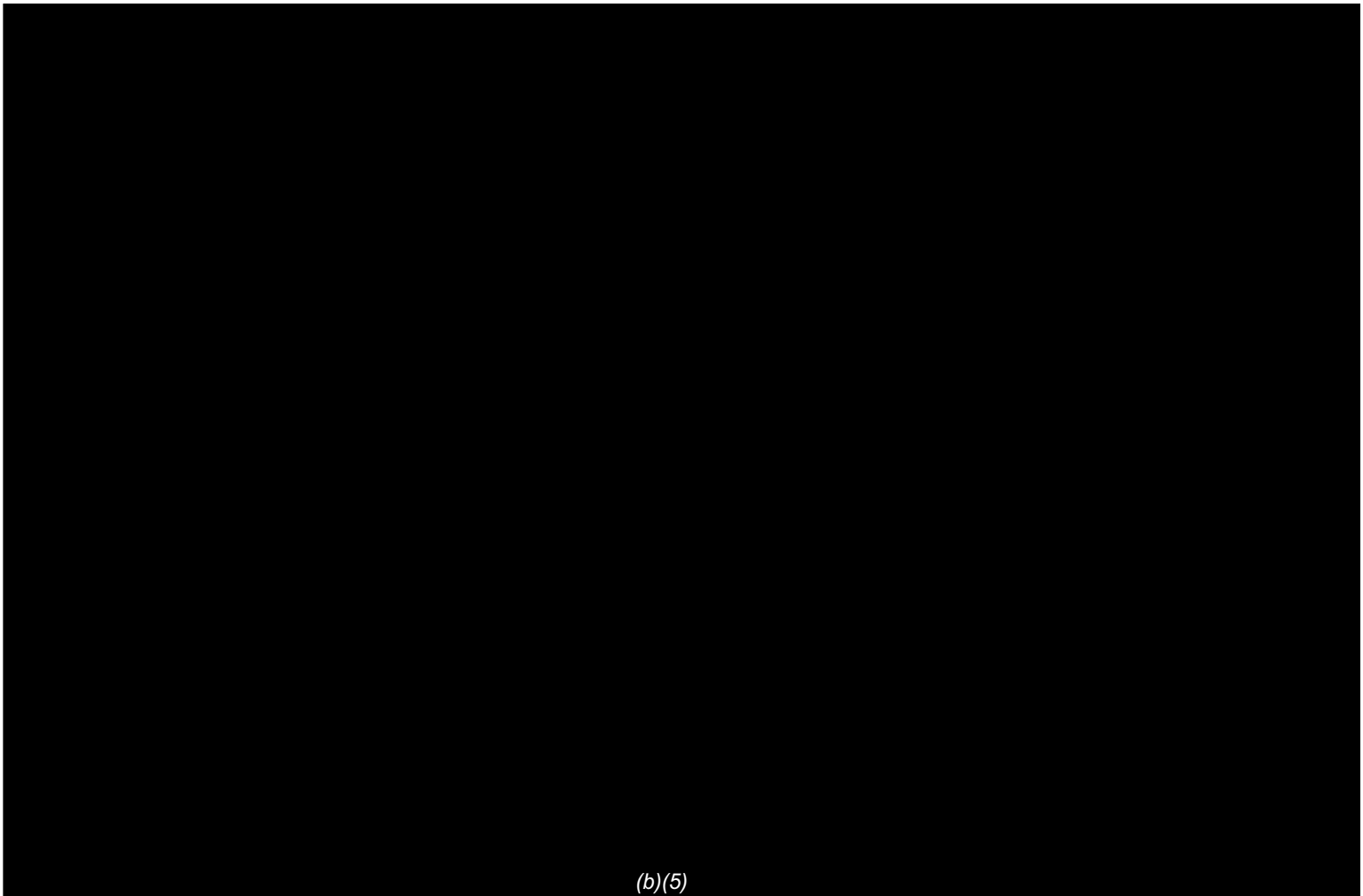
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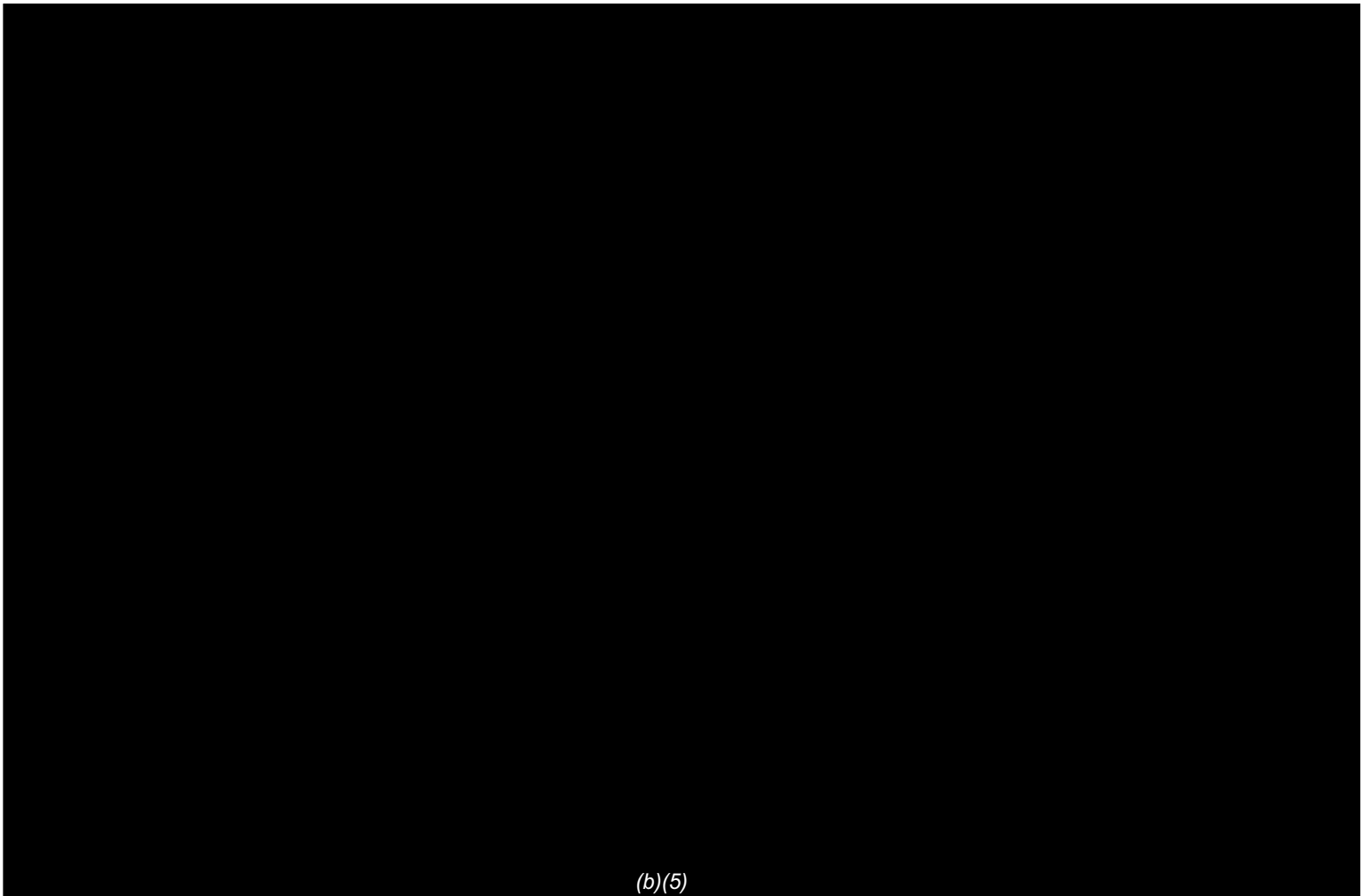
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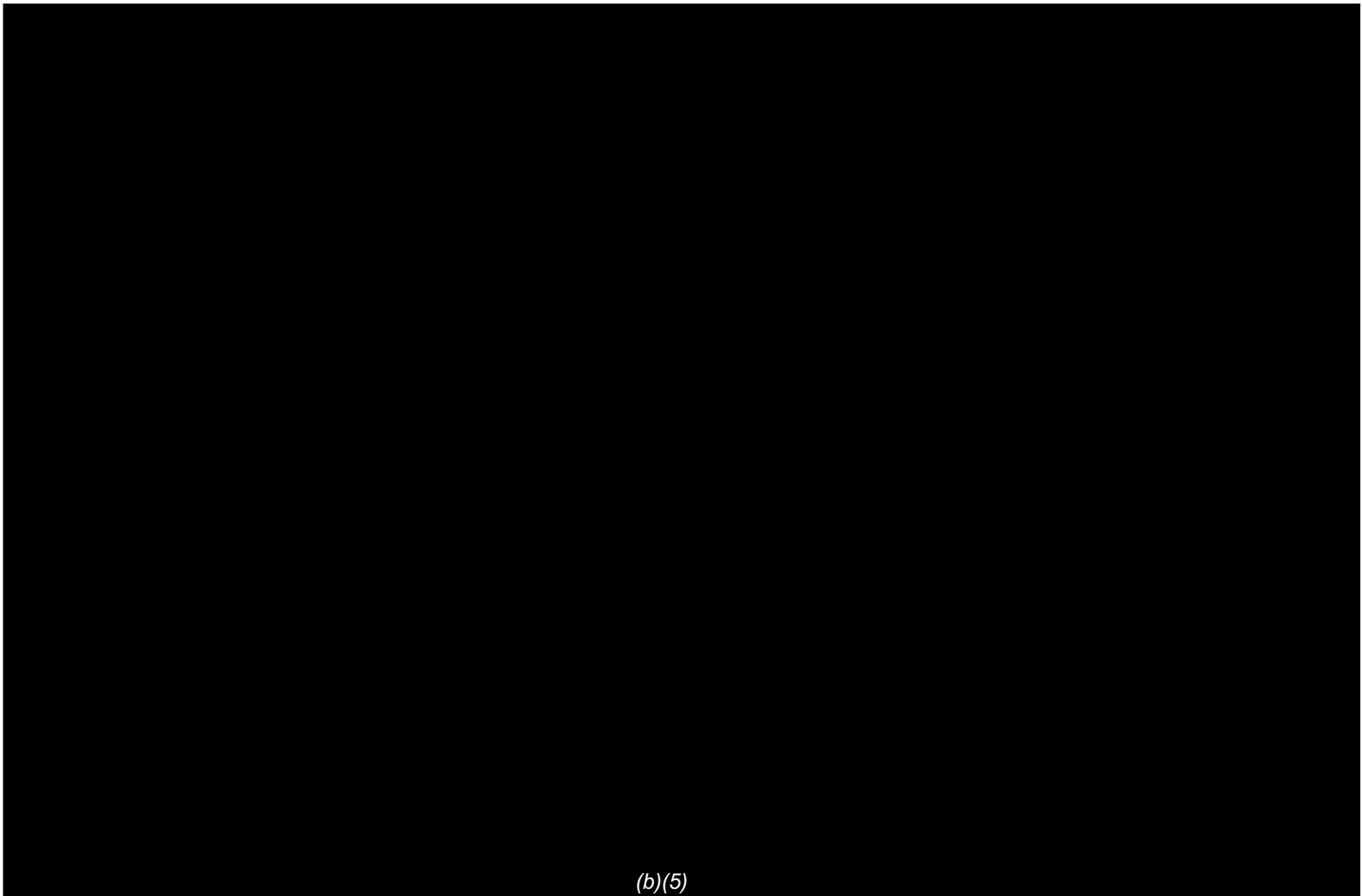
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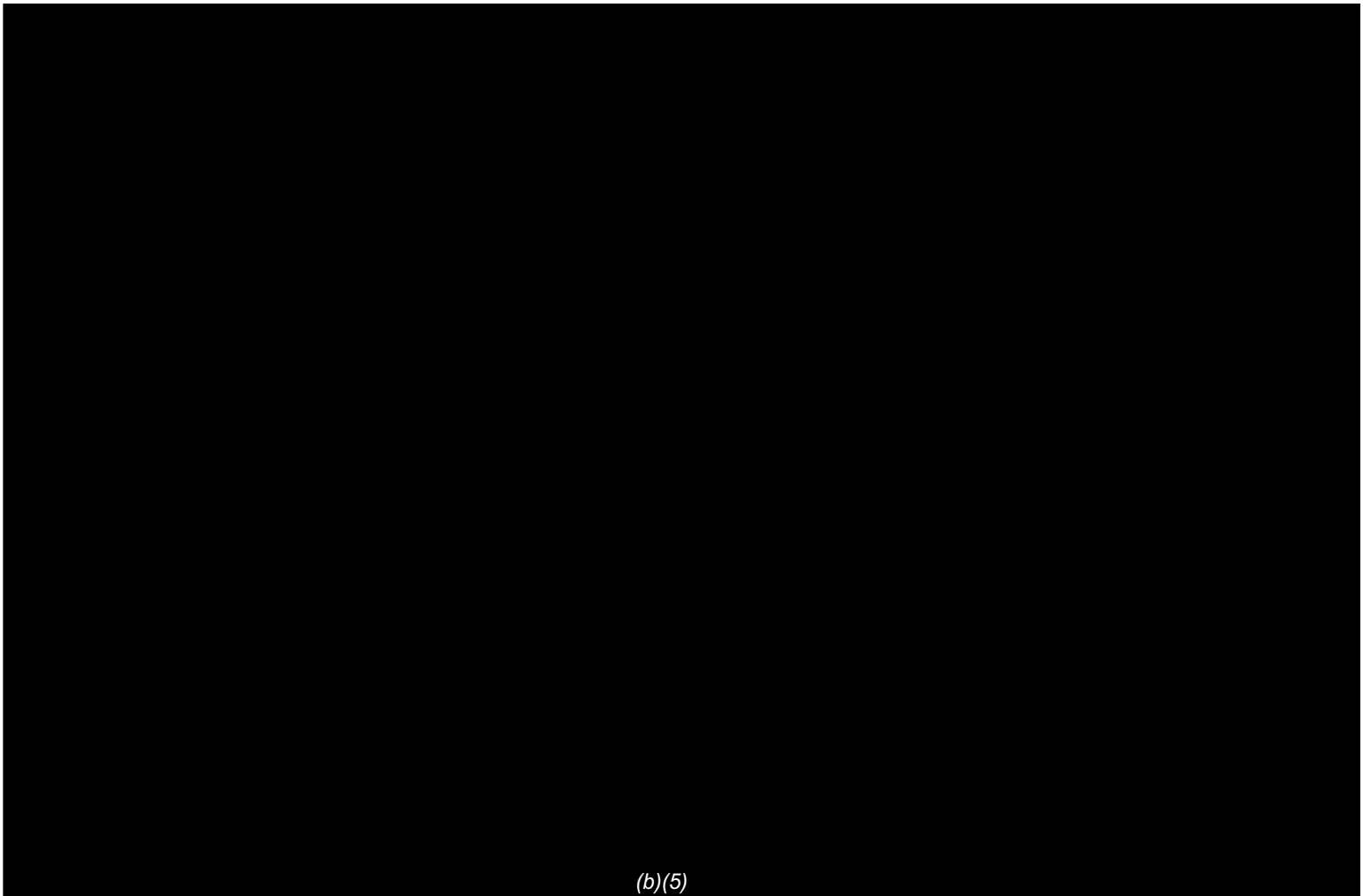
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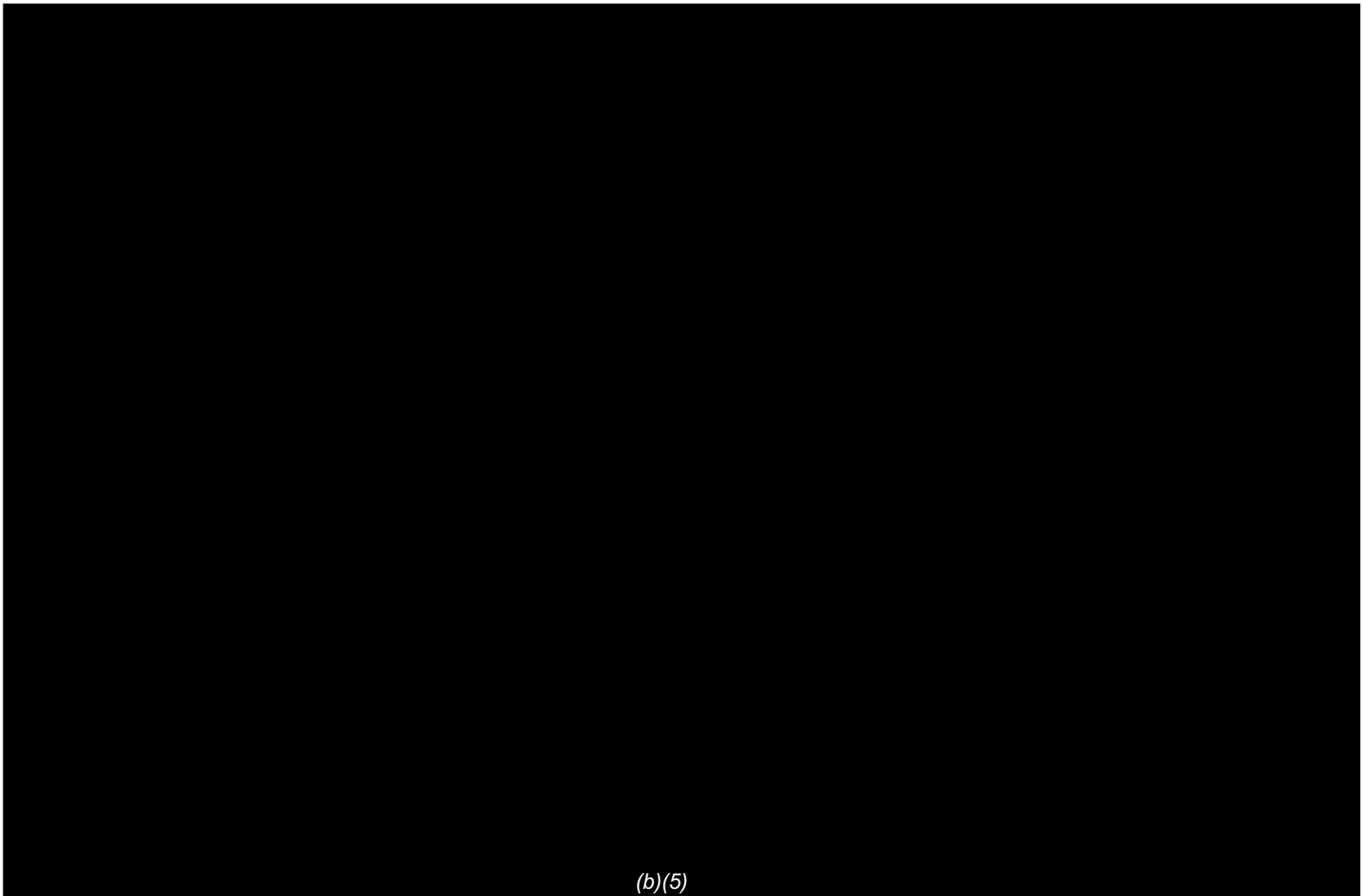
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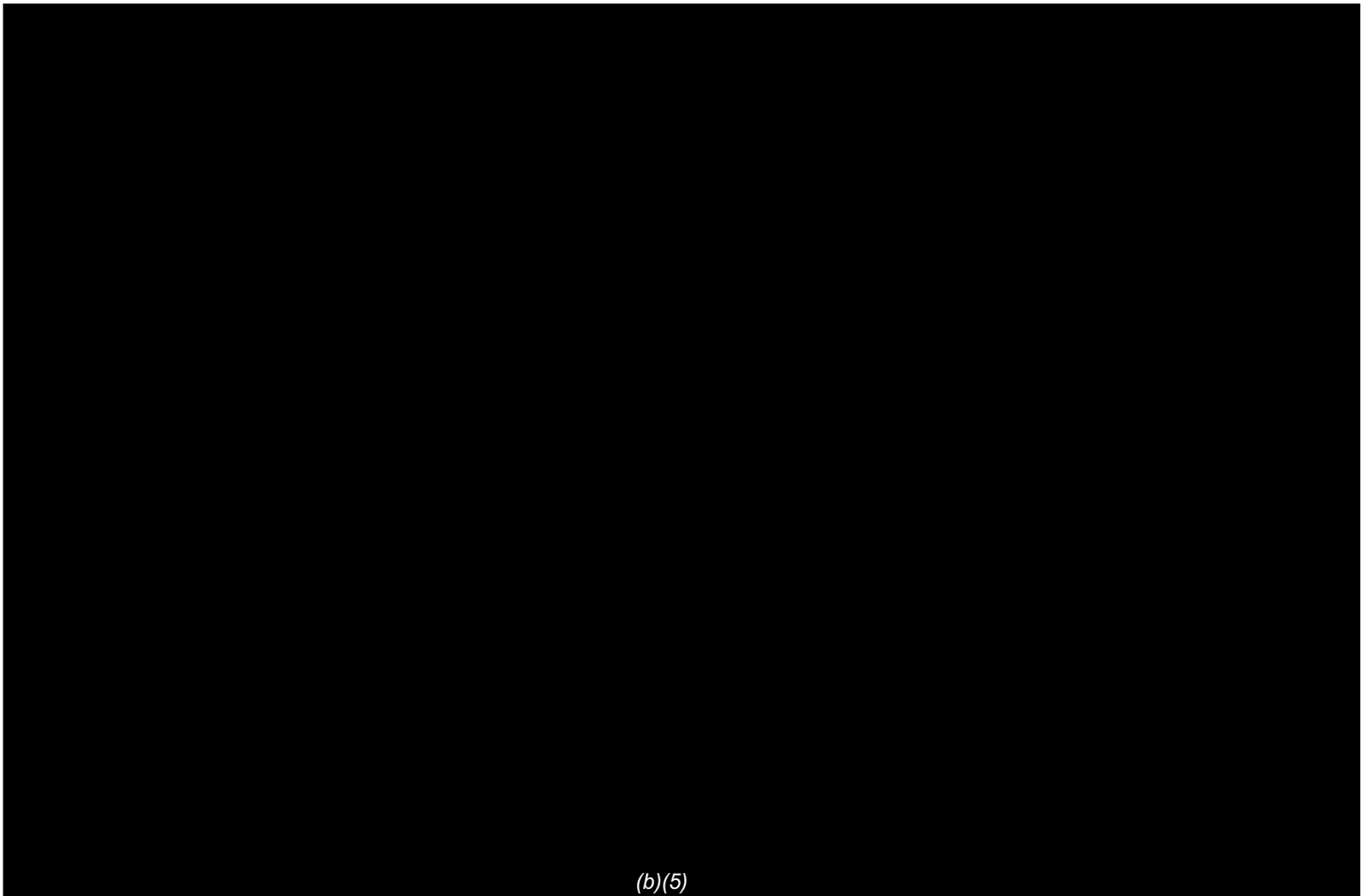
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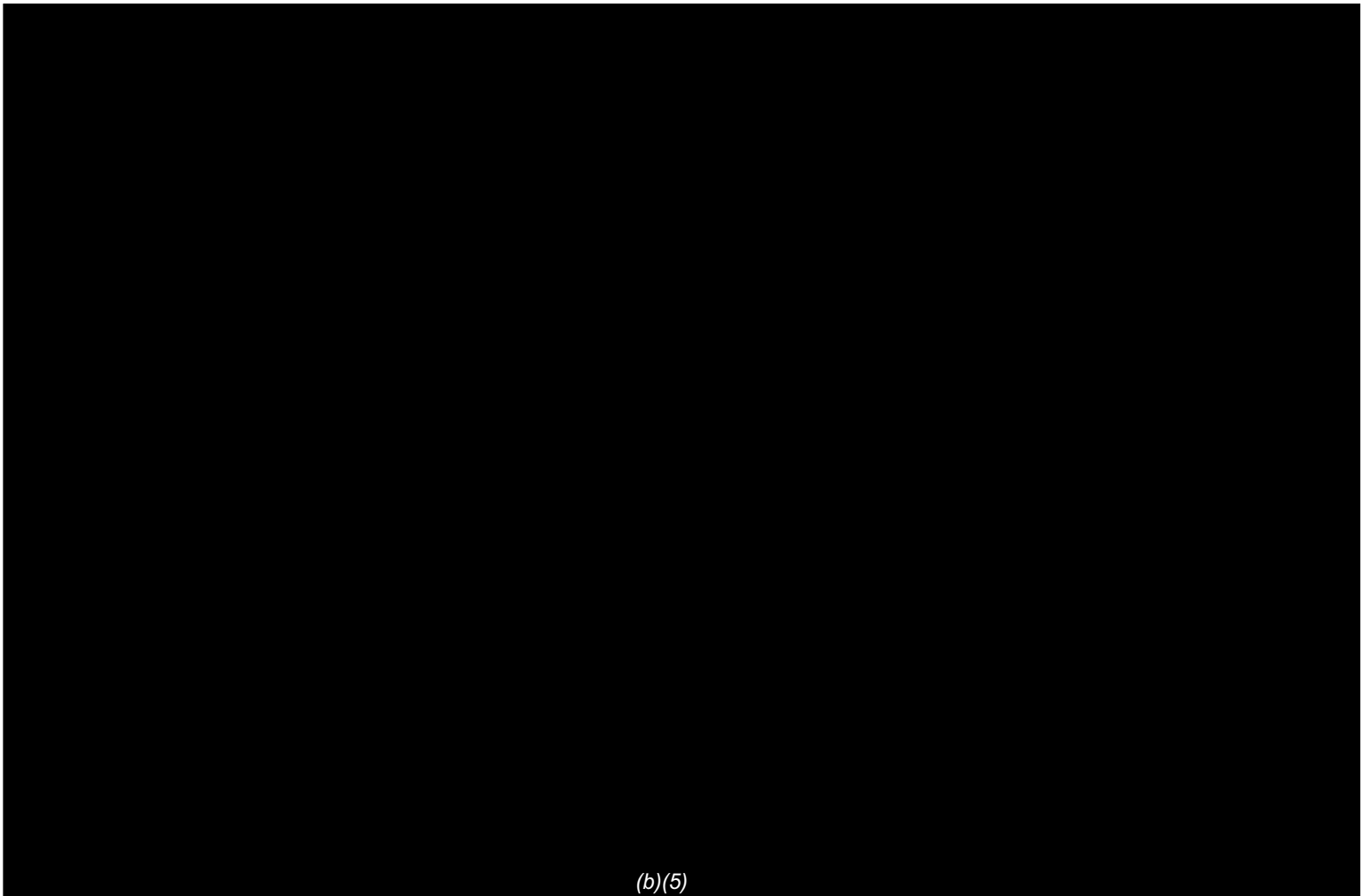
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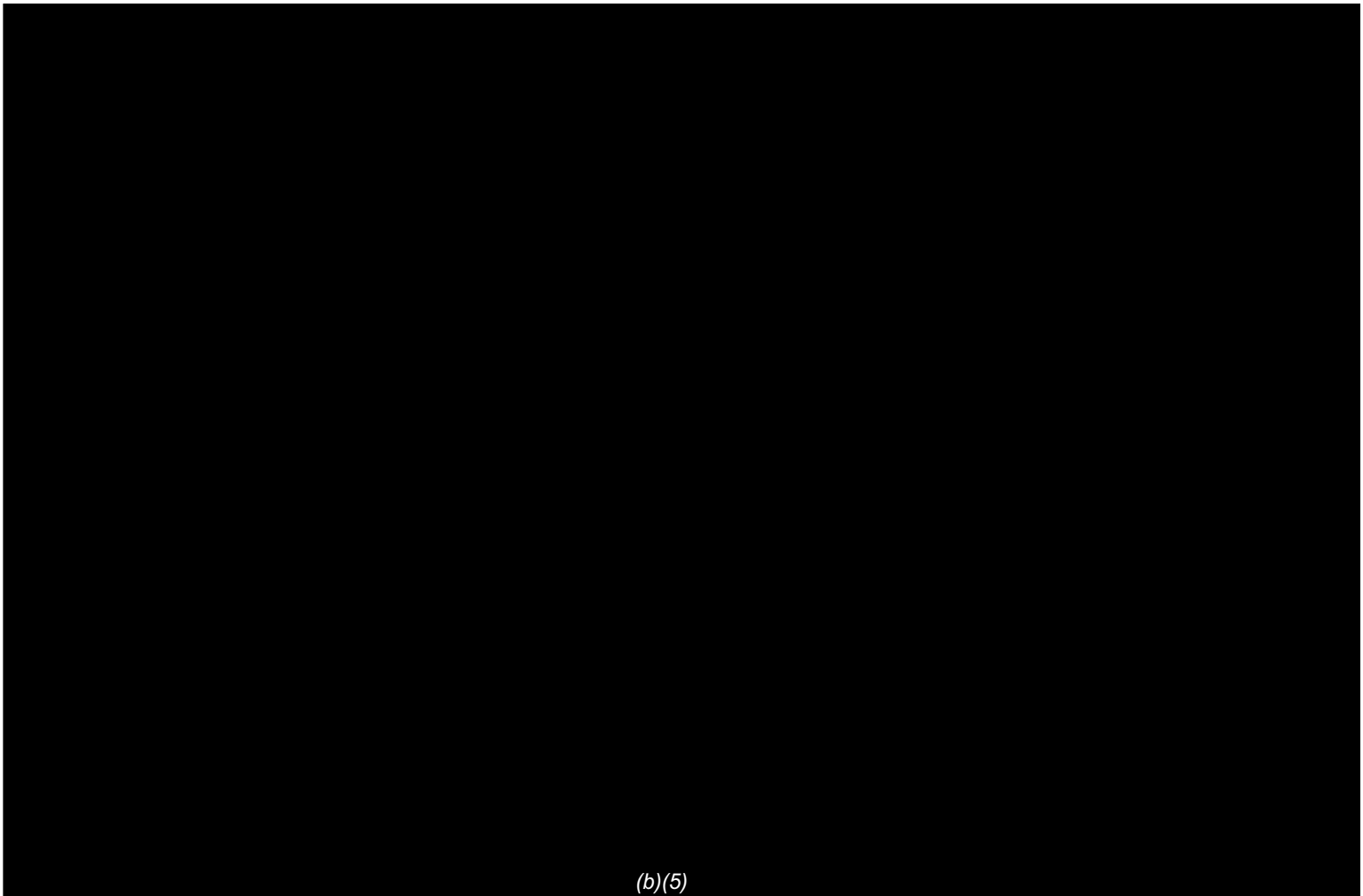
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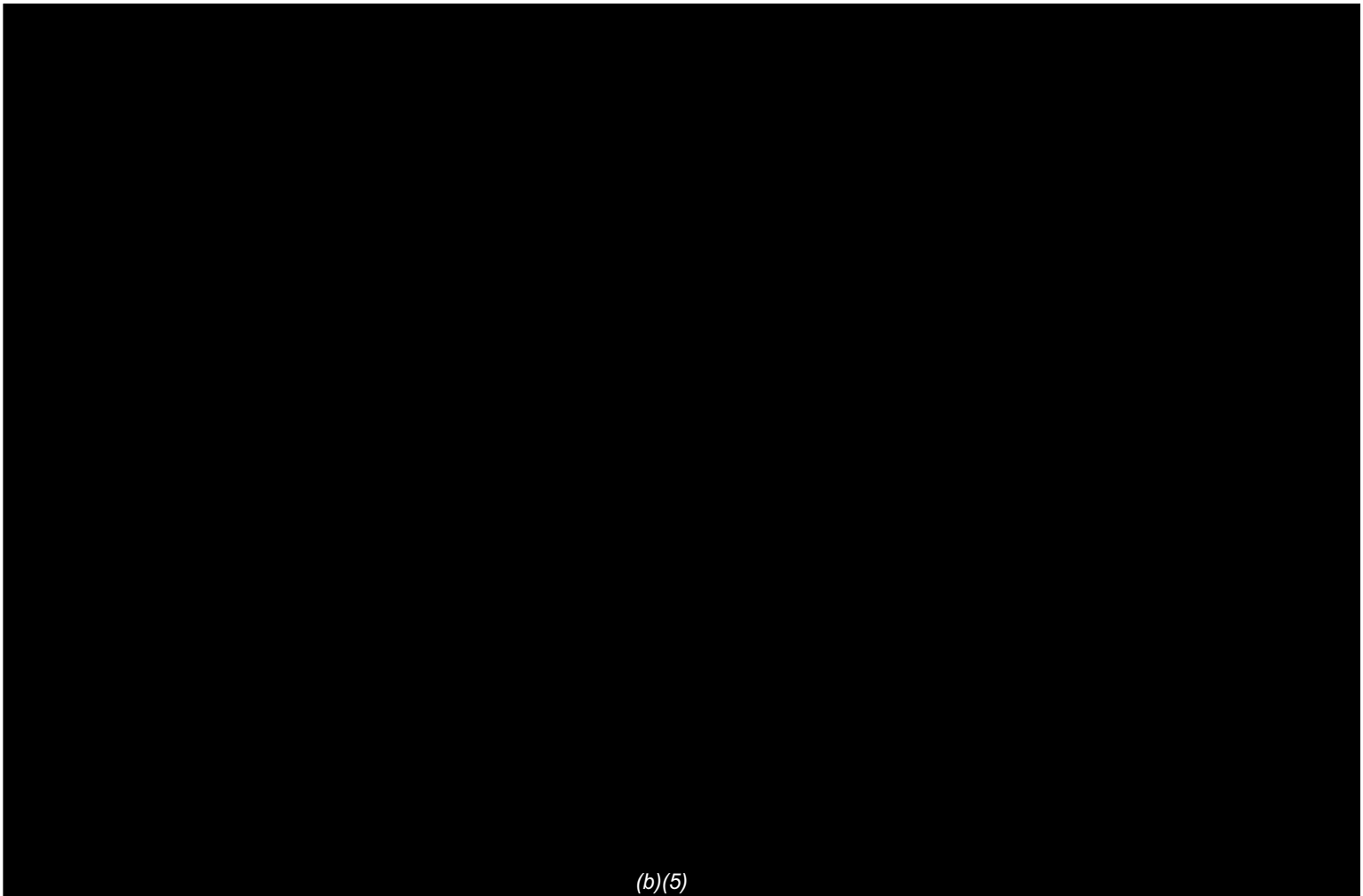
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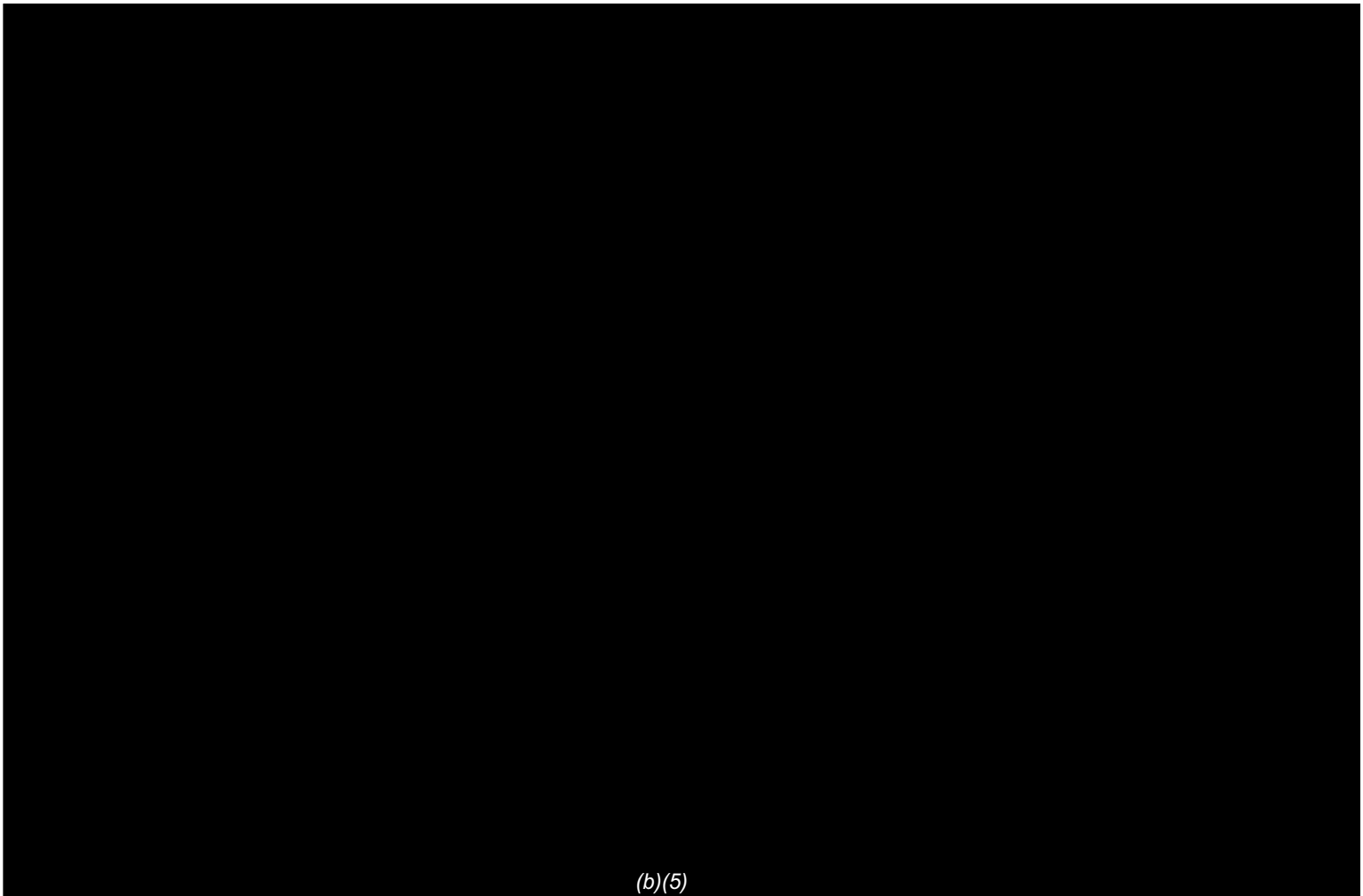
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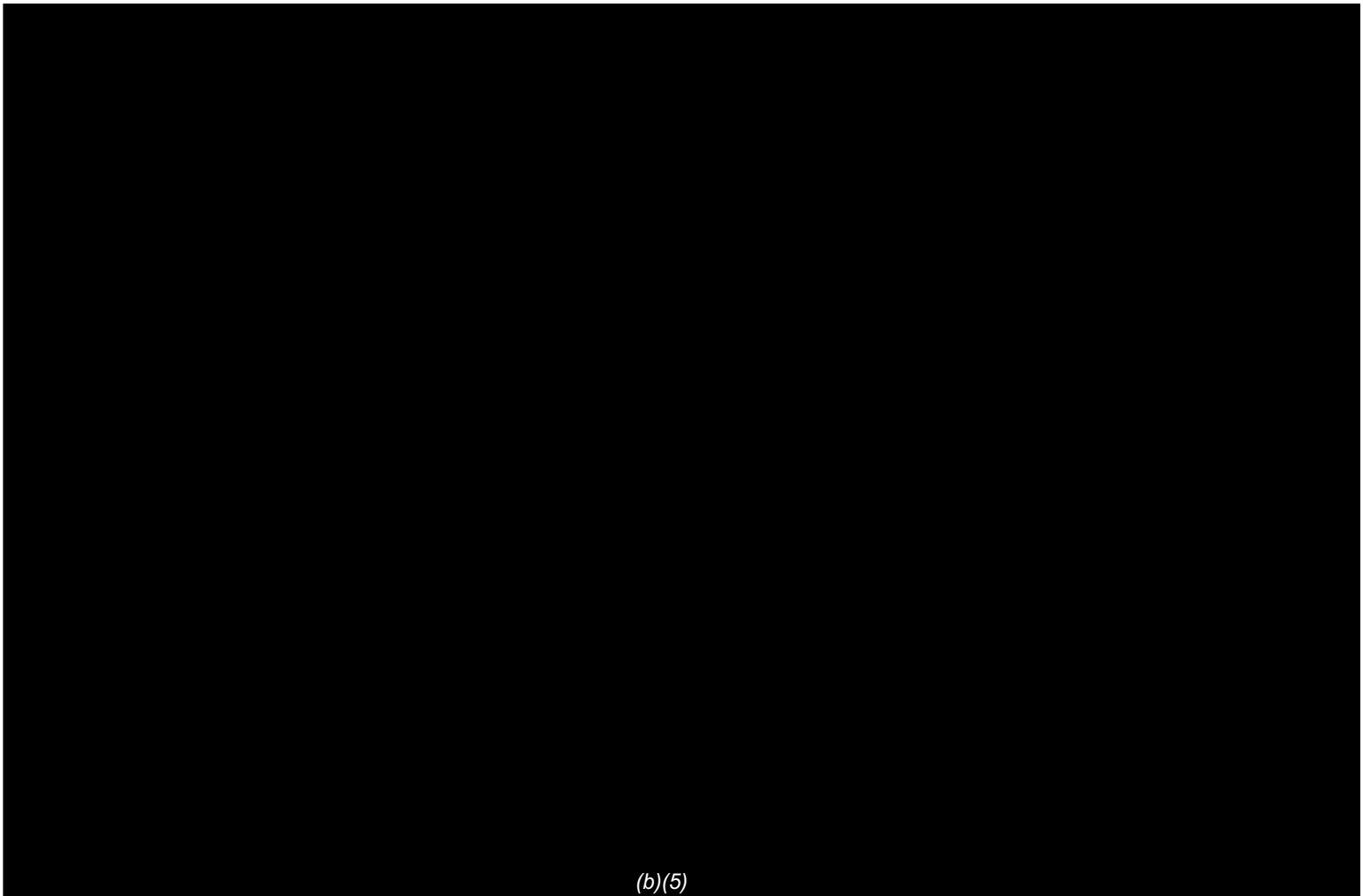
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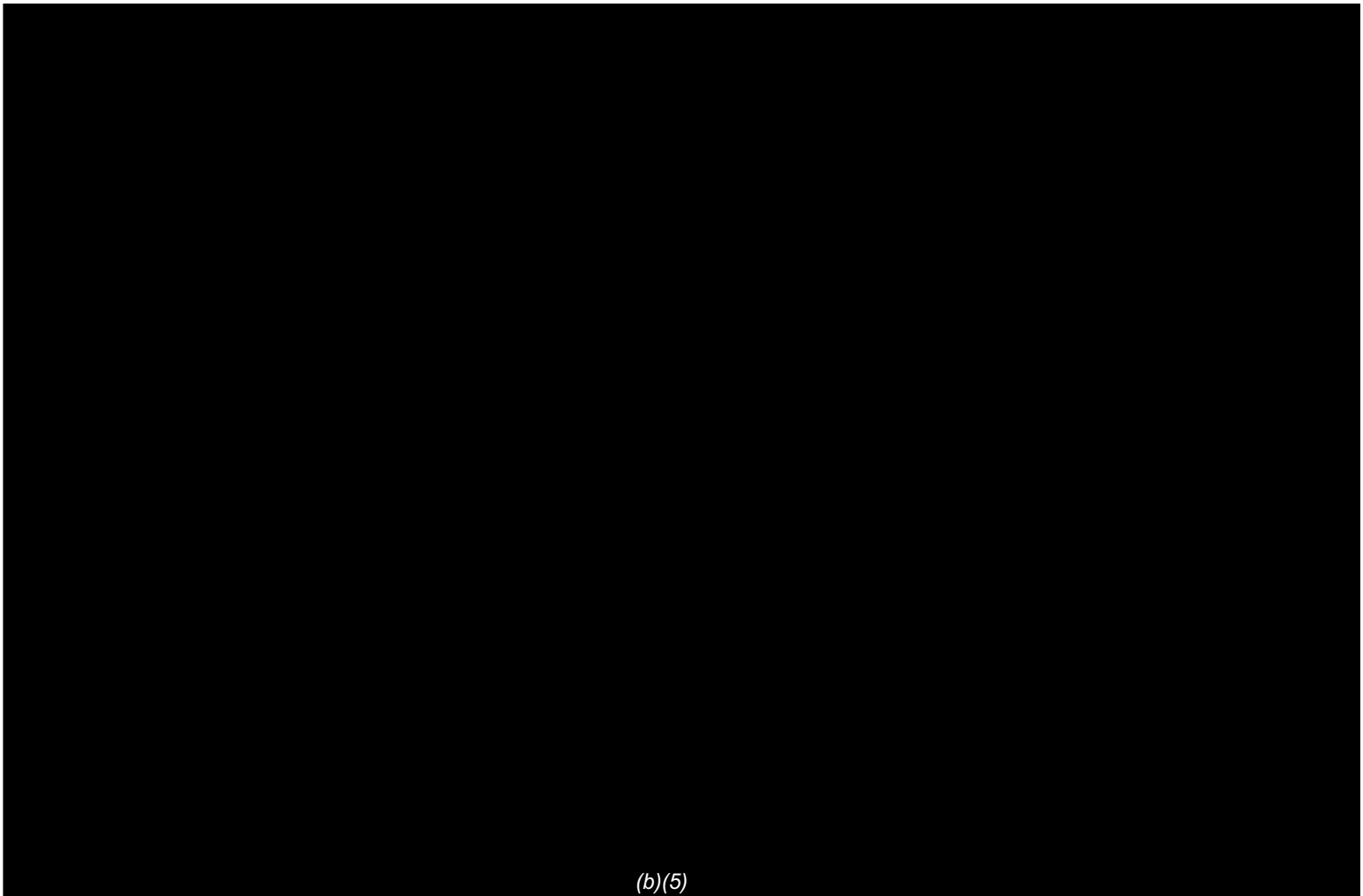
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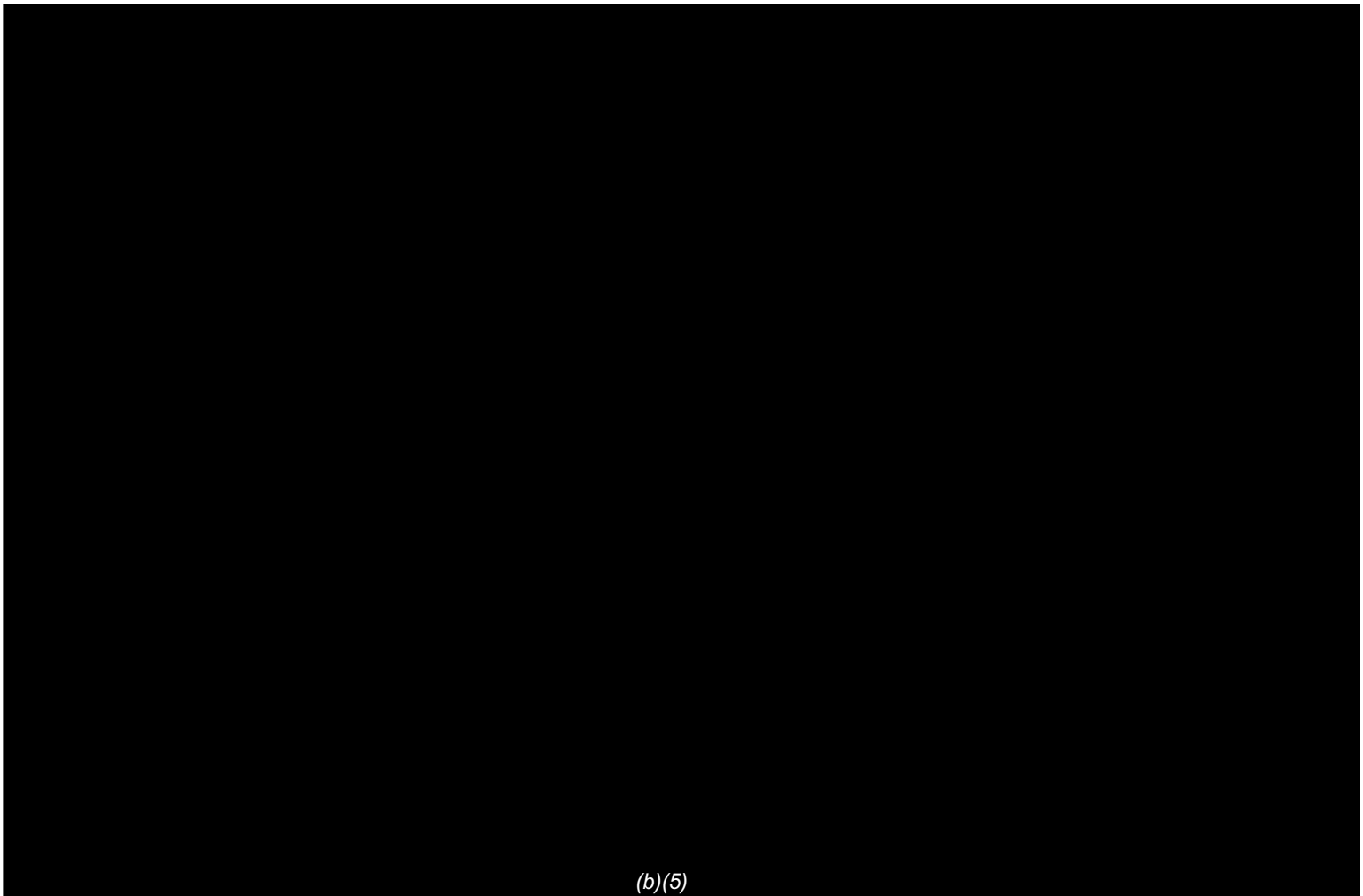
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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

17-01174_017917;17-01174_017917;17-01174_017918;17-01174_017919;17-01174_017920;17-01174_017921;1...

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

INTRODUCTION 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 18

I This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act 18

II This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat 24

TABLE OF CONTENTS - Continued

Page

III This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear* 29

IV This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species 32

CONCLUSION..... 40

APPENDIX A – Panel Opinion of U.S. Court of Appeals, Fifth Circuit, and Dissent, 827 F.3d 452 (5th Cir. 2016) (June 30, 2016) A-1

APPENDIX B - Opinion of U.S. District Court, Eastern District of Louisiana, 40 F. Supp. 3d 744 (Aug. 22, 2014)..... B-1

APPENDIX C – Order of U.S. Court of Appeals, Fifth Circuit Denying En Banc Review, and Dissent from Denial, 848 F.3d 635 (5th Cir. 2016) (Feb. 13, 2017) C-1

TABLE OF CONTENTS - Continued

Page

APPENDIX D – Complaint for Declaratory and Injunctive Relief, filed in U.S. District Court, Eastern District of Louisiana (Feb. 7, 2013) D-1

APPENDIX E – Excerpts from Mar. 12, 2012, Public Comment on Behalf of P&F Lumber, Etc. E-1

APPENDIX F – Excerpts from Nov. 23, 2011, Public Comment on Behalf of P&F Lumber, Etc. F-1

TABLE OF AUTHORITIES

Page

CASES

Alabama-Tombigbee Rivers Coal. v. Kempthorne,
477 F.3d 1250 (11th Cir. 2007) 36

All. for Wild Rockies v. Lyder,
728 F. Supp. 2d 1126 (D. Mont. 2010) 27

Am. Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 27-28

Arizona Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 27

Bennett v. Spear, 540 U.S. 154 (1997)..... 5, 29-32, 40

Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 12, 28

Ctr. for Biological Diversity v. Kelly,
93 F. Supp. 3d 1193 (D. Idaho 2015) 27

Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 37

GDF Realty Invs. v. Norton,
326 F.3d 622 (5th Cir. 2003) 36

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 36

Home Builders Ass'n of N. California v. United States Fish and Wildlife Service,
616 F.3d 983 (9th Cir. 2010) 27

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 20

TABLE OF AUTHORITIES - Continued

Page

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 21, 22

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
40 F. Supp. 3d 744 (E.D. La. 2014)..... 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
827 F.3d 452 (5th Cir. 2016) 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
848 F.3d 635 (5th Cir. 2016) 1

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 22

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins., 463 U.S. 29 (1983) 32

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997) 36

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 38

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,
469 U.S. 189 (1985) 21

Pittston Coal Grp. v. Sebben,
488 U.S. 105 (1988) 22

Rancho Viejo, LLC v. Norton,
323 F.3d 1062 (D.C. Cir. 2003) 36

TABLE OF AUTHORITIES - Continued

Page

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) 36

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 37-40

United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) 20, 21

United States v. Bass, 404 U.S. 336 (1971)..... 39

United States v. Lopez, 514 U.S. 549 (1995) 38

United States v. Morrison, 529 U.S. 528 (2000) 37

FEDERAL STATUTES

16 U.S.C. § 1532(5)(A)(i)–(ii) 2, 19

§ 1532(5)(A)(ii) 22

§ 1533(a)(3)(A)(i)–(ii) 3, 20, 22

§ 1533(b)(2) 3, 11, 30

§ 1536(a)(2) 12

U.S. CONSTITUTION

U.S. Const., amend. X..... 2

U.S. Const., art. I, § 8, cl. 3..... 2

RULE OF COURT

Sup. Ct. Rule 13.3 1

TABLE OF AUTHORITIES - Continued

Page

FEDERAL REGULATIONS

50 C.F.R. § 402.01(a)..... 21
§ 424.12(b) 8
66 Fed. Reg. 62993 (Dec. 4, 2001) 5
75 Fed. Reg. 31389 (June 3, 2010) 6
75 Fed. Reg. 39396 (July 8, 2010) 13
76 Fed. Reg. 59774 (Sept. 27, 2011) 7
77 Fed. Reg. 35118 (June 12, 2012) 8
81 Fed. Reg. 7414 (Feb. 11, 2016) 35

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2014) 19
Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) 11, 12, 13
Index Map, Critical Habitat for the Dusky Gopher Frog 10
The Random House Dictionary of the English Language (1969) 18
Webster's Third New International Dictionary (1961)..... 18

PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

> The term "critical habitat" for a threatened or endangered species means:
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

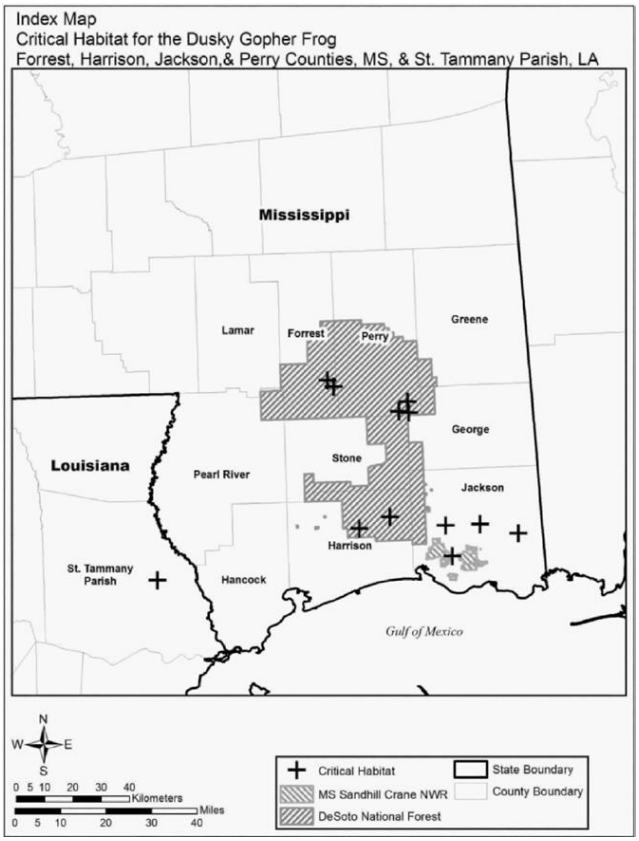
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

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

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

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

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

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

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id*. at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id*. at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id*. at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id*. at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*. In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id*. Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id*.

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id*., Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id.* On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id*. § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id*. Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id*. (citing *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

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

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id*. at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id*. Unit 1 does not contain the upland features necessary for the frog's survival. *Id*.

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id*. at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id*. at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

17-01174_017917;17-01174_017917;17-01174_017918;17-01174_017919;17-01174_017920;17-01174_017921;1...

> species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any

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

16 U.S.C. § 1533(b)(2) (emphasis added).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

17-01174_017917;17-01174_017917;17-01174_017918;17-01174_017919;17-01174_017920;17-01174_017921;1...

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

has not been for more than fifty years." *Id*. at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id*. at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id*. at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id*. at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id*. at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id*. at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id*. Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id*. Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id*. In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id*.

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id*. at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id*. at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id*. *See United States v. Morrison*, 529 U.S. 598, 613

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

17-01174_017917;17-01174_017917;17-01174_017918;17-01174_017919;17-01174_017920;17-01174_017921;1...

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id*. at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

DATED: July 2017.

Respectfully submitted,

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Appendix A-1

United States of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix A-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private

property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open canopied pine forests.[2] They migrate to isolated,

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[1] *Se* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi go*e*pher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you

ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531– 1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review

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hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the

designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross- motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen- suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory

explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly defines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437

U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III

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[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing. [9]*See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development— is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that

"considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so

speculative fear" that the government would imminently target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen

immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court— that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of- interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone- of-interests test. We thus conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical-Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131

determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical- habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding

that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mississippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts

agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35,124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35,133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1

provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35,124.

Finally, in addition to ephemeral ponds, dusky gopher frogs alsorequire upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35,131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35,134. This value, which was based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

> Altogether, the Service concluded:
> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports

> metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's determination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that, when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that

the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument.

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra* note 20

There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F. Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not

demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habitat if these areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The statute defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation

goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii),

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

(b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in effect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider

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account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective

designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any more "necessary" to a

given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental- take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

conservation of the dusky gopher frog.[19]

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the

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[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field essential for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C.

situation here, and the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

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§ 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that in this case, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. See, e.g., Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them.

Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." See 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat designation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . . ." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We

thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical

> habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical- habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, at *7–8 (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which

is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05- 0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit 1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832)). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the

conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in Michigan, the ESA explicitly mandates "consideration" of "economic impact."16 U.S.C.§ 1533(b)(2); see Bennett, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. See Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number

of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. See Bldg. Indus. Ass'n of Bay Area, 2015 WL 4080761, at *5–6. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the

critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is intrastate (not interstate) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." Markle Interests, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." Id.

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third Lopez prong. See United States v. Morrison, 529 U.S. 598, 609– 12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." Id. at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to

instances that "have an explicit connection with or effect on interstate commerce." Id. at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. Id. at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. Id. The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in Morrison. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the "take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff–developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species)

in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. See GDF Realty, 326

F.3d at 639 ("ESA's protection of endangered species is economic in nature."); id. at 640 ("ESA is an economic regulatory scheme . . . ."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. See id. § 1538(a)(1)(E)–(F); GDF Realty, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical- habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic activity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress

has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 214 F.3d

483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C.§ 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habitat—one that the Service has already found to be essential for the conservation of the species—to escape designation

would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted))

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the

regulation of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical- habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical- habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177– 78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect[ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will

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(1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in nature, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under

NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of- interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact- statement requirement

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district Court

PRISCILLA R. OWEN, Circuit Judge, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species" [1]because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3]to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] Id.

[3] Id.

play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one

feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A)

[6] 77 Fed. Reg. at 35,118

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the

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[10] *Id.* at 35,133

[11] *Id.* at 35,135

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . . . However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.")

[13] *Id.* (noting "we hope to work with the landowners").

habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then replaced with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

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[14] *Id*. at 35,129.

[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171-75 (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the endangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example,

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[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

[21] *Ante* at 19.

sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species. [22]The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" To the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24] In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C.§ 203(a) required long-distance communications common carriers to file tariffs with the Federal

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[22] *Bear Valley*, 790 F.3d at 994.

[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long- distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[31] The same can be said of the Service's, and the majority opinions, construction of the Endangered Species Act in the present case. It may be a good idea to

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[25] *Id*. at 220

[26] *Id*. at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id*. at 220.

[28] *Id*. at 228.

[29] *Id*. at 229-31.

[30] *Id*. at 231.

[31] *Id*. at 231-32.

permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation goes beyond the meaning that the statute can bear.[32] That court was fully cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges. This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI*

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[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[34] Sw. Bell Corp., 43 F.3d at 1521 (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)).

[35] Id.

[36] *Id.;* see also id. ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

Telecommunications Corp. is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of."[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the

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[37] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will

be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[s] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not *when the species will be conserved*, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation. The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species. [42]The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

[42]*See* ante at 22

to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species"

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[43] Id.

requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habitat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists

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[44] *See ante* at 22 n.17; 24 n.18.

[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24

and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that uninhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the

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[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant

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[51] *Ante* at 24-25.

[physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat,

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[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] See also ante at 20

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

[56] *See ante* at 25 n.19.

[57] *Id.*

the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[] that virtually *any* part of the United States could be designated as 'critical habitat' for any given

> endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging

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[58] *Id.* (citation omitted).
[59] *Id.*

that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that

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[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[61] *Id.*

are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

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[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id*. (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population)

[64] Ante at 13-14 (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)).

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation of the species" is therefore not supported by substantial evidence, and the

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[65] See 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . . .").

designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However, the Service found that Unit 1 has only one of the three

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[66] 77 Fed. Reg. at 35,131.

[67] Id.

[68] *Id.*

[69] *Id.*

primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed- canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The Service

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.; see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded:

> Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover;

found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact

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(3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] Id. at 35,140.

depended on the extent to which it might be developed,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The Service

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[77] *Id*.

[78] *Id*.

[79] *Id*.

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id*. at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no

reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results

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Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact

[84] *Id*. at 35,140-41:

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to

in development on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to

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section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

Appendix B-1

Filed
August 22, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	CIVIL ACTION
v.	NO. 13-234
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL 13-413	c/w 13-362 and (Pertains to all cases)
	SECTION "F"

ORDER AND REASONS

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross- motion.

Additionally before the Court are two motions to strike extra- record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases -- landowners and a lessee of a tree farm in Louisiana -- challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately-owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

Appendix B-3

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species ... to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16

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[1]Technically, administration responsibilities are divided between the Department of Interior and the Department of Commerce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine...."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. §, 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A)("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable ... (i) shall concurrently with making a [listing] determination ... designate any habitat of such species...."). Like its listing duty, FWS's habitat designation duty is mandatory;[2]the designation must

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[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001)("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'"). It is incumbent on the Secretary -- "to the maximum extent prudent and determinable" -- to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later designation. *See* 16 U.S.C. § 1532(a)(3)(B)("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established...."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii)(if "critical habitat of [listed] species is not ... determinable [at the time of listing], the Secretary ... may extend the one-year

be based on "the best scientific data available ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines ... that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Id.

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means–
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary

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period specified in paragraph (A) by not more than one additional year....") and 50 C.F.R. § 424.17(b)(2).

> that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical occupied habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3]50 C.F.R. § 424.12(b). FWS may designate as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat...." 16 U.S.C. § 1536(a)(2).[4] If

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival andrecovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442-43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and*

FWS or the consulting federal agency determines that a contemplated action "may affect ... critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (Rana Sevosa) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129 - 35131. They travel to small, isolated

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survival of a species imposes a higher threshold than the statutory language permits.")(emphasis in original).

[5] Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking

[7] Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Id. at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. Id. at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

species. FWS determined that the frog was endangered due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

historical breeding sites for the frog. Based on the comments, FWS re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana.[11] FWS identified additional critical habitat in Mississippi and Louisiana[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetica scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9

[11] FWS was not able to identify critical habitat in Alabama.

million").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

land in Unit 1 is owned by Weyerhaeuser Company, which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaueuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531, et seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-record

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for Supplementing, or challenging, the administrative record; no party requested to supplement the record.

evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions,

to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed.R.Civ.P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA -- in particular, a final rule designating critical habitat -- the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174-75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)(Courts must be particularly deferential to agency determinations

made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent

Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001)(citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985))("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February

8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County*, 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record; (2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA, U.S,* 133 S.Ct. 1138, 1146 (2013). "One element of the case-

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545
(5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See S*ummers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); see also *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)(citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[19]

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but

The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. V. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C.Cir. 2006)(an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as

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in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C.Cir. 2005)(firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation ... has immediately devalued the land within Unit 1 for commercial purposes by bringing increased ... regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they

in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117-18 (D.D.C. 2004)(business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

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submit that the designation "limits the usability and saleability of the property" to their detriment.

[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser ... periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce... among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. See *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008)(vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-Lopez Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. V. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. V. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend Lopez, which dealt with a

challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United State*s, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" GDF, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally

valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640-41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n. 9 (1984)("[T]he

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining

that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which

> likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on recovery of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat because Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

occupied habitat must contain all of the relevant PCEs. See 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide. Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere

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[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010)(rejecting argument that FWS must first identify the point at which the endangered species is considered

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008)("While tempting in its logical simplicity...the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), aff'd, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), cert. denied, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly rebutted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument -- to the extent it is reviewable (see *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010)(Service's decision not to

exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map…[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." Id. FWS "chose the value of 621 m...by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog…and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use...." Id. FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." Id. With respect to Unit 1, FWS explained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. Id. at 35123-25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. See *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010("Where an agency's particular technical expertise is

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa*, will be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List...to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants

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involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

acceptance as its own species...and the scientific name for the species was changed to *Rana sevosa."* 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30]And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama Tombigee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position...on the question and is supported by...peer review[,] and by the opinion of the Service's own experts.")

Wyerhaeuser, a co- owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why -- (assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies -- FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the

landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat ... on the basis of the best scientific data available and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. See 16 U.S.C. § 1533(b)(2)(the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)(citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D.Ariz. 2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations' economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens imposed by simply listing the frog) are treated as part of the regulatory baseline and are not

factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation... to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results

million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion -- its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered -- is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

these economic impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013)(*quoting Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. Id. To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

environment."

U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003)(NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed.

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities

Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436-39 (10th Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. Id. Unlike the critical habitat designation in that case -- where the environmental impact of the critical habitat designation "will be immediate and disastrous" -- the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. Douglas County v. Babbitt, 48 F.3d 1495, 1501-08 (9th Cir. 1995)(considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. Id. Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain

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such as timber management lack a federal nexus and are therefore exempt.

terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009)(setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

***

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 202 F. Supp. 2d 594, 646-48 (W.D.Tex. 2002) (citations omitted).

[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

New Orleans, Louisiana, August 22, 2014.

s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse -- contrary to the express terms and scope of the statute -- a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

Appendix C-1

United States Courts of Appeals
Fifth Circuit
FILED
February 13, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix C-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

Opinion June 30, 2016, 827 F.3d 452)

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

ENTERED FOR THE COURT:

S/ STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." See 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied)

Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the

> species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

> Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012.

Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii)

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plantations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical- habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and

benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." [1]*Id.* at 472 n.20. Finally, the panel majority held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

> The ESA states that the Service
>
> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* … and ... may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical"

portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species ... and habitat of such species that has designated as critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant[.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the

species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical*.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This

predecessor provision, like the current consultation requirements, refers to the destruction or modification of "habitat of such species which is determined by the Secretary. . . to be critical."[3] From the very beginning, Congress rooted the concept of

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . . . I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . . . While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . . . In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

critical habitat in the relevant species' actual habitat.

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation. [4]As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be*

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

habitat. A diagram explains this statutory plan:

Figure 1: Under the ESA, a species critical habitat is necessarily a subset of the species habitat

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit decision. Neither of these objections should be persuasive. The first objection—that this textualist argument was waived—is easily disposed of. Throughout this

litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement exists,[5] but a reviewing court could not cite the same context and related regulations to say a

[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

habitability requirement does in fact exist. This objection is meritless

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. the Ninth Circuit appeared to assume that critical- habitat designation of those unoccupied, uninhabitable areas was the only means

of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally

live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)-(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by

chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features* . . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas*. . . [that] are essential for the

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose.[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conservation would be a more substantial

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions.[9] Mirroring the respective Houses' proposals, [10]Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied"

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat");

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional

purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of *unoccupied* critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to

the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious concern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species' occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally

limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical- habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472 n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity ofa Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to articulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances

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[12] *Markle Interests*, 827 F.3d at 471.

merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one

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[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no

would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C. § 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the

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support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent . . . .").

panel majority's one- feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

"unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non- Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical

> habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best

expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary." The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [] economic impact is not reviewable."*Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it— "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Cheney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the ESA's permissive language: "[t]he Secretary

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed,

and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard. The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

Appendix D-1

Filed
February 7, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO.

MARKLE INTERESTS, LLC,

Plaintiff,
v.

UNITED STATES FISH AND WILDLIFESERVICE, DANIEL M. ASHE, Director of United States Fish and Wildlife Service, in his official capacity; United States DEPARTMENT OF INTERIOR; and, KENNETH SALAZAR, Secretary of the Department of Interior, in his official capacity

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIE

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against Defendants for violating federal statutes and the U.S. Constitution. By final rule, dated June 12, 2012, 77 Fed. Reg. 35118, *et seq.*, Defendants, through the U.S. Fish and Wildlife

Service, designated critical habitat for the dusky gopher frog (previously Mississippi Gopher Frog) in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., in that the designation erroneously includes large areas of private land that do not contain the physical and biological features essential to the conservation of the species and the economic analysis is invalid for failing to properly consider the cumulative effects of the designation. Moreover, the designation was issued without the environmental review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*., and in excess of constitutional authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Defendants‟ actions are contrary to law and must be set aside.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (actions arising under the citizen suit provision of the Endangered Species Act); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

3. Plaintiff, Markle Interests, LLC (Markle), satisfied the notice requirement of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(2). More than 60 days ago, by letter dated September 27, 2012, Markle provided Defendants written notice of the violations that are the subject of this complaint in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as

Exhibit 1 and is incorporated herein by reference. Defendants have not responded to this notice or taken any action to withdraw the final rule at issue here, or to otherwise remedy their violations of law.

4. An actual, justiciable controversy now exists between Markle and Defendants. Relief is proper under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

5. The federal government has waived sovereign immunity in this action under 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

6. Markle has exhausted all administrative remedies.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in this district.

PARTIES

Plaintiff

8. Markle Interests, LLC, is a limited liability company that owns an undivided interest in forested property identified in the final rule as Unit 1 in St. Tammany Parish, Louisiana, and included as critical habitat for the dusky gopher frog. This designation imposes significant regulatory burdens on the property such that costly federal approval may be required for any activity deemed to affect the species, including adverse habitat modification. In addition to

these regulatory burdens, the destination of Unit 1 as critical habitat results in a drastic reduction in value and limits the usability and saleability of the property.

Defendants

9. Defendant United States Department of Interior (Department) is an agency of the United States. Congress has charged the Department with administering the Endangered Species Act for certain species, including the dusky gopher frog.

10. Defendant Kenneth Salazar is Secretary of the United States Department of Interior (Secretary). He oversees the Department‟s administration of the Endangered Species Act and is sued in his official capacity.

11. Defendant United States Fish and Wildlife Service (Service) is an agency of the United States Department of Interior. The Service has been delegated responsibility by the Secretary for day-to-day administration of the Endangered Species Act, including the designation of critical habitat.

12. Defendant Daniel M. Ashe is Director of the United States Fish and Wildlife Service. He oversees the Service‟s administration of the Endangered Species Act and is sued in his official capacity.

13. All of these Defendants are responsible for the violations alleged in this complaint.

Appendix D-5

LEGAL FRAMEWORK

Listing of Threatened or Endangered Species

14. Under Section 4 of the Endangered Species Act, Defendants must list a species as "threatened" or "endangered" based on certain factors relating to habitat, overutilization, disease or predation, existing regulatory mechanisms, or other factors. *See* 16 U.S.C. § 1532(20).

15. An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

16. Endangered species are specifically protected by Section 9 of the Endangered Species Act, which, among other things, makes it unlawful for any person to "take" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, hunt, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," and may include habitat modification. 16 U.S.C. § 1532(19)

Critical Habitat Designation

17. Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, Defendants must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

18. Critical habitat is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> ….
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

16 U.S.C. § 1532(5)(A)-(C).

19. "The statute thus differentiates between „occupied" and „unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Grower's Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

20. The term "conservation" means the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at

which the protections of the Act are no longer required. 16 U.S.C. § 1532(3).

21. The Secretary must

> [d]esignate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

Consultation

22. Private property designated as critical habitat is subject to federal regulation.

23. In consultation with the Secretary, federal agencies are required to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

24. Section 7 of the Endangered Species Act also requires a federal agency to consult with the

Secretary at the request of a permit applicant, if the applicant "has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

25. Under Section 7, the Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If it is determined that the project is likely to jeopardize the species" "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.*

26. If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action will not" jeopardize the species" continued existence or result in the destruction or adverse modification of critical habitat of such species, a written "incidental take statement" must be issued that (1) specifies the impact of such incidental taking on the species; (2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3), sets forth the terms and conditions with which the agency or applicant must comply to implement the specified measures. 16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv).

National Environmental Policy Act

27. The National Environmental Policy Act requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency‟s decision making. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

28. An environmental impact statement must include:

> (i) The environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man‟s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

29. The NEPA implementing regulations provide federal agencies with the opportunity to prepare an "environmental assessment" that either determines that an environmental impact statement is required or concludes with a "finding of no

significant impact," which terminates the agency's NEPA obligations. 40 C.F.R. § 1508.9.

Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act, a court must set aside agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D).

31. Section 704 of the Administrative Procedure Act states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

U. S. Constitution

32. Commerce Clause enactments, like the Endangered Species Act, are subject to the limits of that power. "The Constitution grants Congress the power to „*regulate* commerce." Art. 1, § 8, cl. 3. (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012).

FACTUAL ALLEGATIONS

Listing and Critical Habitat Designation

33. On December 4, 2001, the U.S. Fish and Wildlife Service listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*.

34. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq*.

35. Although critical habitat may only include those areas "essential to the conservation of the species," the Service made no finding as to the quantity or location of habitat necessary to conserve the gopher frog or identify "the point" at which the protections of the ESA are no longer required.

36. The critical habitat designation covers 6,477 acres in two states, including 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1. *Id.* at 35118.

37. Unit 1 is private land in which the Plaintiff, Markle, owns an undivided interest. *Id.* at 35134-35135.

38. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35134-35135.

39. Unit 1 is not suitable for gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. *Id.* at 35135.

40. Unit 1 cannot be made suitable for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site. *Id.* at 35129-35130.

41. Unit 1 landowners submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123.

42. The Service acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35126.

43. The Service did not show how Unit 1—which is unoccupied and unsuitable as habitat for the gopher frog—is essential to the conservation of the species.

Economic Impacts Analysis

44. In conjunction with the critical habitat designation, the Service completed an economic impacts analysis mandated by Section 4 of the Endangered Species Act. *See id.* at 35140-35141.

45. That analysis showed that designating Unit 1 as critical habitat could have an adverse impact on the landowners as high as $33.9 million. *See id.* at 35141.

46. On the record, the Service did not conduct a balancing analysis that weighed the economic impact on the landowners of Unit 1 against the benefit of including Unit 1 in the critical habitat designation.

47. Notwithstanding the fact that Unit 1 is unsuitable for gopher frog habitat, the Service concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

48. The Service relied on the "baseline approach" and did not consider the *quantitative* economic impacts of the critical habitat designation coextensively (or cumulatively) with the listing of the gopher frog as an endangered species. *Id.* at 35140-35142.

NEPA Compliance

49. The government admitted that it did not subject the critical habitat designation for the dusky gopher frog to review under the National Environmental Policy Act. *See id.* at 35144.

APA Compliance

50. The rule designating critical habitat for the dusky gopher frog, 77 Fed. Reg. 35118, *et seq.*, is the culmination of the Service‟s decision making and constitutes final agency action.

Constitutional Compliance

51. The Service made no finding that the designation of Unit 1 as critical habitat constitutes the regulation of existing commercial activity as the Constitution and U.S. Supreme Court precedent require. *See United States v. Lopez*, 514 U.S. 549 (1995).

INJUNCTIVE RELIEF ALLEGATIONS

52. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 51 as though fully set forth herein.

53. If an injunction does not issue enjoining Defendants from enforcing the critical habitat designation for the dusky gopher frog, Markle will be irreparably harmed.

54. Markle has no plain, speedy, and adequate remedy at law.

55. If not enjoined by this Court, Defendants will continue to enforce or rely on the critical habitat designations in derogation of Markle‟s rights.

56. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

57. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 as though fully set forth herein.

58. An actual and substantial controversy exists between Markle and Defendants as to their legal rights and duties with respect to the ESA, NEPA, the APA, and the U.S. Constitution in the designation of critical habitat for the dusky gopher frog.

59. This case is presently justiciable because Defendants‟ failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Markle. Markle has a vital interest in knowing whether the critical habitat designation, to which Markle is subject, is statutorily and constitutionally valid.

60. Declaratory relief is therefore appropriate to resolve this controversy.

CLAIMS FOR RELIEF

First Claim for Relief

Failure to Make Threshold Determination for Designating Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(e); Alternatively, APA, 5 U.S.C. § 706)

61. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 60 as though fully set forth herein.

62. The Endangered Species Act defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5). In turn, the Act defines "conservation" to mean the use of all methods and procedures necessary to bring a "threatened" or "endangered" species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3). The Act does not define "essential" but it is axiomatic that to determine what is "essential to the conservation of the species," the Service must first identify "the point" when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. However, those threshold determinations are entirely missing from the final rule.

63. The effect of the Service‟s failure to determine a viable population and minimum habitat

size is that the Service is logically incapable of ascertaining which areas are "essential to the conservation of the species" and whether the designation of any particular unoccupied area is required. *See* 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). In this case, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area. Without the foundational underpinning of a viable population, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

64. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); federal regulation, 50 C.F.R. § 424.12(e); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Second Claim for Relief

Failure to Apply Correct Standard to Determine Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); Alternatively, APA, 5 U.S.C. § 706)

65. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. The Secretary does not have unfettered discretion to designate unoccupied areas as critical

habitat. Such areas must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(ii). Logically, this would include areas that at least contain those physical and biological features that are themselves "essential to the conservation of the species." The Service has identified such features as Primary Constituent Elements (or PCEs). For the dusky gopher frog, there are three: (1) ephemeral wetland habitat; (2) upland forested nonbreeding habitat; and (3) upland connectivity habitat. *See* 77 Fed. Reg. 35131. The Service maintains that all of these PCEs are essential to the conservation of the species. However, the Service admits that Unit 1 does not contain all these PCEs. *See id.* at. 35135. In fact, Unit 1 contains none of the PCEs essential to the conservation of the species. Therefore, Unit 1 is currently not suitable habitat for the dusky gopher frog at all, let alone critical habitat.

67. Nevertheless, the Secretary included this unoccupied area in the designation. In effect, the Secretary designated Unit 1 as critical habitat on the premise that the area would be essential for the conservation of the species, if it ever did contain the requisite PCEs. *See id.* But it doesn"t now and likely never will. The private owners have no intent to convert their property to conservation purposes and, according to the Service, they can"t be compelled to do so.

68. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Third Claim for Relief
Inadequate Economic Analysis
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

69. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 68 as though fully set forth herein.

70. The Economic Analysis (EA) adopts the "baseline" approach whereby the Service only considers the *qualitative* impacts that occur "without critical habitat," such as those impacts caused by listing of the species, whereas the incremental impacts occurring "with critical habitat" are given a *quantitative* analysis. *See* 77 Fed. Reg. at 35140-35141. The result of this approach is that neither the Service nor the public are ever provided a meaningful cumulative economic impacts analysis. This "baseline" approach was rejected by the Tenth Circuit in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). According to the Tenth Circuit, the "baseline" approach is meaningless and inconsistent with the language of the Act and the intent of Congress. Therefore, that Circuit held the Economic Analysis must consider all of the impacts of critical habitat designation, including those impacts co-extensive with the listing. In other words, the EA must consider the cumulative impacts of the listing and the critical habitat designation together, not just the incremental impacts of the designation. (For a contrary view see *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir 2010).) In *Home Builders Association of Northern California v. Norton*, 293 F.

Supp. 2d 1 (D.D.C. 2002), the Service appears to have represented to the court that it would follow the *New Mexico Cattle Growers'* co-extensive approach in all future critical habitat designations. But it has not done so here.

71. Moreover, the EA failed to quantify economic and other impacts of the designation on oil and gas exploration, forestry, and those impacts resulting from conservation activities such as controlled burns.

72. By these acts or omissions Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fourth Claim for Relief
Failure to Exclude
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

73. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The Service acknowledged, as it must, that Unit 1 will only become suitable habitat if the land is managed to develop the requisite PCEs. *See* 77 Fed. Reg. 35135. The Service also acknowledged that Unit 1 is comprised entirely of private land, *id.* at 35134-35135, and that private landowners cannot be compelled to manage the land for recovery purposes, *id.* at 35126. In fact, because Unit 1 is unoccupied and used for timber harvesting and has the potential for

development of oil and gas exploration, that the Service valued at approximately $34 million, the private owners have no intent to convert their property to conservation purposes. Not only do these facts compel a finding that Unit 1 is not "essential for the conservation of the species," but they also compel a finding that the benefits of exclusion outweigh the benefits of inclusion under Section 4(b)(2) of the Act. The Service"s unsupported conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," 77 Fed. Reg. 35141, is arbitrary and irrational. *See Natural Resources Defense Council v. U.S. Department of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) ("Essentially, we must ask „whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made."" (citation omitted)).

75. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fifth Claim for Relief
Failure to Conduct NEPA Review
(Violation of NEPA, 42 U.S.C. § 4321, *et seq.*;
Alternatively, APA, 5 U.S.C. § 706)

76. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. In its final rule designating critical habitat for the dusky gopher frog, the Service stated

categorically that the National Environmental Policy Act does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35121. But the better argument is to the contrary.

78. Neither the Endangered Species Act nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Preservation Alliance v. U. S. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), have held that critical habitat designations are subject to review under NEPA. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit parted ways with the Tenth Circuit and held that NEPA review was not required for critical habitat designations where there is no physical change to the environment. However, this case is different.

79. Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for human interference with the environment through management of the habitat by, among other things, regular controlled burns. Frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog"s aquatic and terrestrial habitat. *See* 77 Fed. Reg. 35129-35130. These burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and habitat for other species. But the critical habitat designation does not discuss these effects. That can only be done

through the NEPA review process. Therefore, notwithstanding the Ninth Circuit decision, and in accordance with the Tenth Circuit decision, NEPA review should have been undertaken here.

80. By these acts or omissions Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.*; and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Sixth Claim for Relief
U.S. Constitutional Violation
(Commerce Clause, Article 1, Section 8, Clause 3, and APA, 5 U.S.C. § 706)

81. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. The Service cites a long list of cases that have upheld the agency‟s authority to regulate intrastate, noncommercial species under the commerce power. *See* 77 Fed. Reg. at 35120. However, those cases do not address whether the agency has authority under the Commerce Clause to regulate private land that has no connection to the protected species other than through the critical habitat designation itself. The designation of Unit 1 as critical habitat for the dusky gopher frog is contrary to U.S. Supreme Court precedent not only because the frog is not a regulable entity but also because the critical habitat designation creates, rather than regulates, the putative economic activity. *See United States v. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); and, more recently, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573-74 (2012) ("This

Court‟s precedent reflects this understanding: As expansive as this Court‟s cases construing the scope of the commerce power have been, they uniformly describe the power as reaching „activity.‟ *E.g.*, *United States v. Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626. The [challenged provision], however, does not regulate existing commercial activity.”). Simply put, the uncontested facts show that the Service is not regulating existing commercial activity. The regulation of Unit 1 as critical habitat is unconstitutional because the land does not contain the listed species or any usable habitat and any activity on the land cannot affect the species or its habitat.

83. By these acts or omissions Defendants violated art. 1, § 8, cl. 3, of the U.S. Constitution and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

PRAYER FOR RELIEF

Wherefore, Markle prays:

As to the First Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to make the threshold determination as to the quality and location of habitat essential to the conservation of the species in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or alternatively, that the final rule is void under the APA, U.S.C. § 706.

As to the Second Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to apply the proper standard for designating critical habitat in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Third Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because the economic analysis was inadequate in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fourth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants‟ failure to exclude Unit 1 was arbitrary and irrational in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fifth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to comply with NEPA, 42 U.S.C. § 4321, *et seq.*, and the final rule is void under the APA, 5 U.S.C. § 706.

As to the Sixth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid under the Commerce Clause, U.S. Constitution, art. 1, § 8, cl. 3, and the final rule is void under the APA, 5 U.S.C. § 706.

As to all Claims for Relief:

That this Court:

(a) issue a judgment and order enjoining Defendants from enforcing or otherwise acting pursuant to the final rule, vacating the rule, and remanding the rule for redesignation of critical habitat in accordance with ESA, NEPA, the APA, and the U.S. Constitution;

(b) award Plaintiff attorneys‟ fees and costs to the extent permitted by law; and

(c) grant such other relief as the Court shall deem just and proper.

DATED: February 7, 2013.

Respectfully submitted,

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Appendix E-1

Excerpts from Mar. 12, 2012
Public Comment on Behalf of
P&F Lumber, Etc.

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16,
and Weyerhaeuser's comments of November 28, 2011 at page

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed bums would be necessary")

the only known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,201 I at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23,2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also sec proposed Rule at page 59777.

In *United States v. Lopez,* 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel,* 301 U.S. **1,** 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is

absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Commerce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist-- and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any

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Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?,* 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

Appendix F-1

Excerpts from Nov. 23, 2011 Public Comment on Behalf of P&F Lumber, Etc.

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands-- and, indeed, the FWS in the

Proposed Rule concludes that (by its own investigation on the Lands) the MGF does not now actually occupy the Lands-- it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both

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[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

the St. Tammany Parish Planning and Zoning Commission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish..

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million' dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

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[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

Appendix F-5

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.

To: Jeffrey.Wood@usdoj.gov[Jeffrey.Wood@usdoj.gov]
From: Daniel Jorjani
Sent: 2017-08-15T15:53:32-04:00
Importance: Normal
Subject: Fwd: Markle Interests v. FWS (Sup. Ct.)
Received: 2017-08-15T15:53:58-04:00
ATT00001.htm
APPELLATE-#355564-v1-Markle_-_brief_in_opp_draft.DOCX
APPELLATE-#355251-v1-Markle_-_Petition_for_cert__of_Markle_Interests.PDF
ATT00002.htm
APPELLATE-#355213-v1-Markle_-_Weyerhaueser_s_cert__petition.PDF
ATT00003.htm

Thoughts?

Sent from my iPhone

Begin forwarded message:

From: "Jesup, Benjamin" <benjamin.jesup@sol.doi.gov>
To: Kevin Haugrud <jack.haugrud@sol.doi.gov>, Daniel Jorjani <daniel_jorjani@ios.doi.gov>
Subject: Fwd: Markle Interests v. FWS (Sup. Ct.)

Gentlemen:
Rick may have already sent this to you, but out of abundance of caution here is the draft brief from Appellate on the cert. petition in the dusky gopher frog critical habitat case.

Ben
---------- Forwarded message ----------
From: **Shilton, David (ENRD)** <David.Shilton@usdoj.gov>
Date: Fri, Aug 4, 2017 at 12:41 PM
Subject: RE: Markle Interests v. FWS (Sup. Ct.)
To: "Hollingsworth, Mary (ENRD)" <Mary.Hollingsworth@usdoj.gov>, "Jesup, Benjamin" <benjamin.jesup@sol.doi.gov>, Ruth Ann Lowery - NOAA Federal <ruthann.lowery@noaa.gov>, "Stevens, Michael" <mike.stevens@sol.doi.gov>, "Romanik, Peg" <peg.romanik@sol.doi.gov>
Cc: "kristen.l.gustafson@noaa.gov" <kristen.l.gustafson@noaa.gov>, "Barsky, Seth (ENRD)" <Seth.Barsky@usdoj.gov>

Colleagues,

Attached is a draft brief in opposition to cert. for your review. I would like to get comments by COB Tuesday, so I can get a reviewed version to our front office on

Wednesday. I'm also attaching the two petitions. Let me know if you have questions.
Thanks, David

David C. Shilton

Senior Litigation Counsel, Appellate Section

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If you have received this message in error, please delete it and notify the sender immediately. Thank you.

--
Ben Jesup
Assistant Solicitor for Fish and Wildlife
Solicitor's Office
Department of the Interior
202-208-3170

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No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
LIST OF ALL PARTIES ii
CORPORATE DISCLOSURE STATEMENT ii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1
INTRODUCTION 4
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE PETITION 18

I This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act 18

II This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat 24

TABLE OF CONTENTS - Continued

Page

III This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear* 29

IV This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species 32

CONCLUSION..... 40

APPENDIX A – Panel Opinion of U.S. Court of Appeals, Fifth Circuit, and Dissent, 827 F.3d 452 (5th Cir. 2016) (June 30, 2016) A-1

APPENDIX B - Opinion of U.S. District Court, Eastern District of Louisiana, 40 F. Supp. 3d 744 (Aug. 22, 2014)..... B-1

APPENDIX C – Order of U.S. Court of Appeals, Fifth Circuit Denying En Banc Review, and Dissent from Denial, 848 F.3d 635 (5th Cir. 2016) (Feb. 13, 2017) C-1

TABLE OF CONTENTS - Continued

Page

APPENDIX D – Complaint for Declaratory and Injunctive Relief, filed in U.S. District Court, Eastern District of Louisiana (Feb. 7, 2013) D-1

APPENDIX E – Excerpts from Mar. 12, 2012, Public Comment on Behalf of P&F Lumber, Etc. E-1

APPENDIX F – Excerpts from Nov. 23, 2011, Public Comment on Behalf of P&F Lumber, Etc. F-1

TABLE OF AUTHORITIES

Page

CASES

Alabama-Tombigbee Rivers Coal. v. Kempthorne,
477 F.3d 1250 (11th Cir. 2007) 36

All. for Wild Rockies v. Lyder,
728 F. Supp. 2d 1126 (D. Mont. 2010) 27

Am. Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 27-28

Arizona Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 27

Bennett v. Spear, 540 U.S. 154 (1997)..... 5, 29-32, 40

Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 12, 28

Ctr. for Biological Diversity v. Kelly,
93 F. Supp. 3d 1193 (D. Idaho 2015) 27

Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 37

GDF Realty Invs. v. Norton,
326 F.3d 622 (5th Cir. 2003) 36

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 36

Home Builders Ass'n of N. California v. United States Fish and Wildlife Service,
616 F.3d 983 (9th Cir. 2010) 27

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 20

TABLE OF AUTHORITIES - Continued

Page

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 21, 22

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
40 F. Supp. 3d 744 (E.D. La. 2014)..... 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
827 F.3d 452 (5th Cir. 2016) 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
848 F.3d 635 (5th Cir. 2016) 1

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 22

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins., 463 U.S. 29 (1983) 32

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997) 36

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 38

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,
469 U.S. 189 (1985) 21

Pittston Coal Grp. v. Sebben,
488 U.S. 105 (1988) 22

Rancho Viejo, LLC v. Norton,
323 F.3d 1062 (D.C. Cir. 2003) 36

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

TABLE OF AUTHORITIES - Continued

Page

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) 36

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 37-40

United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) 20, 21

United States v. Bass, 404 U.S. 336 (1971)..... 39

United States v. Lopez, 514 U.S. 549 (1995) 38

United States v. Morrison, 529 U.S. 528 (2000) 37

FEDERAL STATUTES

16 U.S.C. § 1532(5)(A)(i)–(ii) 2, 19

§ 1532(5)(A)(ii) 22

§ 1533(a)(3)(A)(i)–(ii) 3, 20, 22

§ 1533(b)(2) 3, 11, 30

§ 1536(a)(2) 12

U.S. CONSTITUTION

U.S. Const., amend. X..... 2

U.S. Const., art. I, § 8, cl. 3..... 2

RULE OF COURT

Sup. Ct. Rule 13.3 1

TABLE OF AUTHORITIES - Continued

Page

FEDERAL REGULATIONS

50 C.F.R. § 402.01(a)..... 21
§ 424.12(b) 8
66 Fed. Reg. 62993 (Dec. 4, 2001) 5
75 Fed. Reg. 31389 (June 3, 2010) 6
75 Fed. Reg. 39396 (July 8, 2010) 13
76 Fed. Reg. 59774 (Sept. 27, 2011) 7
77 Fed. Reg. 35118 (June 12, 2012) 8
81 Fed. Reg. 7414 (Feb. 11, 2016) 35

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2014) 19
Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) 11, 12, 13
Index Map, Critical Habitat for the Dusky Gopher Frog 10
The Random House Dictionary of the English Language (1969) 18
Webster's Third New International Dictionary (1961)..... 18

PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

The term "critical habitat" for a threatened or endangered species means:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

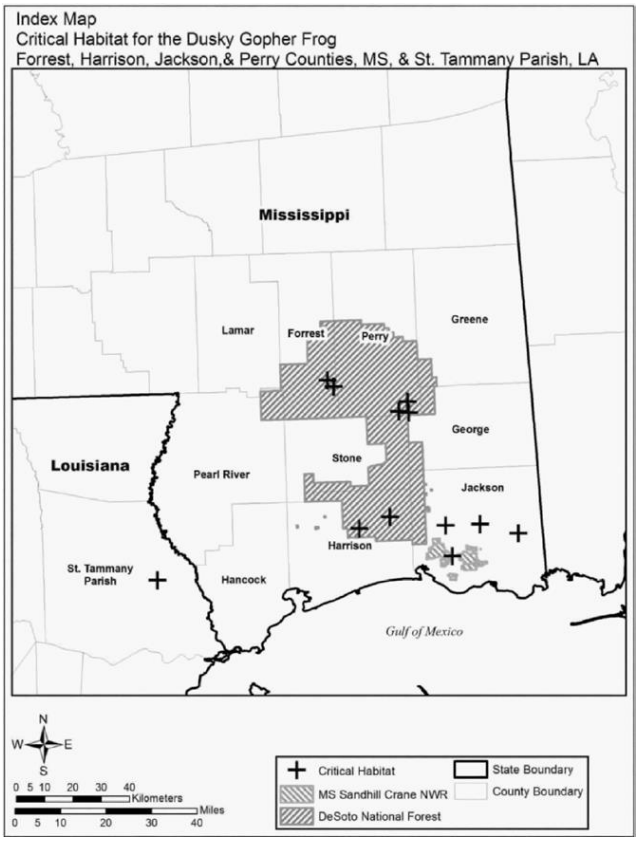
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

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

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

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

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

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

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id*. at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id*. at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id*. at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id*. at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*. In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id*. Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id*.

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id*., Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id*. On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id*. § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id*. Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id*. (citing *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

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

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id*. at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id*. Unit 1 does not contain the upland features necessary for the frog's survival. *Id*.

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id*. at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id*. at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

> species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any

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

16 U.S.C. § 1533(b)(2) (emphasis added).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

has not been for more than fifty years." *Id*. at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id*. at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id*. at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id*. at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id*. at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id*. at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id*. Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id*. Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id*. In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id*.

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id*. at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id*. at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id*. *See United States v. Morrison*, 529 U.S. 598, 613

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

17-01174_018208;17-01174_018208;17-01174_018209;17-01174_018210;17-01174_018211;17-01174_018212;1...

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id*. at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

DATED: July 2017.

Respectfully submitted,

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Appendix A-1

United States of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix A-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private

property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open canopied pine forests.[2] They migrate to isolated,

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[1] *Se* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi go*e*pher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you

ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531– 1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review

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hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the

designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross- motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen- suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory

explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly defines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437

U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III

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[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing. [9]*See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development— is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that

"considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so

speculative fear" that the government would imminently target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen

immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court— that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of- interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone- of-interests test. We thus conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical-Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131

determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical- habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding

that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mississippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts

agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35,124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35,133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1

provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35,124.

Finally, in addition to ephemeral ponds, dusky gopher frogs alsorequire upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35,131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35,134. This value, which was based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

> Altogether, the Service concluded:
> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports

> metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's determination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that, when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that

the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument.

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra* note 20

There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F. Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not

demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habitat if these areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The statute defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation

goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii),

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

(b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into

> arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in effect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider

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account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective

designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any more "necessary" to a

given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental- take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

conservation of the dusky gopher frog.[19]

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the

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[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field essential for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C.

situation here, and the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

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§ 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that in this case, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. See, e.g., Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them.

Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." See 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat designation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . . ." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We

thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical

> habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical- habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, at *7–8 (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which

is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05- 0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit 1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832)). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the

conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in Michigan, the ESA explicitly mandates "consideration" of "economic impact."16 U.S.C.§ 1533(b)(2); see Bennett, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. See Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number

of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. See Bldg. Indus. Ass'n of Bay Area, 2015 WL 4080761, at *5–6. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the

critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is intrastate (not interstate) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." Markle Interests, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." Id.

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third Lopez prong. See United States v. Morrison, 529 U.S. 598, 609– 12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." Id. at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to

instances that "have an explicit connection with or effect on interstate commerce." Id. at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. Id. at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. Id. The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in Morrison. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the "take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff–developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species)

in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. See GDF Realty, 326

F.3d at 639 ("ESA's protection of endangered species is economic in nature."); id. at 640 ("ESA is an economic regulatory scheme . . . ."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. See id. § 1538(a)(1)(E)–(F); GDF Realty, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical- habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic activity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress

has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 214 F.3d

483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C.§ 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habitat—one that the Service has already found to be essential for the conservation of the species—to escape designation

would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted))

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the

regulation of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical- habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical- habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177– 78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect[ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will

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(1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in nature, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under

NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of- interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact- statement requirement

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district Court

PRISCILLA R. OWEN, Circuit Judge, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species" [1]because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3]to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] Id.

[3] Id.

play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one

feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A)

[6] 77 Fed. Reg. at 35,118

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the

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[10] *Id.* at 35,133

[11] *Id.* at 35,135

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . . . However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.")

[13] *Id.* (noting "we hope to work with the landowners").

habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then replaced with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

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[14] *Id.* at 35,129.

[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171-75 (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the endangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example,

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[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

[21] *Ante* at 19.

sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species. [22]The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" To the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24] In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C.§ 203(a) required long-distance communications common carriers to file tariffs with the Federal

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[22] *Bear Valley*, 790 F.3d at 994.

[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long- distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[31] The same can be said of the Service's, and the majority opinions, construction of the Endangered Species Act in the present case. It may be a good idea to

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[25] *Id*. at 220

[26] *Id*. at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id*. at 220.

[28] *Id*. at 228.

[29] *Id*. at 229-31.

[30] *Id*. at 231.

[31] *Id*. at 231-32.

permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation goes beyond the meaning that the statute can bear.[32] That court was fully cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges. This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI*

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[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[34] Sw. Bell Corp., 43 F.3d at 1521 (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)).

[35] Id.

[36] *Id.;* see also id. ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

Telecommunications Corp. is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of."[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the

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[37] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will

be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[s] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not *when the species will be conserved*, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation. The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species. [42]The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

[42]*See* ante at 22

to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species"

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[43] Id.

requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habitat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists

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[44] *See ante* at 22 n.17; 24 n.18.

[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24

and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that uninhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the

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[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant

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[51] *Ante* at 24-25.

[physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat,

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[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] See also ante at 20

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

[56] *See ante* at 25 n.19.

[57] *Id.*

the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[] that virtually *any* part of the United States could be designated as 'critical habitat' for any given

> endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging

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[58] *Id.* (citation omitted).
[59] *Id.*

that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that

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[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[61] *Id.*

are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

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[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id*. (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population)

[64] Ante at 13-14 (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)).

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation of the species" is therefore not supported by substantial evidence, and the

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[65] See 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . . .").

designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However, the Service found that Unit 1 has only one of the three

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[66] 77 Fed. Reg. at 35,131.

[67] Id.

[68] *Id.*

[69] *Id.*

primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed- canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The Service

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.; see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded:

> Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover;

found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact

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(3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] Id. at 35,140.

depended on the extent to which it might be developed,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The Service

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[77] *Id*.

[78] *Id*.

[79] *Id*.

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id*. at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no

reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results

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Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact

[84] *Id*. at 35,140-41:

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to

in development on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to

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section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

Appendix B-1

Filed
August 22, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	CIVIL ACTION
v.	NO. 13-234
UNITED STATES	c/w 13-362 and
FISH AND WILDLIFE	(Pertains to all
SERVICE, ET AL 13-413	cases)
	SECTION "F"

ORDER AND REASONS

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross- motion.

Additionally before the Court are two motions to strike extra- record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases -- landowners and a lessee of a tree farm in Louisiana -- challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately-owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

Appendix B-3

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species ... to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16

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[1]Technically, administration responsibilities are divided between the Department of Interior and the Department of Commerce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine...."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. §, 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A)("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable ... (i) shall concurrently with making a [listing] determination ... designate any habitat of such species...."). Like its listing duty, FWS's habitat designation duty is mandatory;[2]the designation must

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[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001)("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'"). It is incumbent on the Secretary -- "to the maximum extent prudent and determinable" -- to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later designation. *See* 16 U.S.C. § 1532(a)(3)(B)("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established...."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii)(if "critical habitat of [listed] species is not ... determinable [at the time of listing], the Secretary ... may extend the one-year

be based on "the best scientific data available ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines ... that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Id.

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means–
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> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary

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period specified in paragraph (A) by not more than one additional year....") and 50 C.F.R. § 424.17(b)(2).

> that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical occupied habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3]50 C.F.R. § 424.12(b). FWS may designate as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat...." 16 U.S.C. § 1536(a)(2).[4] If

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival andrecovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442-43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and*

FWS or the consulting federal agency determines that a contemplated action "may affect ... critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (Rana Sevosa) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129 - 35131. They travel to small, isolated

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survival of a species imposes a higher threshold than the statutory language permits.")(emphasis in original).

[5] Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking

[7] Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Id. at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. Id. at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

species. FWS determined that the frog was endangered due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

historical breeding sites for the frog. Based on the comments, FWS re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana.[11] FWS identified additional critical habitat in Mississippi and Louisiana[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetica scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9

[11] FWS was not able to identify critical habitat in Alabama.

million").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

land in Unit 1 is owned by Weyerhaeuser Company, which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaueuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531, et seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-record

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for Supplementing, or challenging, the administrative record; no party requested to supplement the record.

evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions,

to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed.R.Civ.P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA -- in particular, a final rule designating critical habitat -- the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174-75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)(Courts must be particularly deferential to agency determinations

made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent

Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001)(citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985))("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February

8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County*, 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record; (2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA, U.S,* 133 S.Ct. 1138, 1146 (2013). "One element of the case-

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545
(5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See S*ummers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); see also *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)(citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[19]

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but

The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. V. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C.Cir. 2006)(an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as

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in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C.Cir. 2005)(firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation ... has immediately devalued the land within Unit 1 for commercial purposes by bringing increased ... regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they

in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117-18 (D.D.C. 2004)(business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

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submit that the designation "limits the usability and saleability of the property" to their detriment.

[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser ... periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce... among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. See *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008)(vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-Lopez Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. V. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. V. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend Lopez, which dealt with a

challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United State*s, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" GDF, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally

valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640-41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n. 9 (1984)("[T]he

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining

that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which

> likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on recovery of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat because Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

occupied habitat must contain all of the relevant PCEs. See 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide. Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere

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[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010)(rejecting argument that FWS must first identify the point at which the endangered species is considered

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008)("While tempting in its logical simplicity...the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), aff'd, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), cert. denied, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly rebutted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument -- to the extent it is reviewable (see *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010)(Service's decision not to

exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map…[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." Id. FWS "chose the value of 621 m...by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog…and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use...." Id. FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." Id. With respect to Unit 1, FWS explained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. Id. at 35123-25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. See *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010("Where an agency's particular technical expertise is

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa*, will be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List...to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants

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involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

acceptance as its own species...and the scientific name for the species was changed to *Rana sevosa."* 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30]And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama Tombigee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position...on the question and is supported by...peer review[,] and by the opinion of the Service's own experts.")

Wyerhaeuser, a co- owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why -- (assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies -- FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the

landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat ... on the basis of the best scientific data available and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. See 16 U.S.C. § 1533(b)(2)(the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)(citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D.Ariz. 2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations' economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens imposed by simply listing the frog) are treated as part of the regulatory baseline and are not

factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation... to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results

million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion -- its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered -- is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

these economic impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013)(*quoting Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. Id. To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

environment."

U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003)(NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed.

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities

Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436-39 (10th Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. Id. Unlike the critical habitat designation in that case -- where the environmental impact of the critical habitat designation "will be immediate and disastrous" -- the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. Douglas County v. Babbitt, 48 F.3d 1495, 1501-08 (9th Cir. 1995)(considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. Id. Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain

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such as timber management lack a federal nexus and are therefore exempt.

terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009)(setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

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Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 202 F. Supp. 2d 594, 646-48 (W.D.Tex. 2002) (citations omitted).

[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

New Orleans, Louisiana, August 22, 2014.

s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse -- contrary to the express terms and scope of the statute -- a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

Appendix C-1

United States Courts of Appeals
Fifth Circuit
FILED
February 13, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix C-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

Opinion June 30, 2016, 827 F.3d 452)

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

ENTERED FOR THE COURT:

S/ STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." See 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied)

Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
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> (ii) specific areas outside the geographical area occupied by the

> species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

> Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012.

Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii)

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plantations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical- habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and

benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." [1]*Id.* at 472 n.20. Finally, the panel majority held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

> The ESA states that the Service
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> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* … and ... may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical"

portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species ... and habitat of such species that has designated as critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant[.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the

species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical*.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This

predecessor provision, like the current consultation requirements, refers to the destruction or modification of "habitat of such species which is determined by the Secretary. . . to be critical."[3] From the very beginning, Congress rooted the concept of

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . . . I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . . . While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . . . In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

critical habitat in the relevant species' actual habitat.

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation. [4]As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be*

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

habitat. A diagram explains this statutory plan:

Figure 1: Under the ESA, a species critical habitat is necessarily a subset of the species habitat

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit decision. Neither of these objections should be persuasive. The first objection—that this textualist argument was waived—is easily disposed of. Throughout this

litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement exists,[5] but a reviewing court could not cite the same context and related regulations to say a

[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

habitability requirement does in fact exist. This objection is meritless

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. the Ninth Circuit appeared to assume that critical- habitat designation of those unoccupied, uninhabitable areas was the only means

of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

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For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally

live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)-(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by

chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features* . . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas*. . . [that] are essential for the

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose.[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conservation would be a more substantial

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions.[9] Mirroring the respective Houses' proposals, [10]Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied"

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat");

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional

purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of *unoccupied* critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to

the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious concern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species' occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally

limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical- habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472 n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity ofa Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to articulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances

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[12] *Markle Interests*, 827 F.3d at 471.

merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one

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[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no

would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C. § 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the

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support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent . . . .").

panel majority's one- feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

"unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non- Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical

> habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best

expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary." The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [] economic impact is not reviewable."*Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it— "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Cheney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the ESA's permissive language: "[t]he Secretary

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed,

and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard. The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

Appendix D-1

Filed
February 7, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO.

MARKLE INTERESTS, LLC,

Plaintiff,
v.

UNITED STATES FISH AND WILDLIFESERVICE, DANIEL M. ASHE, Director of United States Fish and Wildlife Service, in his official capacity; United States DEPARTMENT OF INTERIOR; and, KENNETH SALAZAR, Secretary of the Department of Interior, in his official capacity

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIE

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against Defendants for violating federal statutes and the U.S. Constitution. By final rule, dated June 12, 2012, 77 Fed. Reg. 35118, *et seq.*, Defendants, through the U.S. Fish and Wildlife

Service, designated critical habitat for the dusky gopher frog (previously Mississippi Gopher Frog) in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., in that the designation erroneously includes large areas of private land that do not contain the physical and biological features essential to the conservation of the species and the economic analysis is invalid for failing to properly consider the cumulative effects of the designation. Moreover, the designation was issued without the environmental review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*., and in excess of constitutional authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Defendants‟ actions are contrary to law and must be set aside.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (actions arising under the citizen suit provision of the Endangered Species Act); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

3. Plaintiff, Markle Interests, LLC (Markle), satisfied the notice requirement of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(2). More than 60 days ago, by letter dated September 27, 2012, Markle provided Defendants written notice of the violations that are the subject of this complaint in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as

Exhibit 1 and is incorporated herein by reference. Defendants have not responded to this notice or taken any action to withdraw the final rule at issue here, or to otherwise remedy their violations of law.

4. An actual, justiciable controversy now exists between Markle and Defendants. Relief is proper under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

5. The federal government has waived sovereign immunity in this action under 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

6. Markle has exhausted all administrative remedies.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in this district.

PARTIES

Plaintiff

8. Markle Interests, LLC, is a limited liability company that owns an undivided interest in forested property identified in the final rule as Unit 1 in St. Tammany Parish, Louisiana, and included as critical habitat for the dusky gopher frog. This designation imposes significant regulatory burdens on the property such that costly federal approval may be required for any activity deemed to affect the species, including adverse habitat modification. In addition to

these regulatory burdens, the destination of Unit 1 as critical habitat results in a drastic reduction in value and limits the usability and saleability of the property.

Defendants

9. Defendant United States Department of Interior (Department) is an agency of the United States. Congress has charged the Department with administering the Endangered Species Act for certain species, including the dusky gopher frog.

10. Defendant Kenneth Salazar is Secretary of the United States Department of Interior (Secretary). He oversees the Department‟s administration of the Endangered Species Act and is sued in his official capacity.

11. Defendant United States Fish and Wildlife Service (Service) is an agency of the United States Department of Interior. The Service has been delegated responsibility by the Secretary for day-to-day administration of the Endangered Species Act, including the designation of critical habitat.

12. Defendant Daniel M. Ashe is Director of the United States Fish and Wildlife Service. He oversees the Service‟s administration of the Endangered Species Act and is sued in his official capacity.

13. All of these Defendants are responsible for the violations alleged in this complaint.

Appendix D-5

LEGAL FRAMEWORK

Listing of Threatened or Endangered Species

14. Under Section 4 of the Endangered Species Act, Defendants must list a species as "threatened" or "endangered" based on certain factors relating to habitat, overutilization, disease or predation, existing regulatory mechanisms, or other factors. *See* 16 U.S.C. § 1532(20).

15. An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

16. Endangered species are specifically protected by Section 9 of the Endangered Species Act, which, among other things, makes it unlawful for any person to "take" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, hunt, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," and may include habitat modification. 16 U.S.C. § 1532(19)

Critical Habitat Designation

17. Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, Defendants must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

18. Critical habitat is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> ….
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

16 U.S.C. § 1532(5)(A)-(C).

19. "The statute thus differentiates between „occupied" and „unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Grower's Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

20. The term "conservation" means the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at

which the protections of the Act are no longer required. 16 U.S.C. § 1532(3).

21. The Secretary must

> [d]esignate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

Consultation

22. Private property designated as critical habitat is subject to federal regulation.

23. In consultation with the Secretary, federal agencies are required to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

24. Section 7 of the Endangered Species Act also requires a federal agency to consult with the

Secretary at the request of a permit applicant, if the applicant "has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

25. Under Section 7, the Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If it is determined that the project is likely to jeopardize the species" "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.*

26. If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action will not" jeopardize the species" continued existence or result in the destruction or adverse modification of critical habitat of such species, a written "incidental take statement" must be issued that (1) specifies the impact of such incidental taking on the species; (2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3), sets forth the terms and conditions with which the agency or applicant must comply to implement the specified measures. 16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv).

National Environmental Policy Act

27. The National Environmental Policy Act requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency‟s decision making. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

28. An environmental impact statement must include:

> (i) The environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man‟s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

29. The NEPA implementing regulations provide federal agencies with the opportunity to prepare an "environmental assessment" that either determines that an environmental impact statement is required or concludes with a "finding of no

significant impact," which terminates the agency's NEPA obligations. 40 C.F.R. § 1508.9.

Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act, a court must set aside agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D).

31. Section 704 of the Administrative Procedure Act states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

U. S. Constitution

32. Commerce Clause enactments, like the Endangered Species Act, are subject to the limits of that power. "The Constitution grants Congress the power to „*regulate* commerce." Art. 1, § 8, cl. 3. (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012).

FACTUAL ALLEGATIONS

Listing and Critical Habitat Designation

33. On December 4, 2001, the U.S. Fish and Wildlife Service listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*.

34. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq*.

35. Although critical habitat may only include those areas "essential to the conservation of the species," the Service made no finding as to the quantity or location of habitat necessary to conserve the gopher frog or identify "the point" at which the protections of the ESA are no longer required.

36. The critical habitat designation covers 6,477 acres in two states, including 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1. *Id.* at 35118.

37. Unit 1 is private land in which the Plaintiff, Markle, owns an undivided interest. *Id.* at 35134-35135.

38. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35134-35135.

39. Unit 1 is not suitable for gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. *Id.* at 35135.

40. Unit 1 cannot be made suitable for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site. *Id.* at 35129-35130.

41. Unit 1 landowners submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123.

42. The Service acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35126.

43. The Service did not show how Unit 1—which is unoccupied and unsuitable as habitat for the gopher frog—is essential to the conservation of the species.

Economic Impacts Analysis

44. In conjunction with the critical habitat designation, the Service completed an economic impacts analysis mandated by Section 4 of the Endangered Species Act. *See id.* at 35140-35141.

45. That analysis showed that designating Unit 1 as critical habitat could have an adverse impact on the landowners as high as $33.9 million. *See id.* at 35141.

46. On the record, the Service did not conduct a balancing analysis that weighed the economic impact on the landowners of Unit 1 against the benefit of including Unit 1 in the critical habitat designation.

47. Notwithstanding the fact that Unit 1 is unsuitable for gopher frog habitat, the Service concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

48. The Service relied on the "baseline approach" and did not consider the *quantitative* economic impacts of the critical habitat designation coextensively (or cumulatively) with the listing of the gopher frog as an endangered species. *Id.* at 35140-35142.

NEPA Compliance

49. The government admitted that it did not subject the critical habitat designation for the dusky gopher frog to review under the National Environmental Policy Act. *See id.* at 35144.

APA Compliance

50. The rule designating critical habitat for the dusky gopher frog, 77 Fed. Reg. 35118, *et seq.*, is the culmination of the Service‟s decision making and constitutes final agency action.

Constitutional Compliance

51. The Service made no finding that the designation of Unit 1 as critical habitat constitutes the regulation of existing commercial activity as the Constitution and U.S. Supreme Court precedent require. *See United States v. Lopez*, 514 U.S. 549 (1995).

INJUNCTIVE RELIEF ALLEGATIONS

52. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 51 as though fully set forth herein.

53. If an injunction does not issue enjoining Defendants from enforcing the critical habitat designation for the dusky gopher frog, Markle will be irreparably harmed.

54. Markle has no plain, speedy, and adequate remedy at law.

55. If not enjoined by this Court, Defendants will continue to enforce or rely on the critical habitat designations in derogation of Markle‟s rights.

56. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

57. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 as though fully set forth herein.

58. An actual and substantial controversy exists between Markle and Defendants as to their legal rights and duties with respect to the ESA, NEPA, the APA, and the U.S. Constitution in the designation of critical habitat for the dusky gopher frog.

59. This case is presently justiciable because Defendants‟ failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Markle. Markle has a vital interest in knowing whether the critical habitat designation, to which Markle is subject, is statutorily and constitutionally valid.

60. Declaratory relief is therefore appropriate to resolve this controversy.

CLAIMS FOR RELIEF

First Claim for Relief

Failure to Make Threshold Determination for Designating Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(e); Alternatively, APA, 5 U.S.C. § 706)

61. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 60 as though fully set forth herein.

62. The Endangered Species Act defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5). In turn, the Act defines "conservation" to mean the use of all methods and procedures necessary to bring a "threatened" or "endangered" species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3). The Act does not define "essential" but it is axiomatic that to determine what is "essential to the conservation of the species," the Service must first identify "the point" when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. However, those threshold determinations are entirely missing from the final rule.

63. The effect of the Service‟s failure to determine a viable population and minimum habitat

size is that the Service is logically incapable of ascertaining which areas are "essential to the conservation of the species" and whether the designation of any particular unoccupied area is required. *See* 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). In this case, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area. Without the foundational underpinning of a viable population, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

64. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); federal regulation, 50 C.F.R. § 424.12(e); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Second Claim for Relief

Failure to Apply Correct Standard to Determine Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); Alternatively, APA, 5 U.S.C. § 706)

65. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. The Secretary does not have unfettered discretion to designate unoccupied areas as critical

habitat. Such areas must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(ii). Logically, this would include areas that at least contain those physical and biological features that are themselves "essential to the conservation of the species." The Service has identified such features as Primary Constituent Elements (or PCEs). For the dusky gopher frog, there are three: (1) ephemeral wetland habitat; (2) upland forested nonbreeding habitat; and (3) upland connectivity habitat. *See* 77 Fed. Reg. 35131. The Service maintains that all of these PCEs are essential to the conservation of the species. However, the Service admits that Unit 1 does not contain all these PCEs. *See id.* at. 35135. In fact, Unit 1 contains none of the PCEs essential to the conservation of the species. Therefore, Unit 1 is currently not suitable habitat for the dusky gopher frog at all, let alone critical habitat.

67. Nevertheless, the Secretary included this unoccupied area in the designation. In effect, the Secretary designated Unit 1 as critical habitat on the premise that the area would be essential for the conservation of the species, if it ever did contain the requisite PCEs. *See id.* But it doesn‟t now and likely never will. The private owners have no intent to convert their property to conservation purposes and, according to the Service, they can‟t be compelled to do so.

68. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Third Claim for Relief
Inadequate Economic Analysis
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

69. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 68 as though fully set forth herein.

70. The Economic Analysis (EA) adopts the "baseline" approach whereby the Service only considers the *qualitative* impacts that occur "without critical habitat," such as those impacts caused by listing of the species, whereas the incremental impacts occurring "with critical habitat" are given a *quantitative* analysis. *See* 77 Fed. Reg. at 35140-35141. The result of this approach is that neither the Service nor the public are ever provided a meaningful cumulative economic impacts analysis. This "baseline" approach was rejected by the Tenth Circuit in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). According to the Tenth Circuit, the "baseline" approach is meaningless and inconsistent with the language of the Act and the intent of Congress. Therefore, that Circuit held the Economic Analysis must consider all of the impacts of critical habitat designation, including those impacts co-extensive with the listing. In other words, the EA must consider the cumulative impacts of the listing and the critical habitat designation together, not just the incremental impacts of the designation. (For a contrary view see *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir 2010).) In *Home Builders Association of Northern California v. Norton*, 293 F.

Supp. 2d 1 (D.D.C. 2002), the Service appears to have represented to the court that it would follow the *New Mexico Cattle Growers'* co-extensive approach in all future critical habitat designations. But it has not done so here.

71. Moreover, the EA failed to quantify economic and other impacts of the designation on oil and gas exploration, forestry, and those impacts resulting from conservation activities such as controlled burns.

72. By these acts or omissions Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fourth Claim for Relief
Failure to Exclude
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

73. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The Service acknowledged, as it must, that Unit 1 will only become suitable habitat if the land is managed to develop the requisite PCEs. *See* 77 Fed. Reg. 35135. The Service also acknowledged that Unit 1 is comprised entirely of private land, *id.* at 35134-35135, and that private landowners cannot be compelled to manage the land for recovery purposes, *id.* at 35126. In fact, because Unit 1 is unoccupied and used for timber harvesting and has the potential for

development of oil and gas exploration, that the Service valued at approximately $34 million, the private owners have no intent to convert their property to conservation purposes. Not only do these facts compel a finding that Unit 1 is not "essential for the conservation of the species," but they also compel a finding that the benefits of exclusion outweigh the benefits of inclusion under Section 4(b)(2) of the Act. The Service‟s unsupported conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," 77 Fed. Reg. 35141, is arbitrary and irrational. *See Natural Resources Defense Council v. U.S. Department of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) ("Essentially, we must ask „whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.‟" (citation omitted)).

75. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fifth Claim for Relief
Failure to Conduct NEPA Review
(Violation of NEPA, 42 U.S.C. § 4321, *et seq.*;
Alternatively, APA, 5 U.S.C. § 706)

76. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. In its final rule designating critical habitat for the dusky gopher frog, the Service stated

categorically that the National Environmental Policy Act does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35121. But the better argument is to the contrary.

78. Neither the Endangered Species Act nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Preservation Alliance v. U. S. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), have held that critical habitat designations are subject to review under NEPA. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit parted ways with the Tenth Circuit and held that NEPA review was not required for critical habitat designations where there is no physical change to the environment. However, this case is different.

79. Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for human interference with the environment through management of the habitat by, among other things, regular controlled burns. Frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog"s aquatic and terrestrial habitat. *See* 77 Fed. Reg. 35129-35130. These burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and habitat for other species. But the critical habitat designation does not discuss these effects. That can only be done

through the NEPA review process. Therefore, notwithstanding the Ninth Circuit decision, and in accordance with the Tenth Circuit decision, NEPA review should have been undertaken here.

80. By these acts or omissions Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.*; and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Sixth Claim for Relief
U.S. Constitutional Violation
(Commerce Clause, Article 1, Section 8, Clause 3, and APA, 5 U.S.C. § 706)

81. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. The Service cites a long list of cases that have upheld the agency‟s authority to regulate intrastate, noncommercial species under the commerce power. *See* 77 Fed. Reg. at 35120. However, those cases do not address whether the agency has authority under the Commerce Clause to regulate private land that has no connection to the protected species other than through the critical habitat designation itself. The designation of Unit 1 as critical habitat for the dusky gopher frog is contrary to U.S. Supreme Court precedent not only because the frog is not a regulable entity but also because the critical habitat designation creates, rather than regulates, the putative economic activity. *See United States v. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); and, more recently, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573-74 (2012) ("This

Court‟s precedent reflects this understanding: As expansive as this Court‟s cases construing the scope of the commerce power have been, they uniformly describe the power as reaching „activity.‟ *E.g.*, *United States v. Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626. The [challenged provision], however, does not regulate existing commercial activity.”). Simply put, the uncontested facts show that the Service is not regulating existing commercial activity. The regulation of Unit 1 as critical habitat is unconstitutional because the land does not contain the listed species or any usable habitat and any activity on the land cannot affect the species or its habitat.

83. By these acts or omissions Defendants violated art. 1, § 8, cl. 3, of the U.S. Constitution and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

PRAYER FOR RELIEF

Wherefore, Markle prays:

As to the First Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to make the threshold determination as to the quality and location of habitat essential to the conservation of the species in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or alternatively, that the final rule is void under the APA, U.S.C. § 706.

As to the Second Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to apply the proper standard for designating critical habitat in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Third Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because the economic analysis was inadequate in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fourth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants‟ failure to exclude Unit 1 was arbitrary and irrational in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fifth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to comply with NEPA, 42 U.S.C. § 4321, *et seq.*, and the final rule is void under the APA, 5 U.S.C. § 706.

As to the Sixth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid under the Commerce Clause, U.S. Constitution, art. 1, § 8, cl. 3, and the final rule is void under the APA, 5 U.S.C. § 706.

As to all Claims for Relief:

That this Court:

(a) issue a judgment and order enjoining Defendants from enforcing or otherwise acting pursuant to the final rule, vacating the rule, and remanding the rule for redesignation of critical habitat in accordance with ESA, NEPA, the APA, and the U.S. Constitution;

(b) award Plaintiff attorneys‟ fees and costs to the extent permitted by law; and

(c) grant such other relief as the Court shall deem just and proper.

DATED: February 7, 2013.

Respectfully submitted,

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Appendix E-1

Excerpts from Mar. 12, 2012
Public Comment on Behalf of
P&F Lumber, Etc.

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16,
and Weyerhaeuser's comments of November 28, 2011 at page

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed bums would be necessary")

the only known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,201 I at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23,2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also sec proposed Rule at page 59777.

In *United States v. Lopez,* 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel,* 301 U.S. **1,** 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is

absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Commerce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist-- and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any

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Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?,* 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

Appendix F-1

Excerpts from Nov. 23, 2011 Public Comment on Behalf of P&F Lumber, Etc.

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands-- and, indeed, the FWS in the

Proposed Rule concludes that (by its own investigation on the Lands) the MGF does not now actually occupy the Lands-- it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both

---

[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

the St. Tammany Parish Planning and Zoning Commission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish..

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million' dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

---

[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

Appendix F-5

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.

Nos. 17-71, 17-74

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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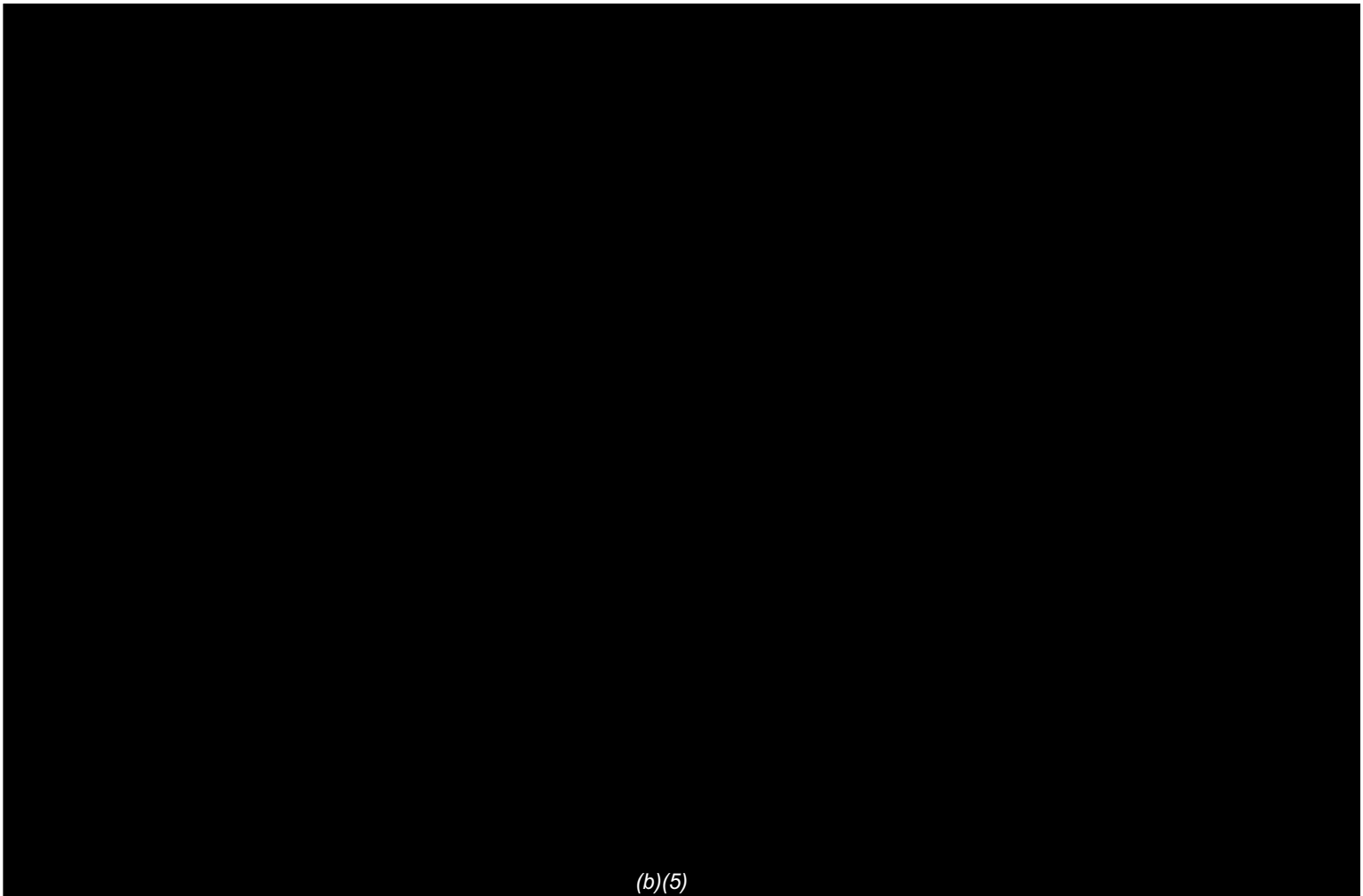
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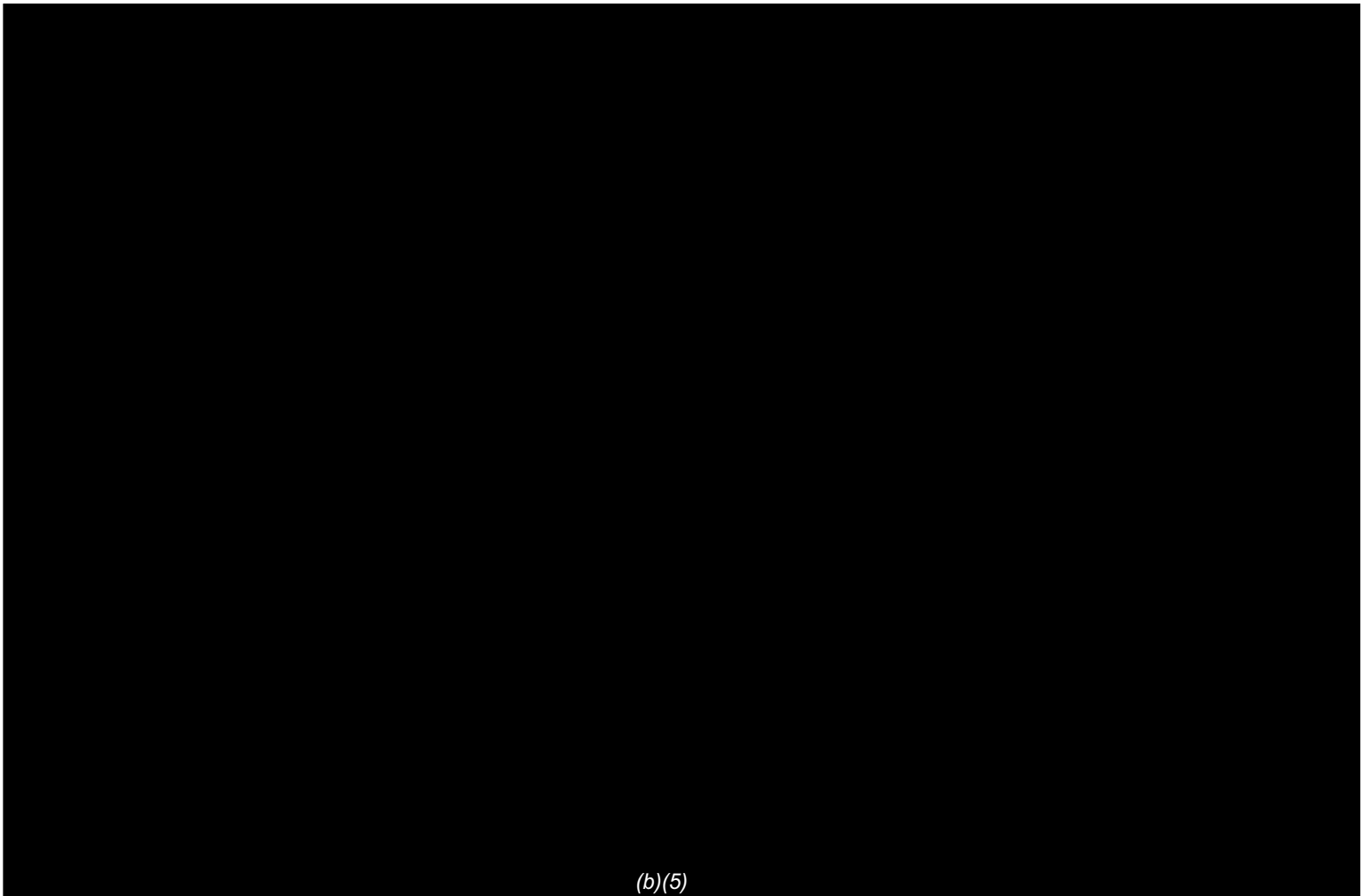
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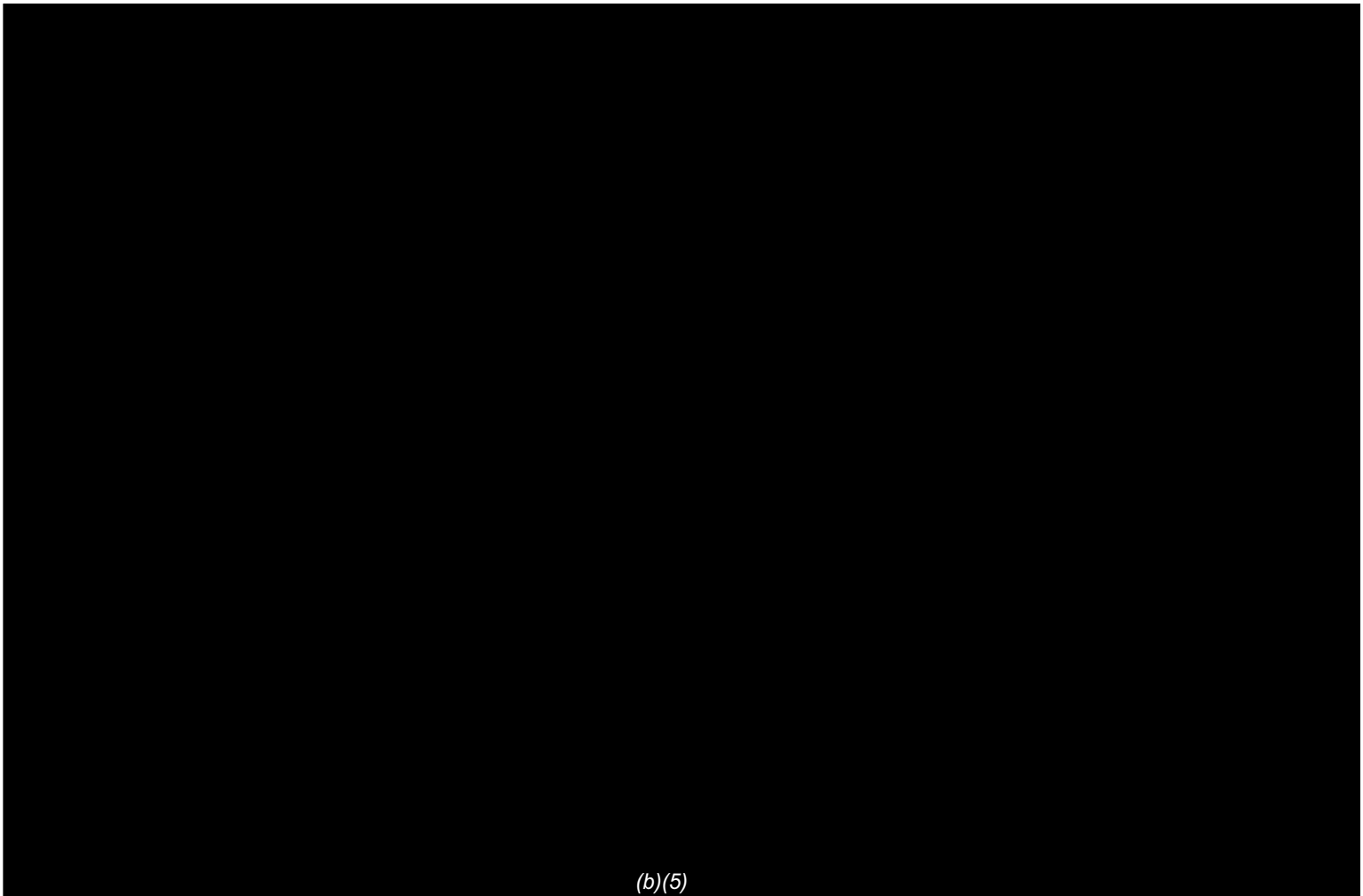
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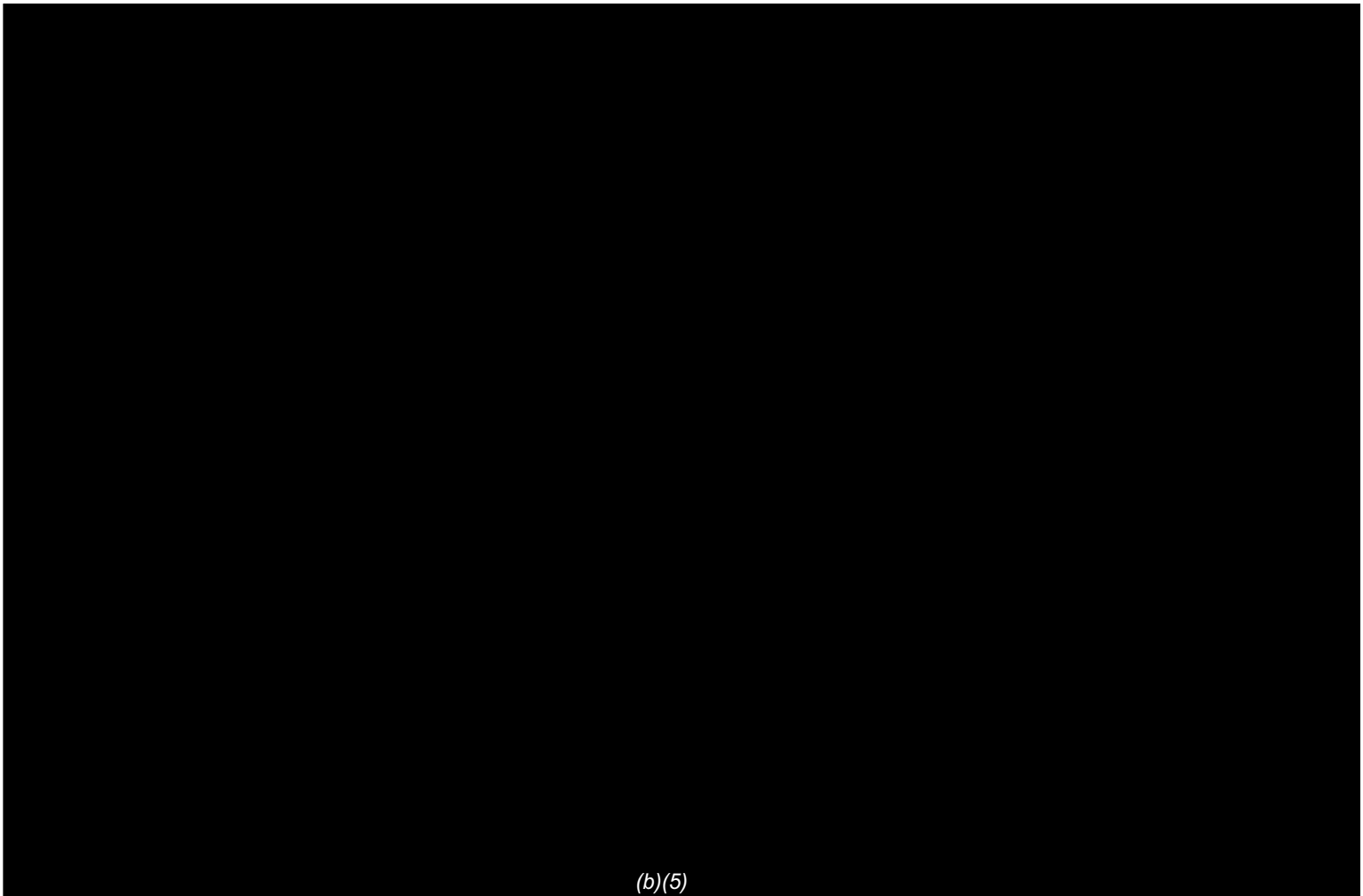
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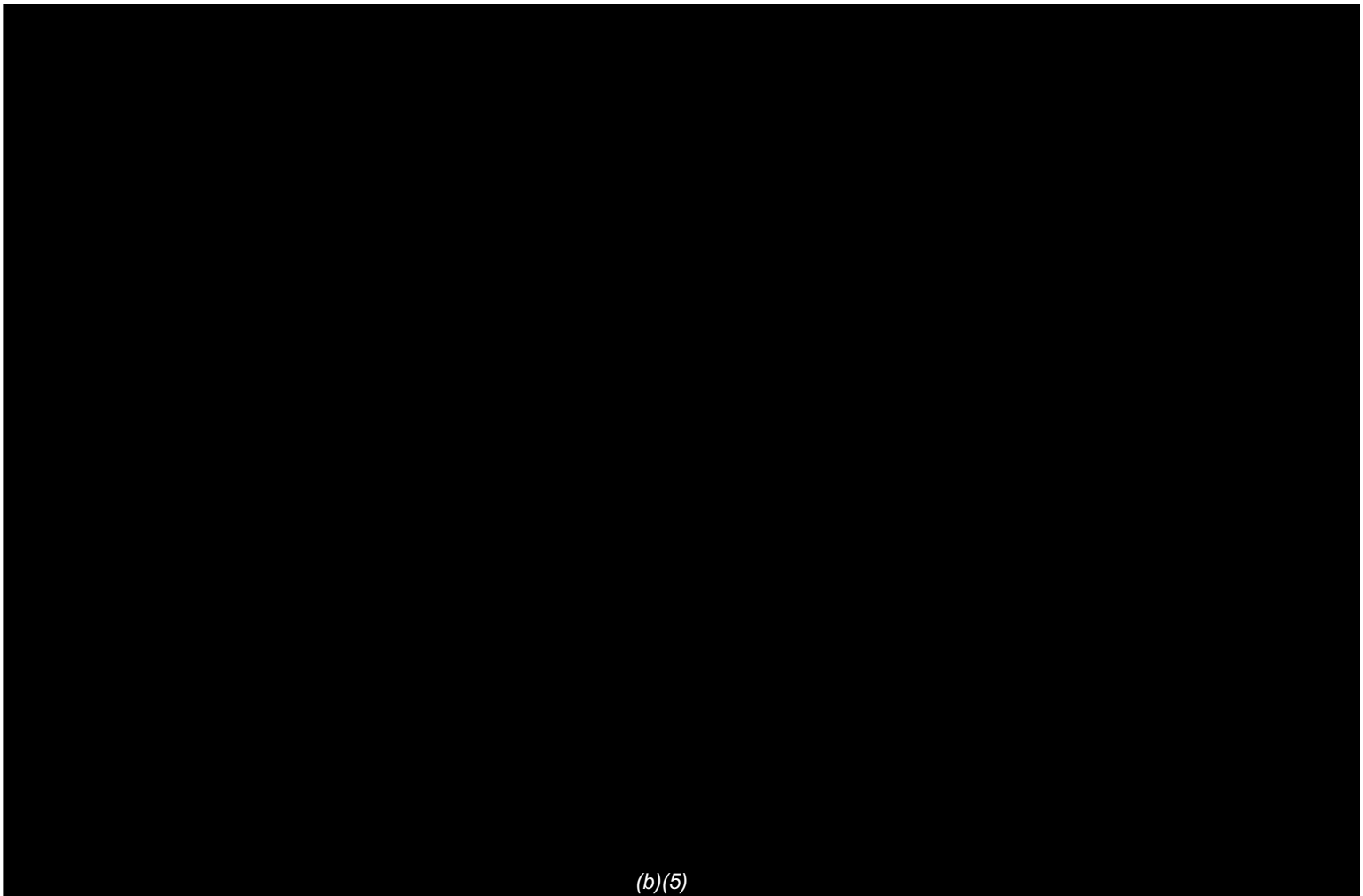
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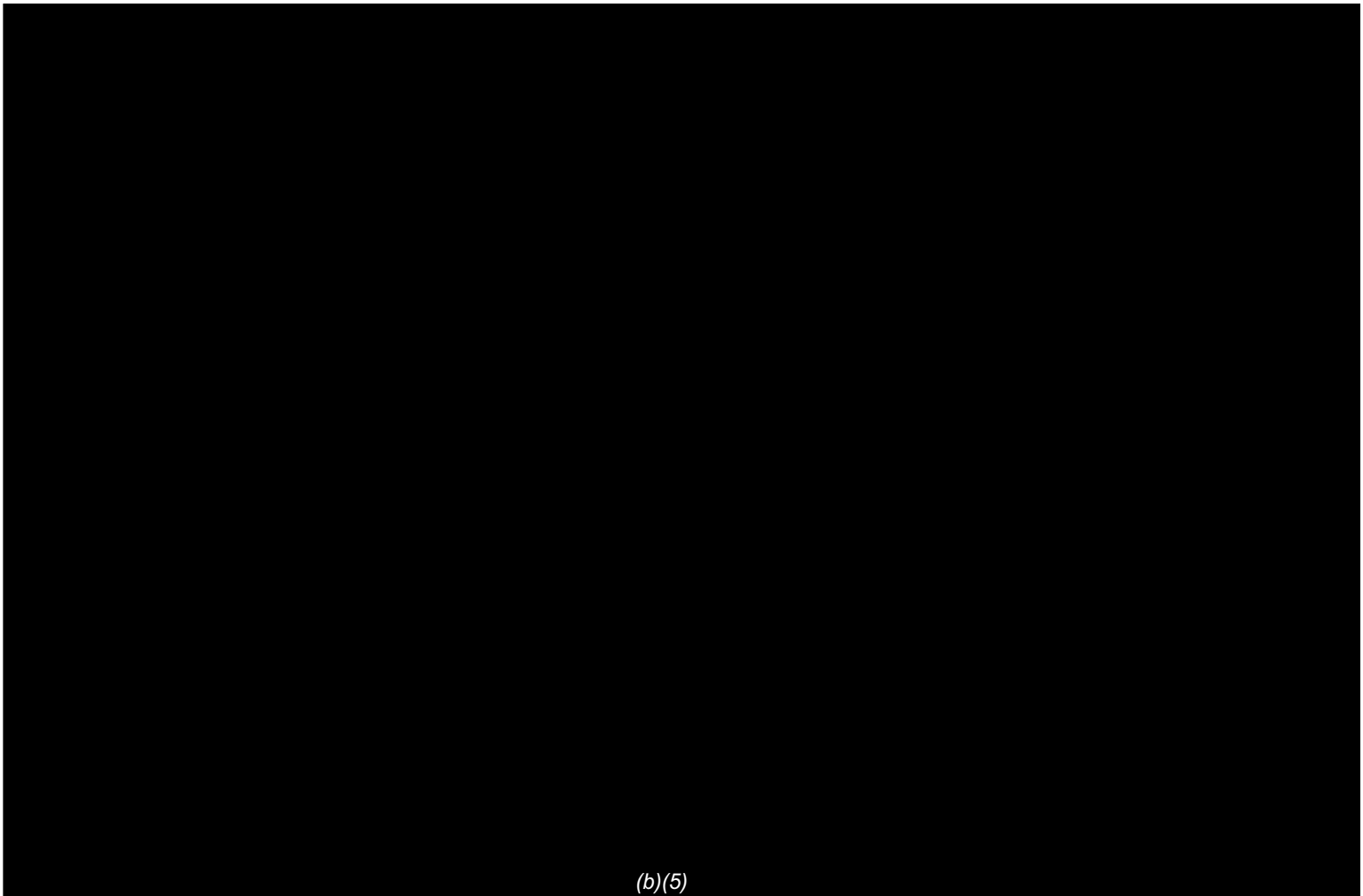
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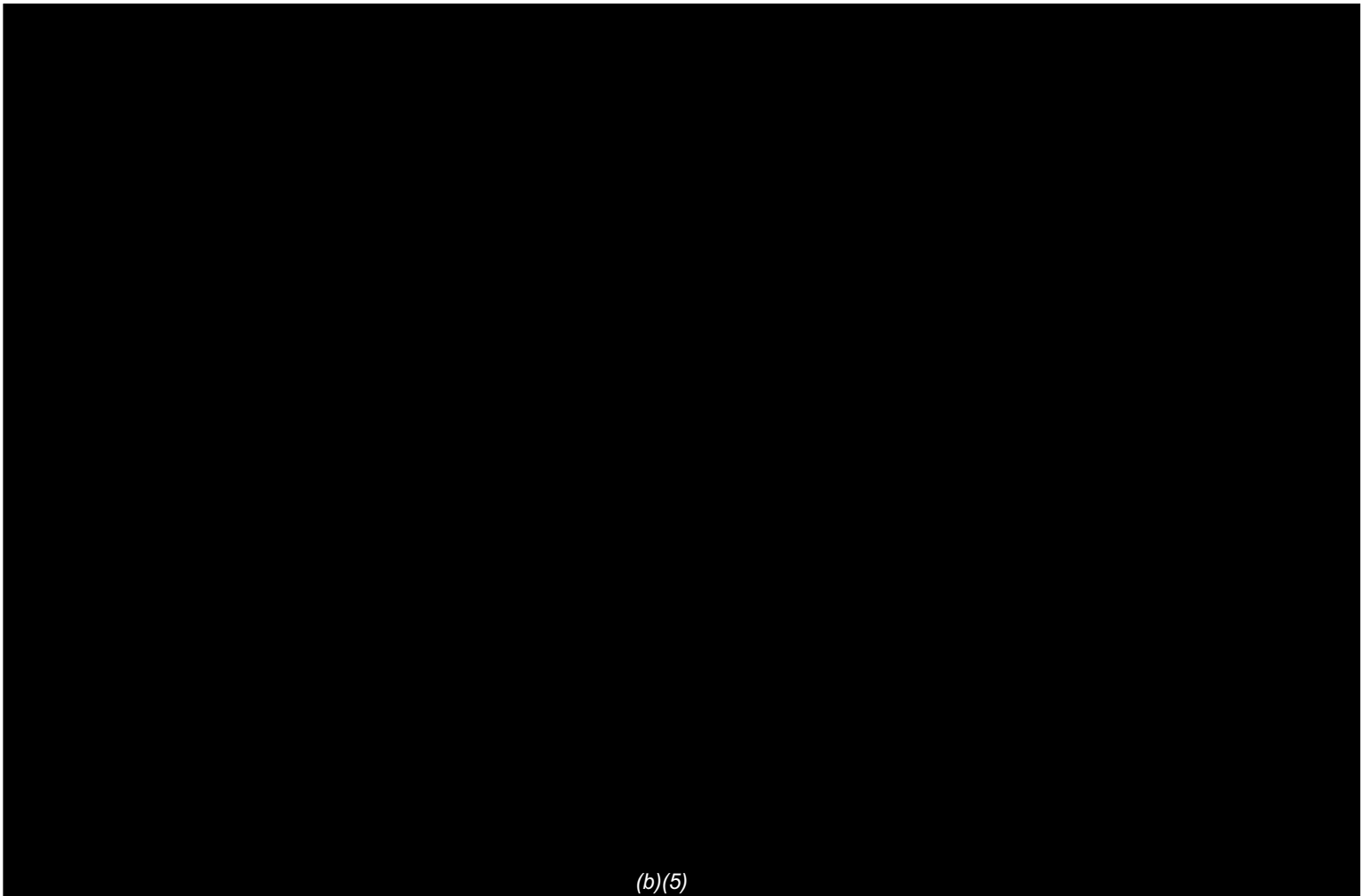
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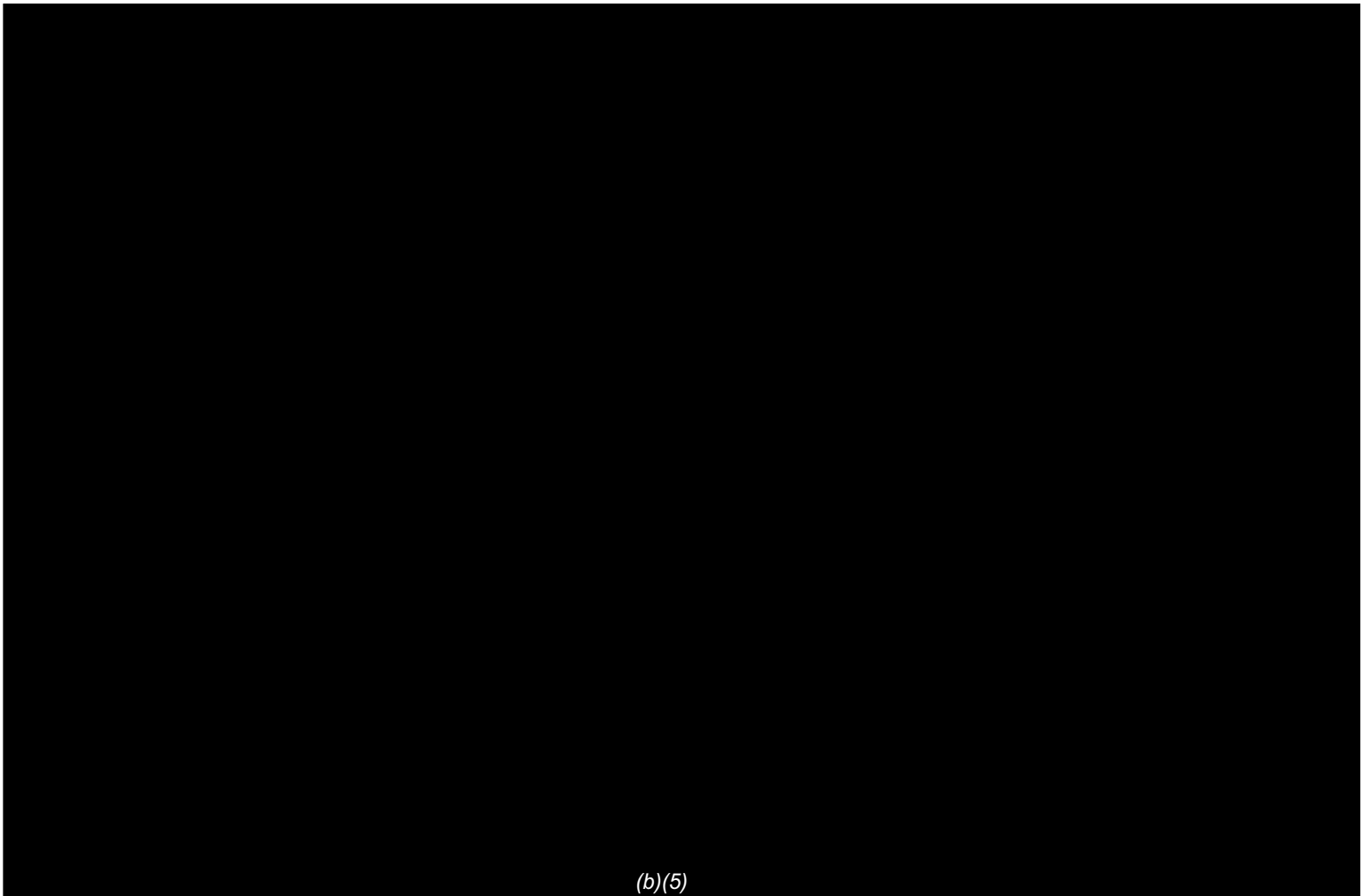
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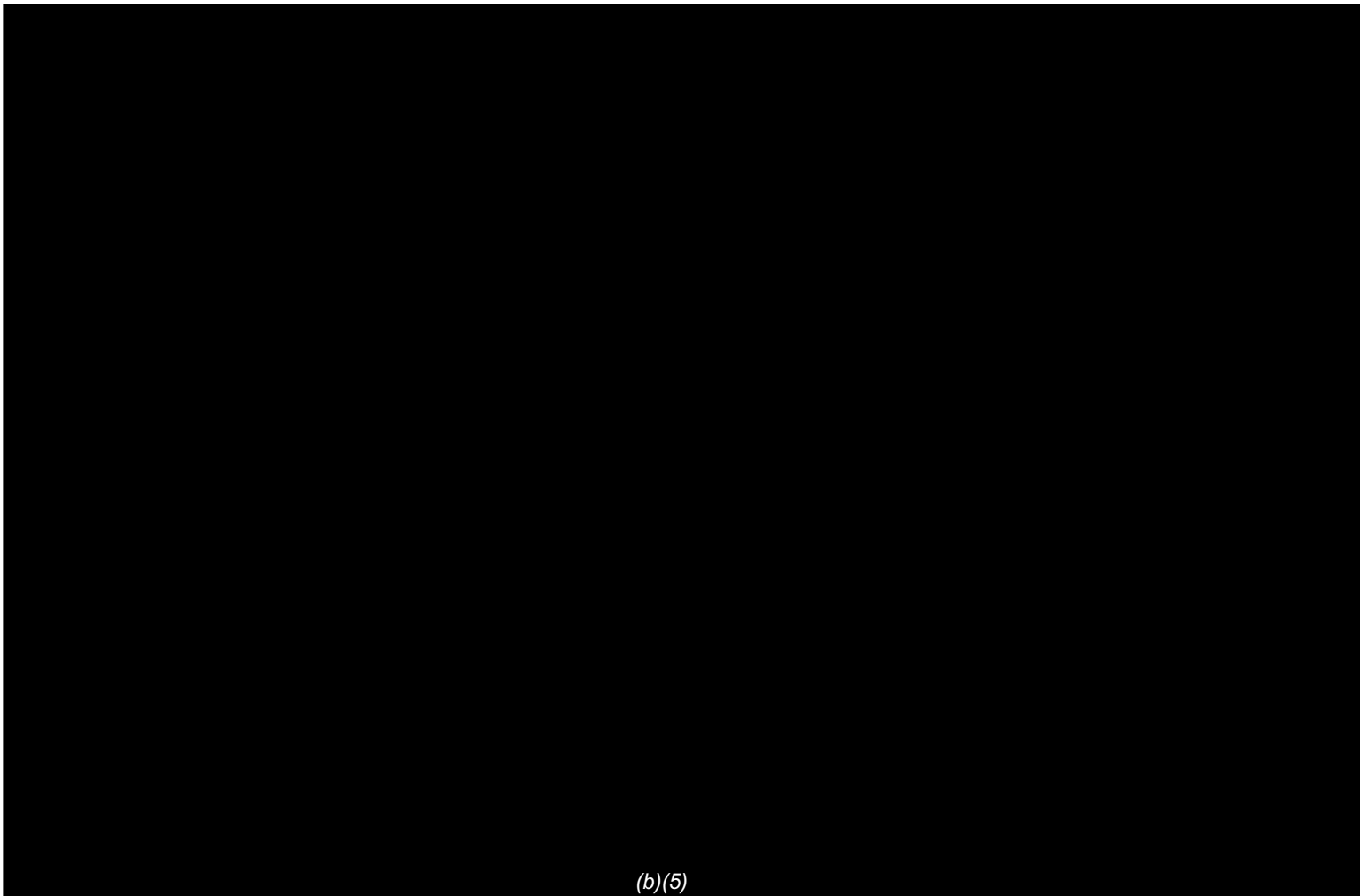
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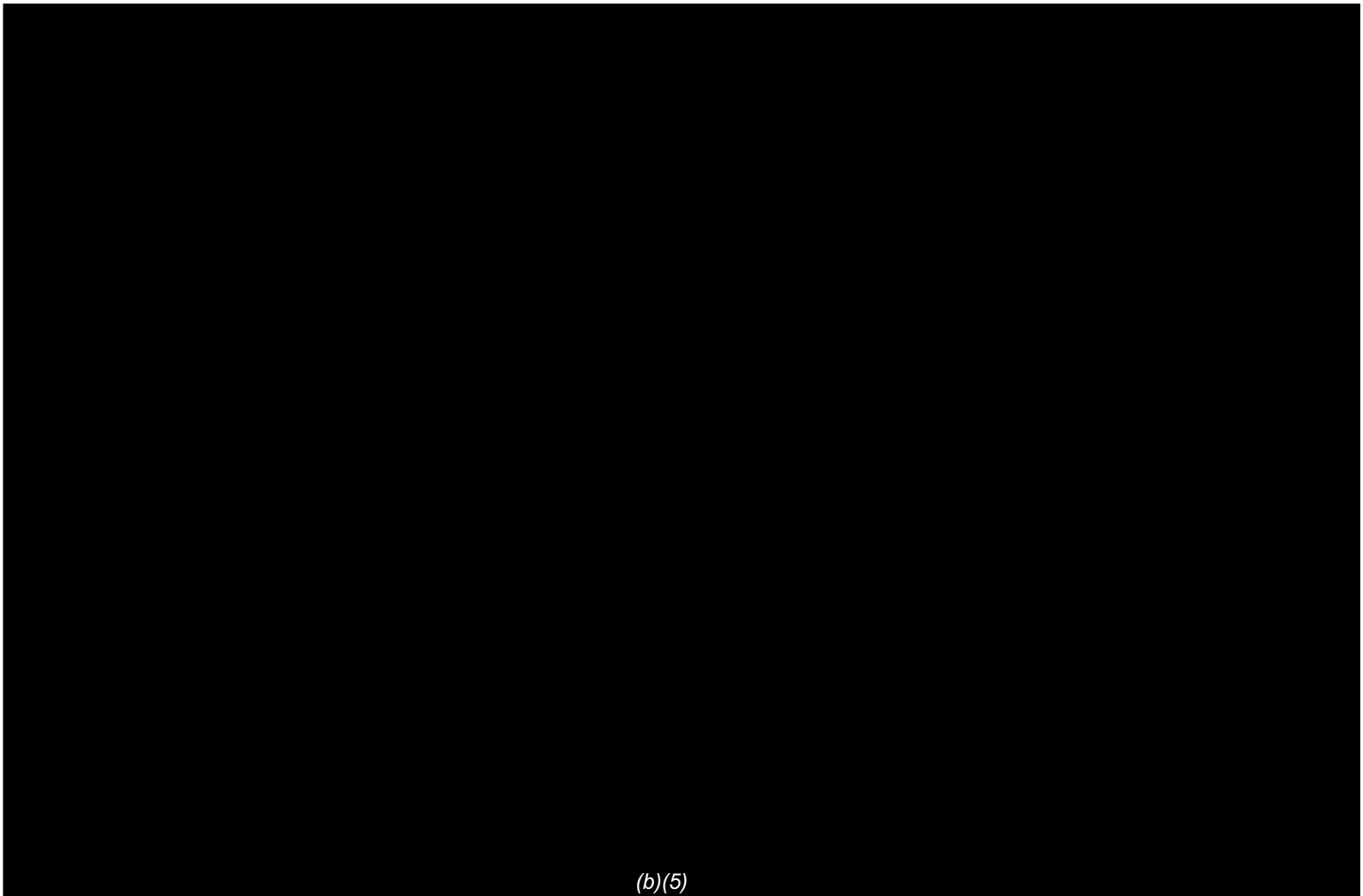
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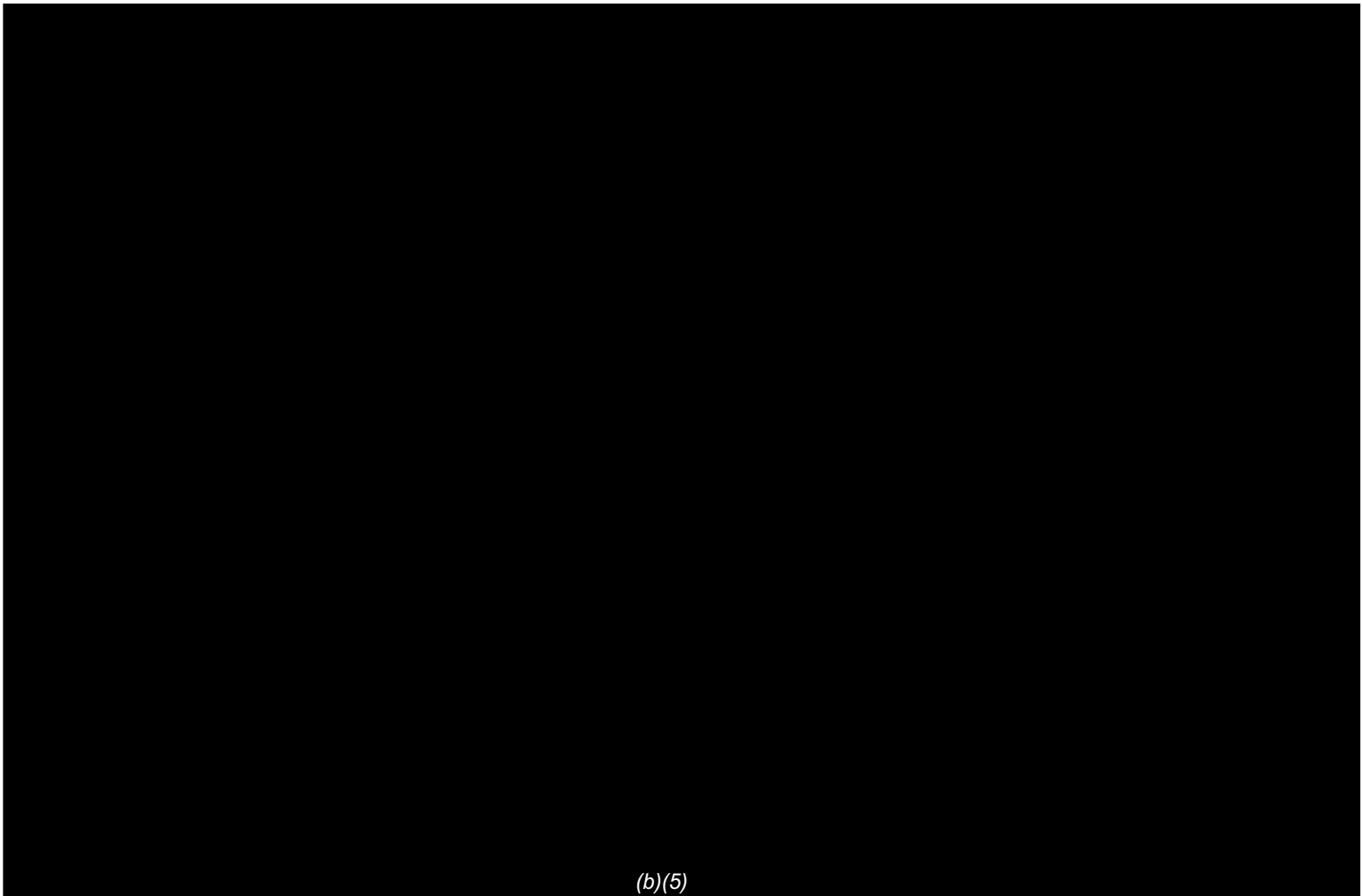
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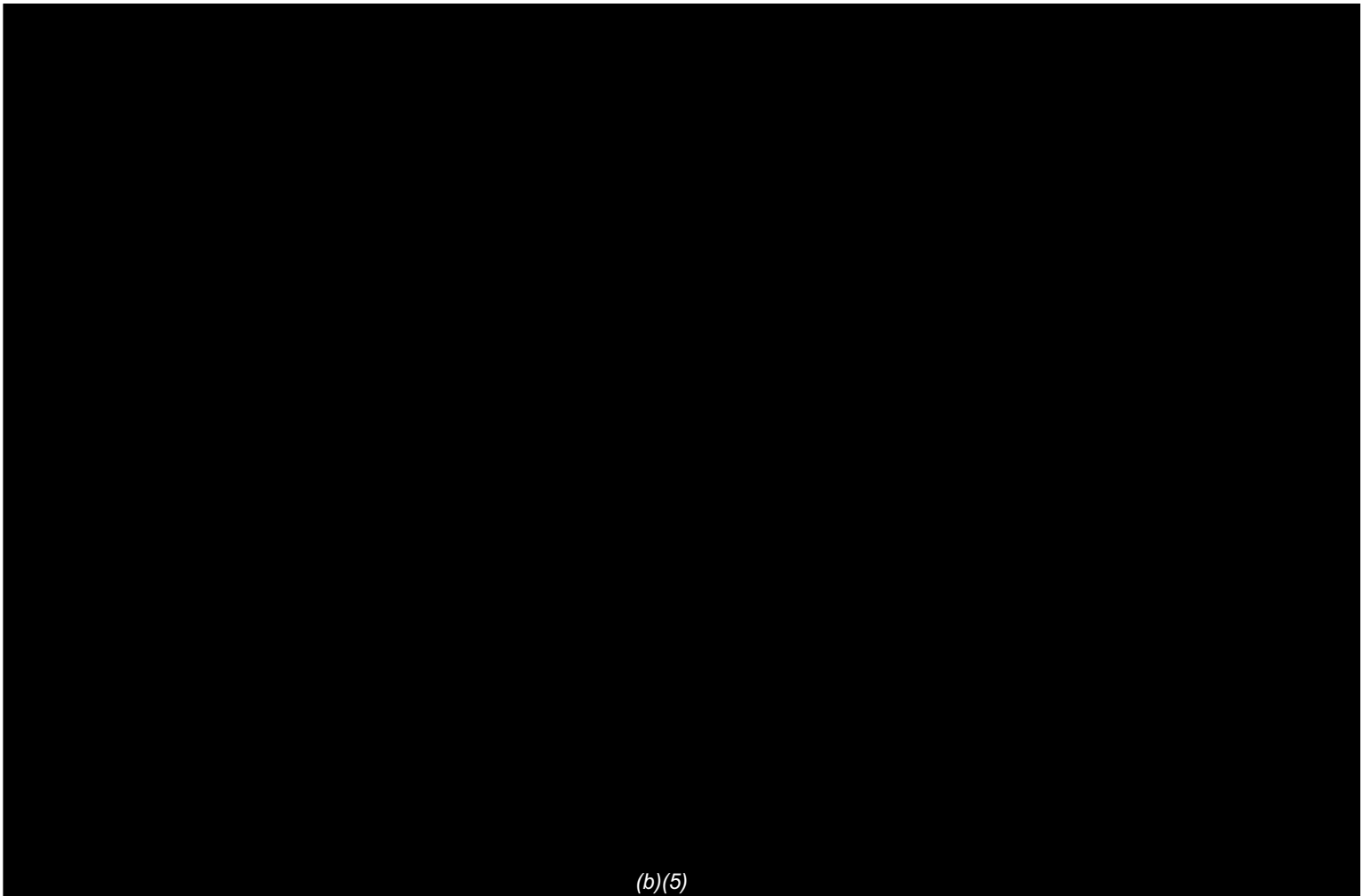
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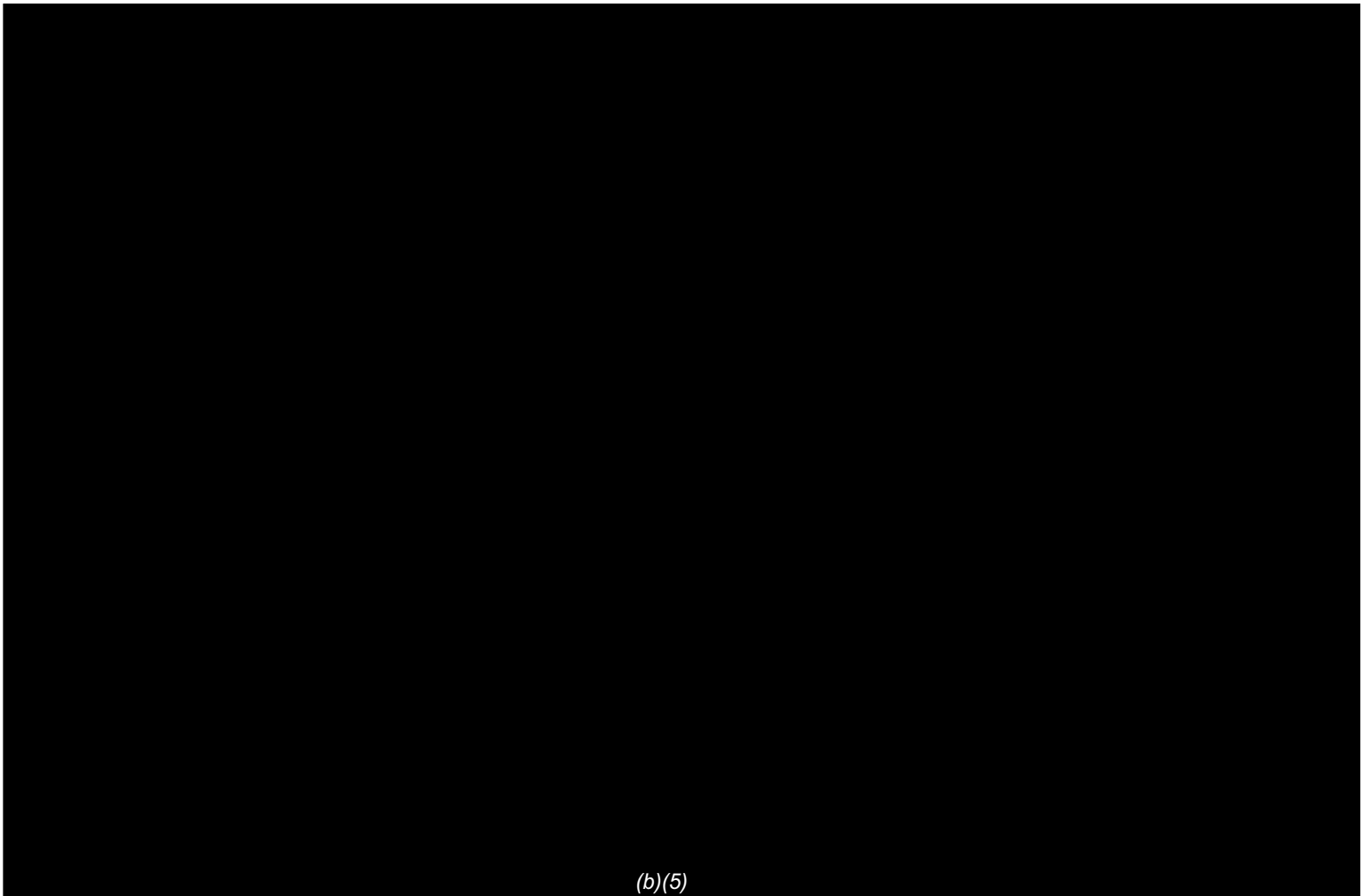
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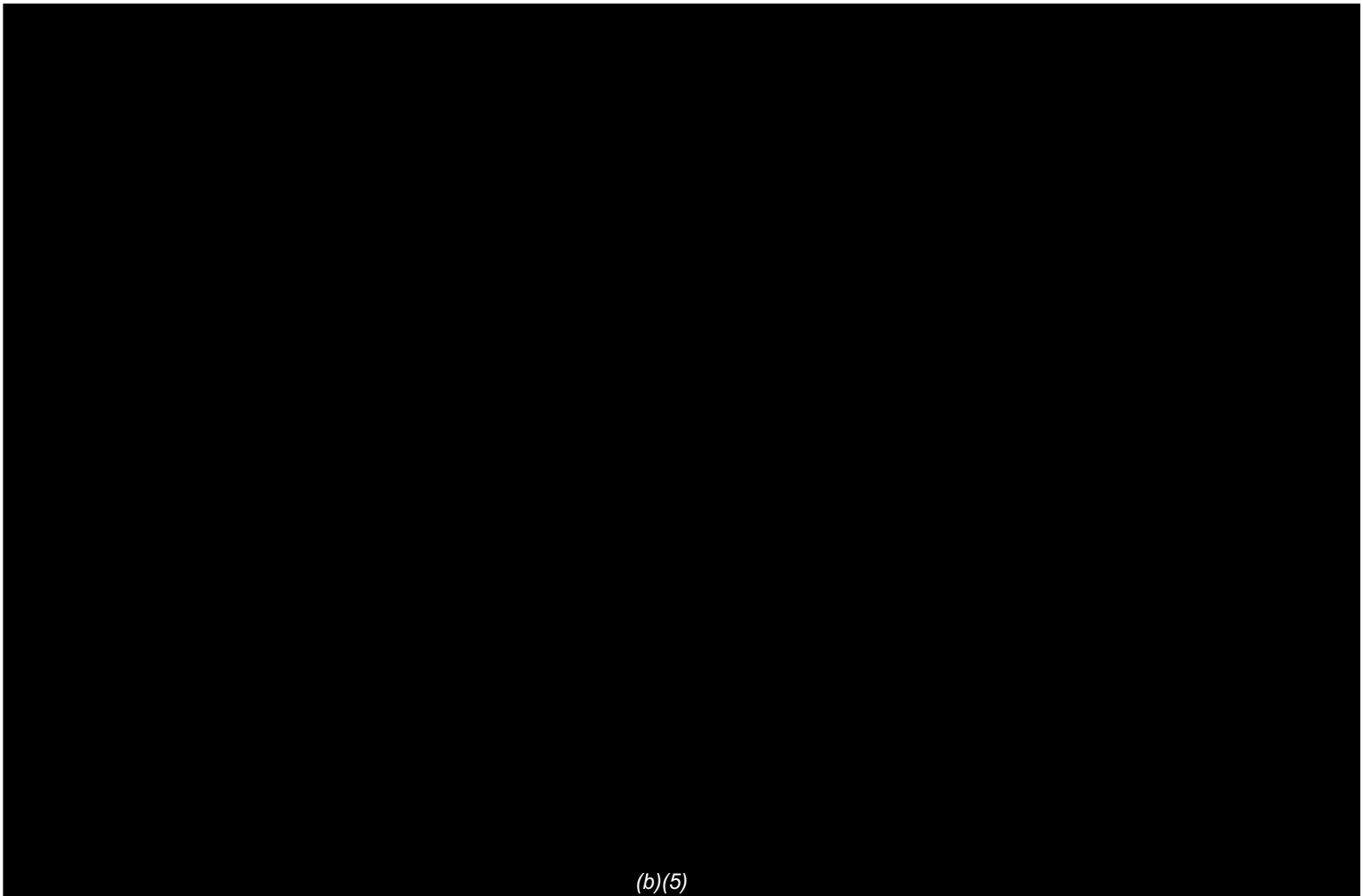
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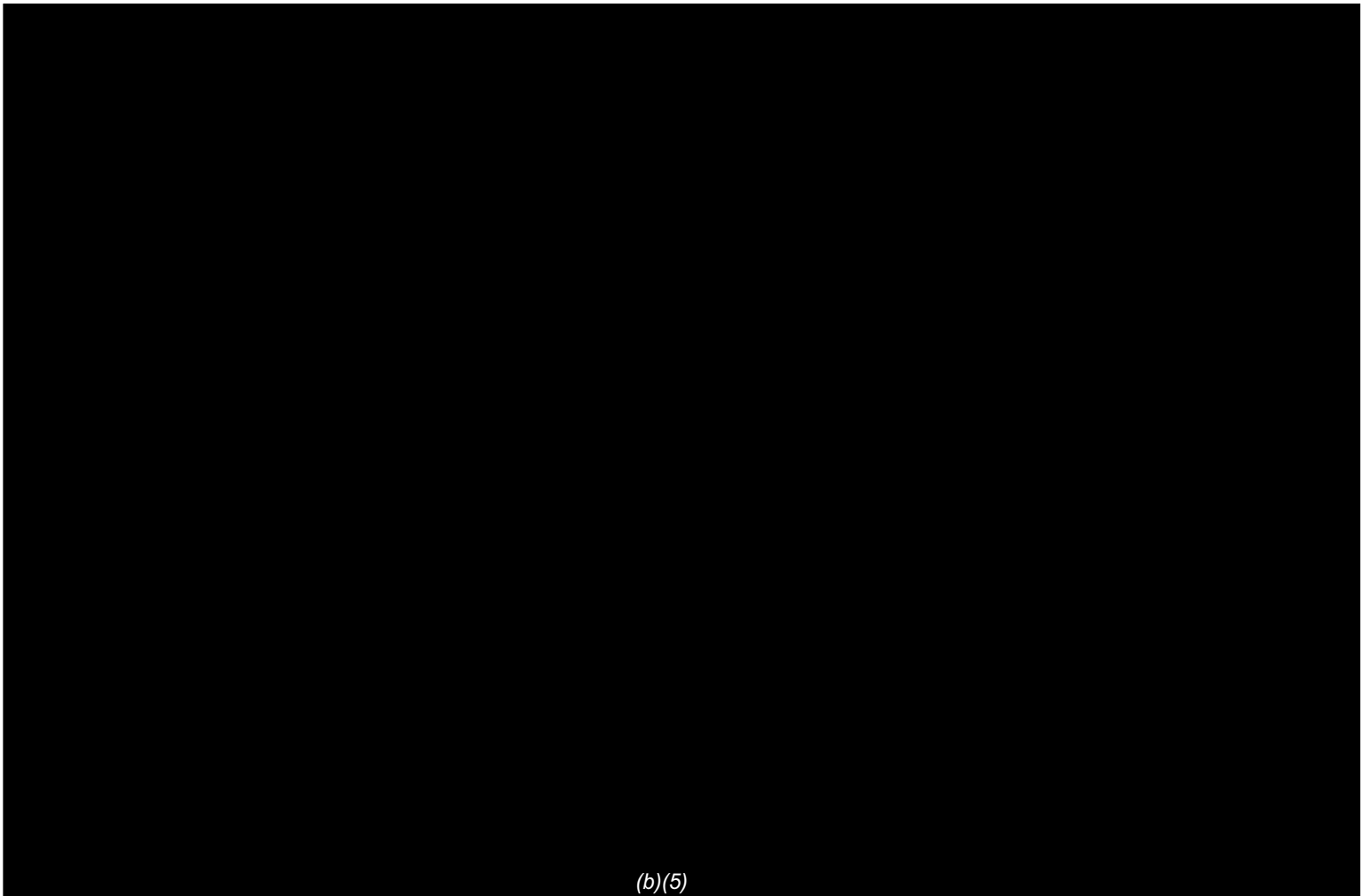
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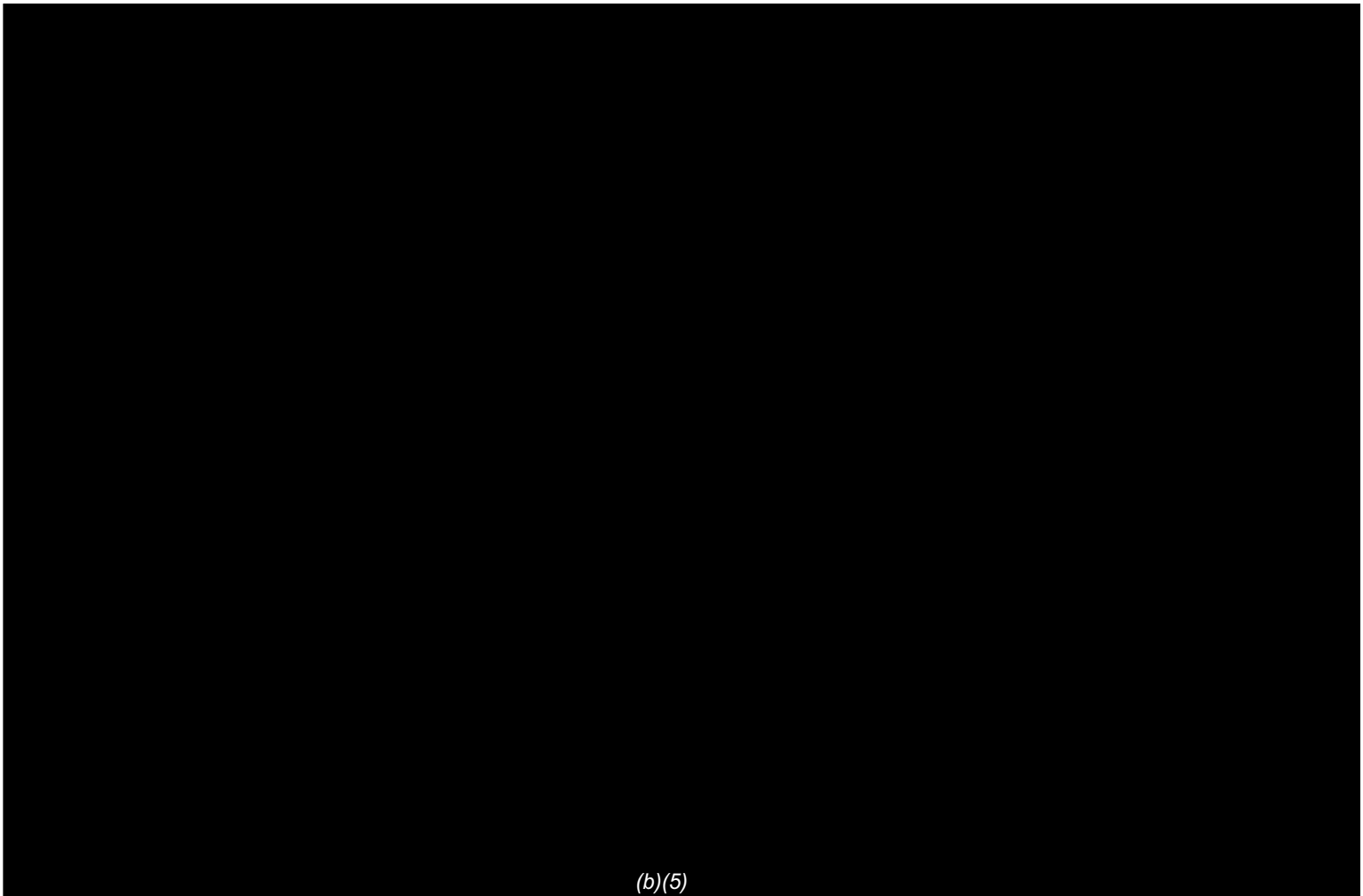
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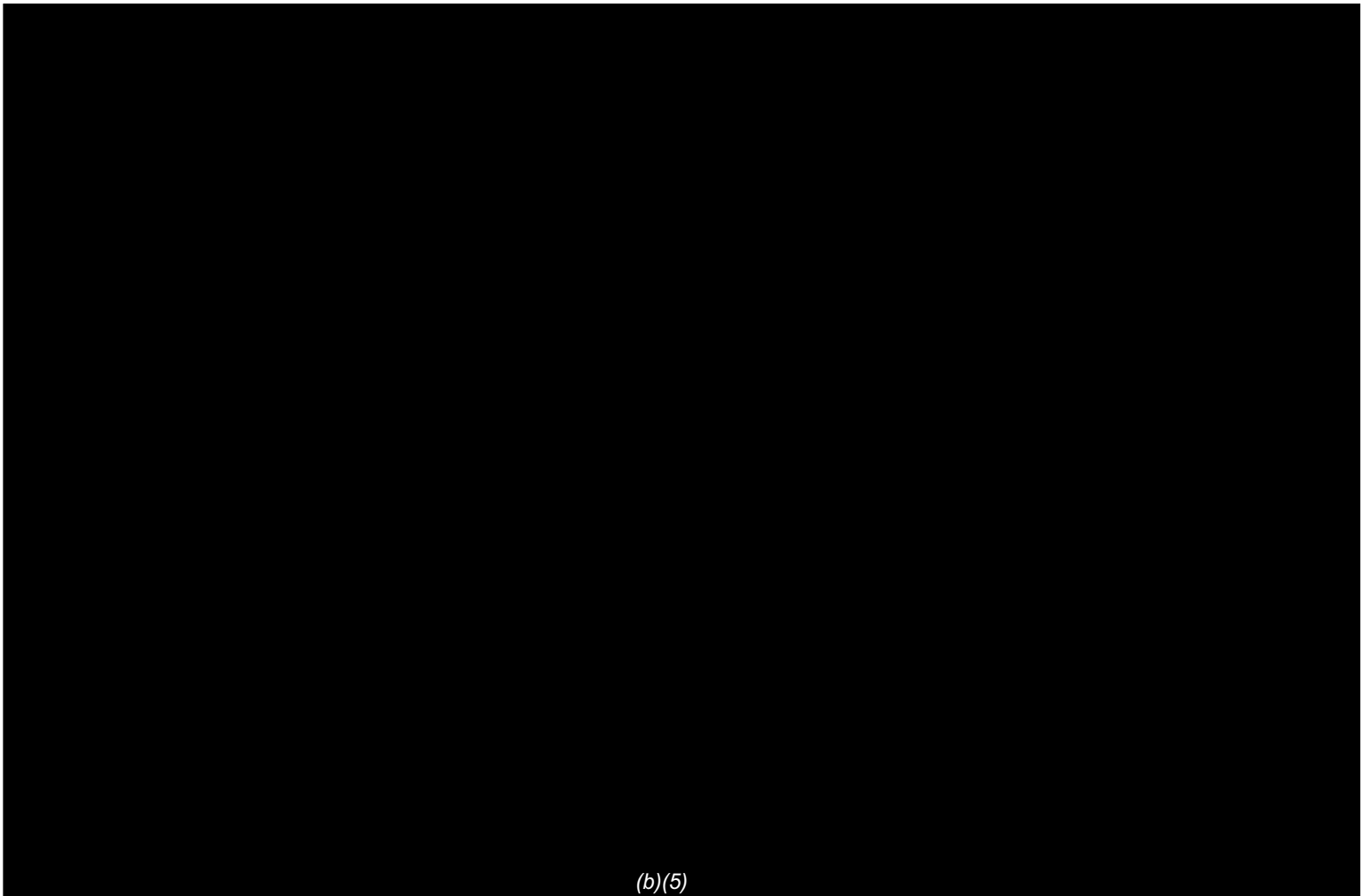
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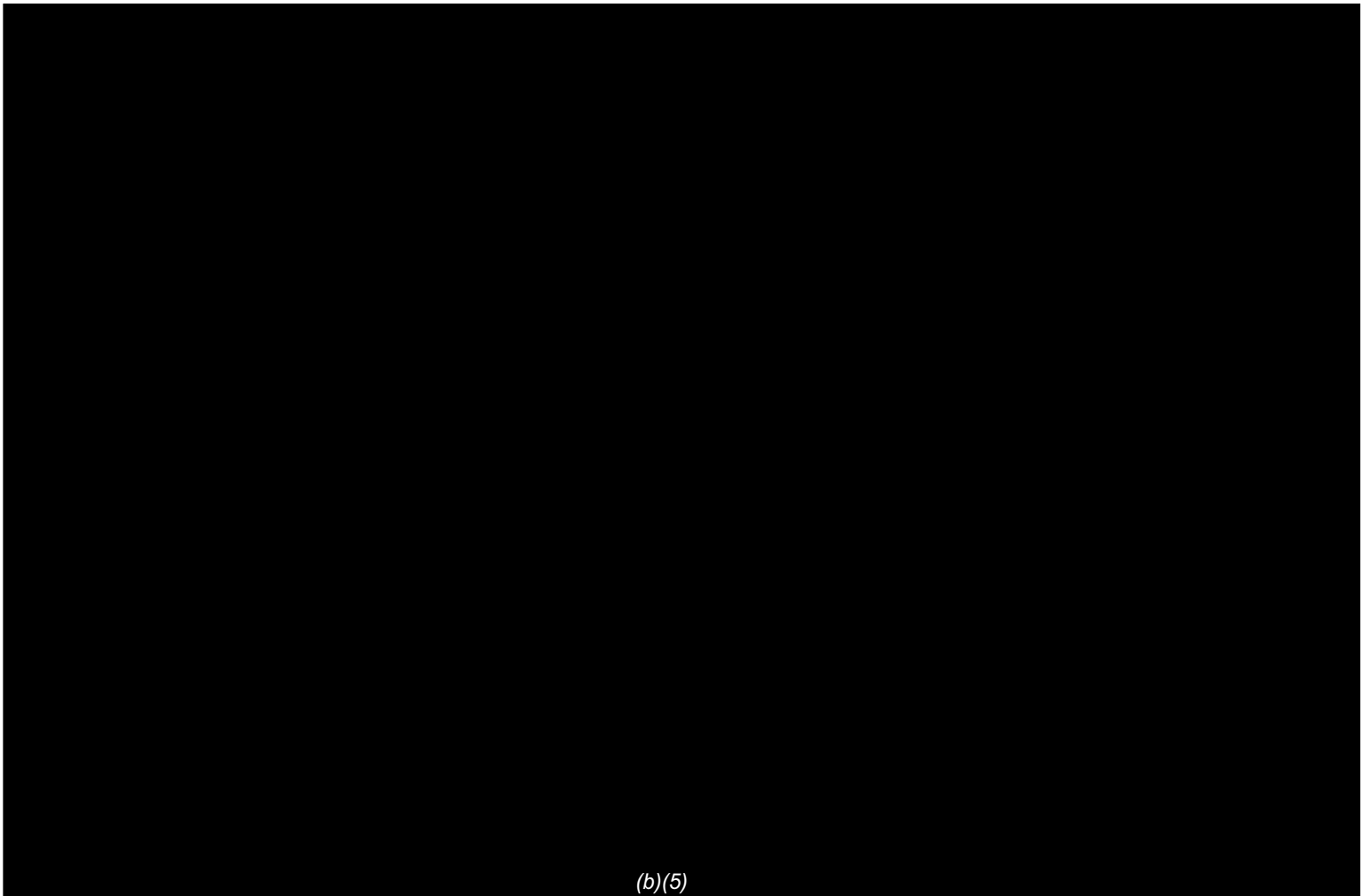
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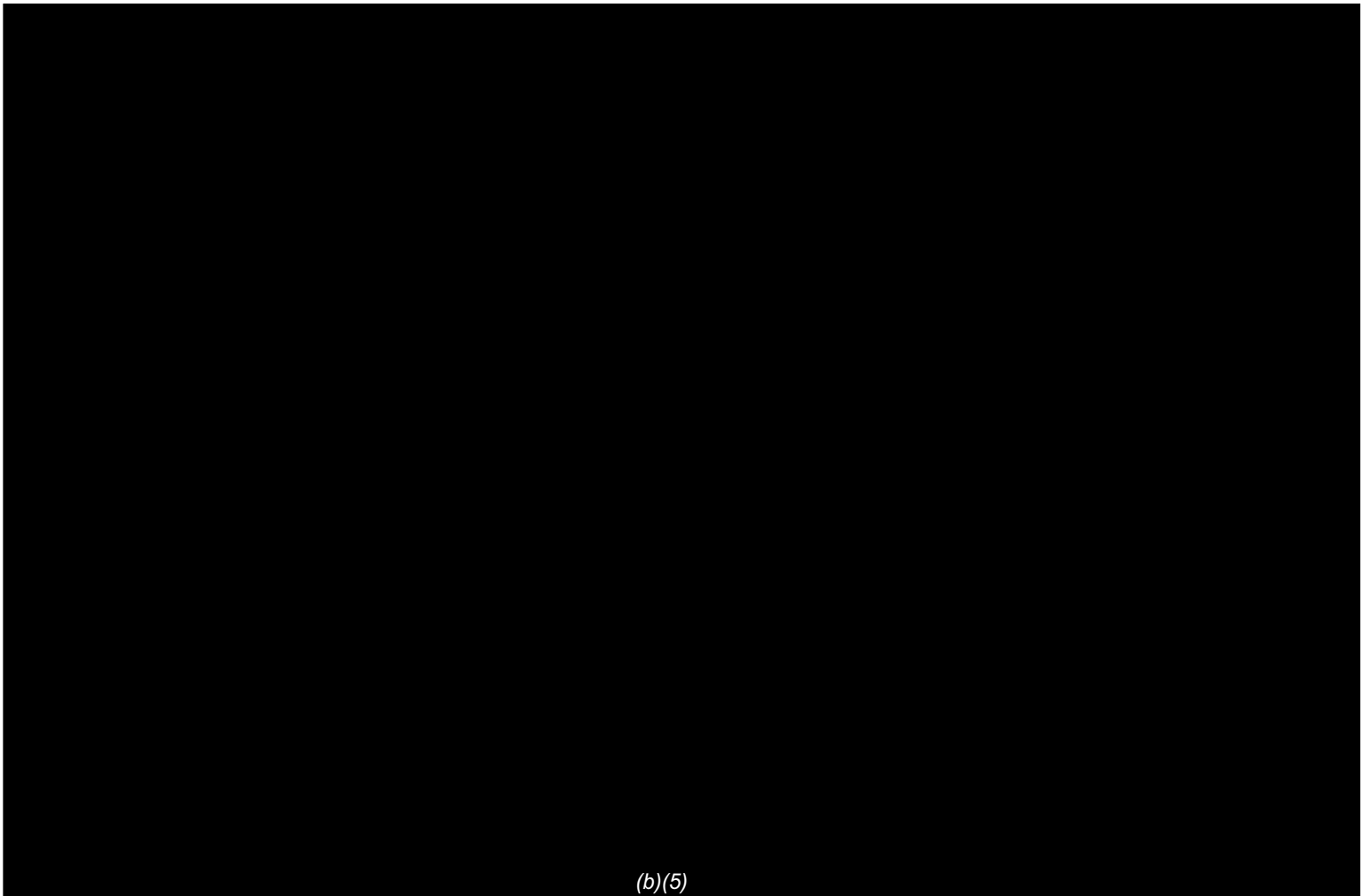
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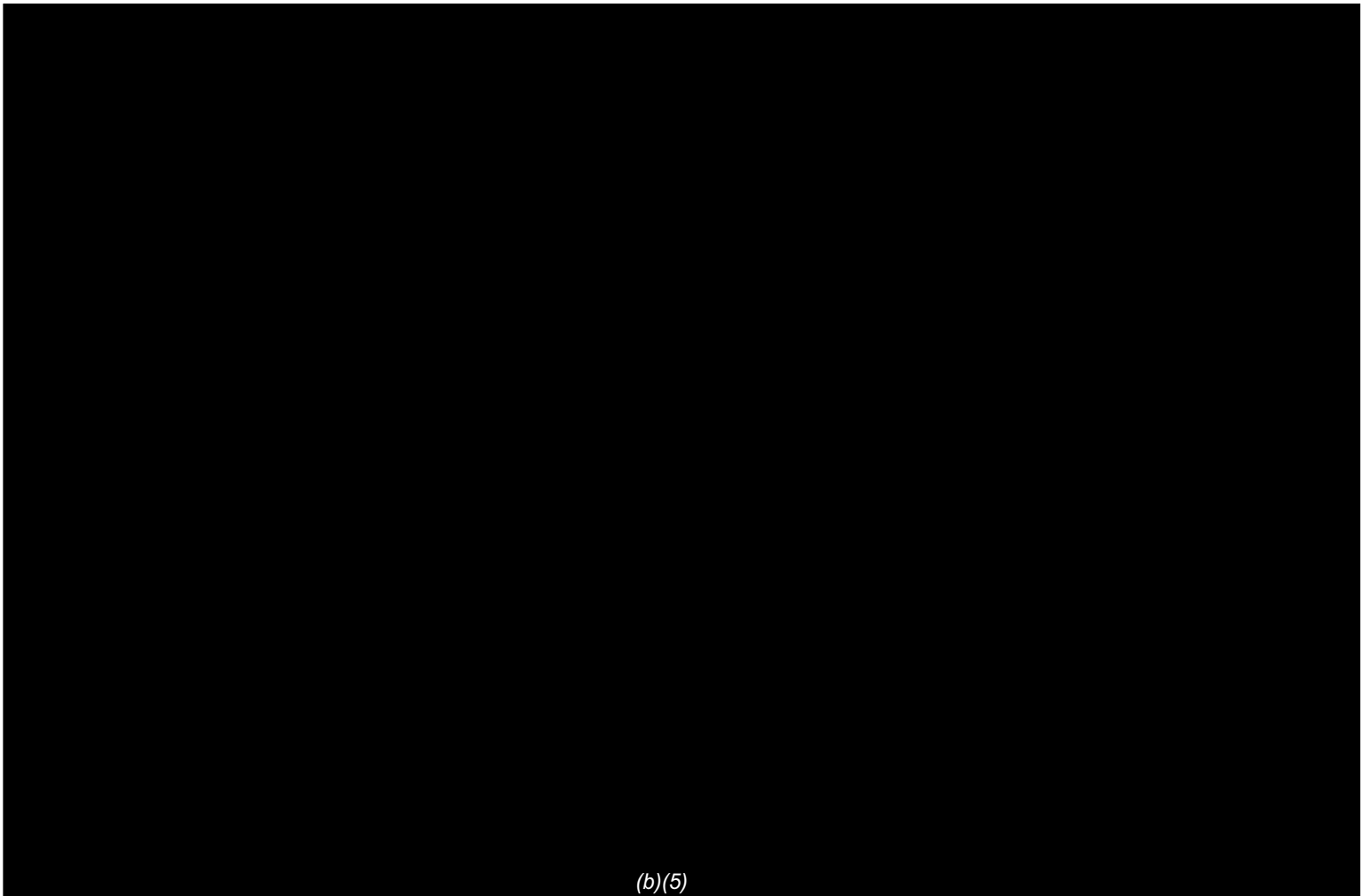
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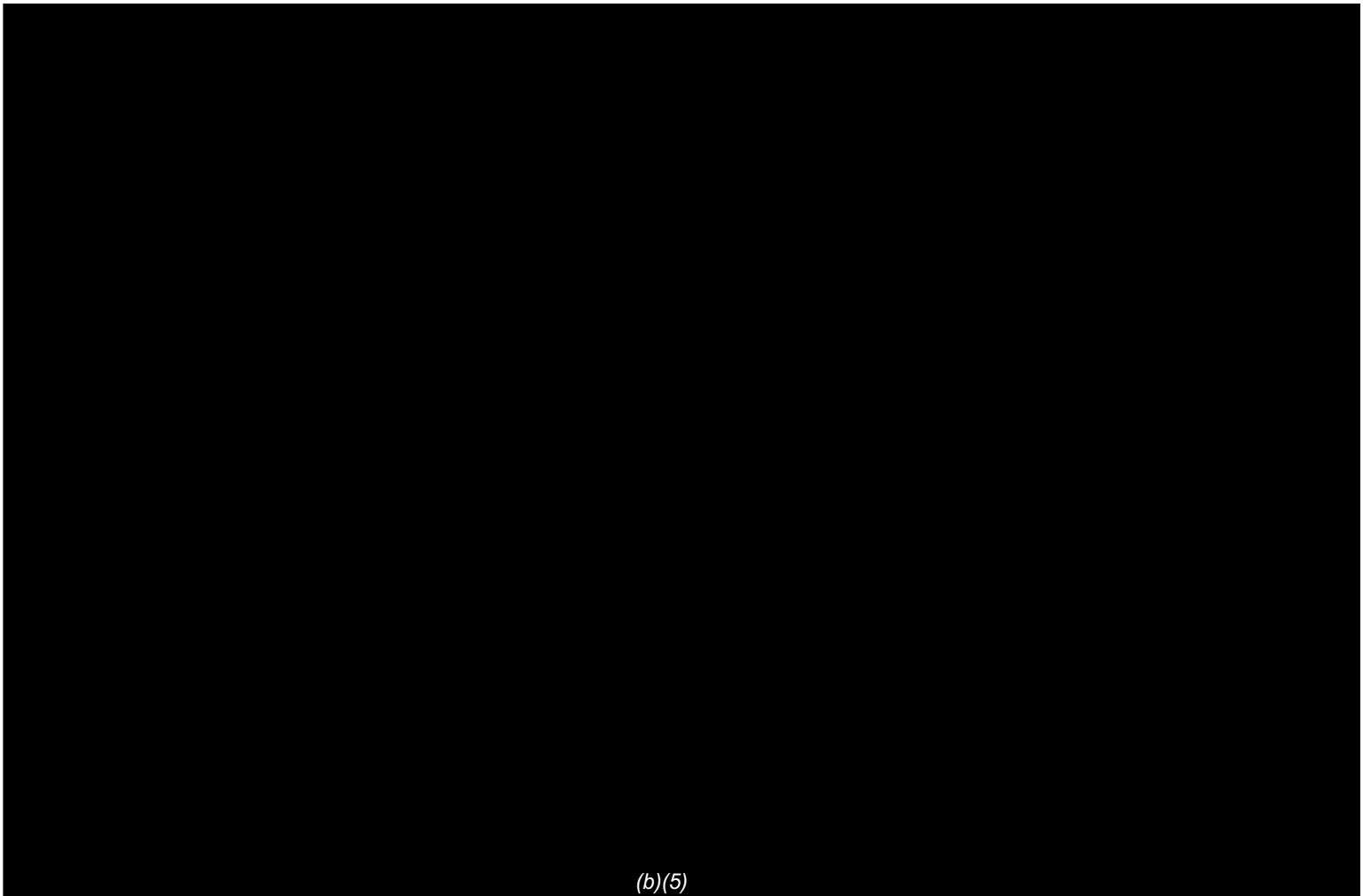
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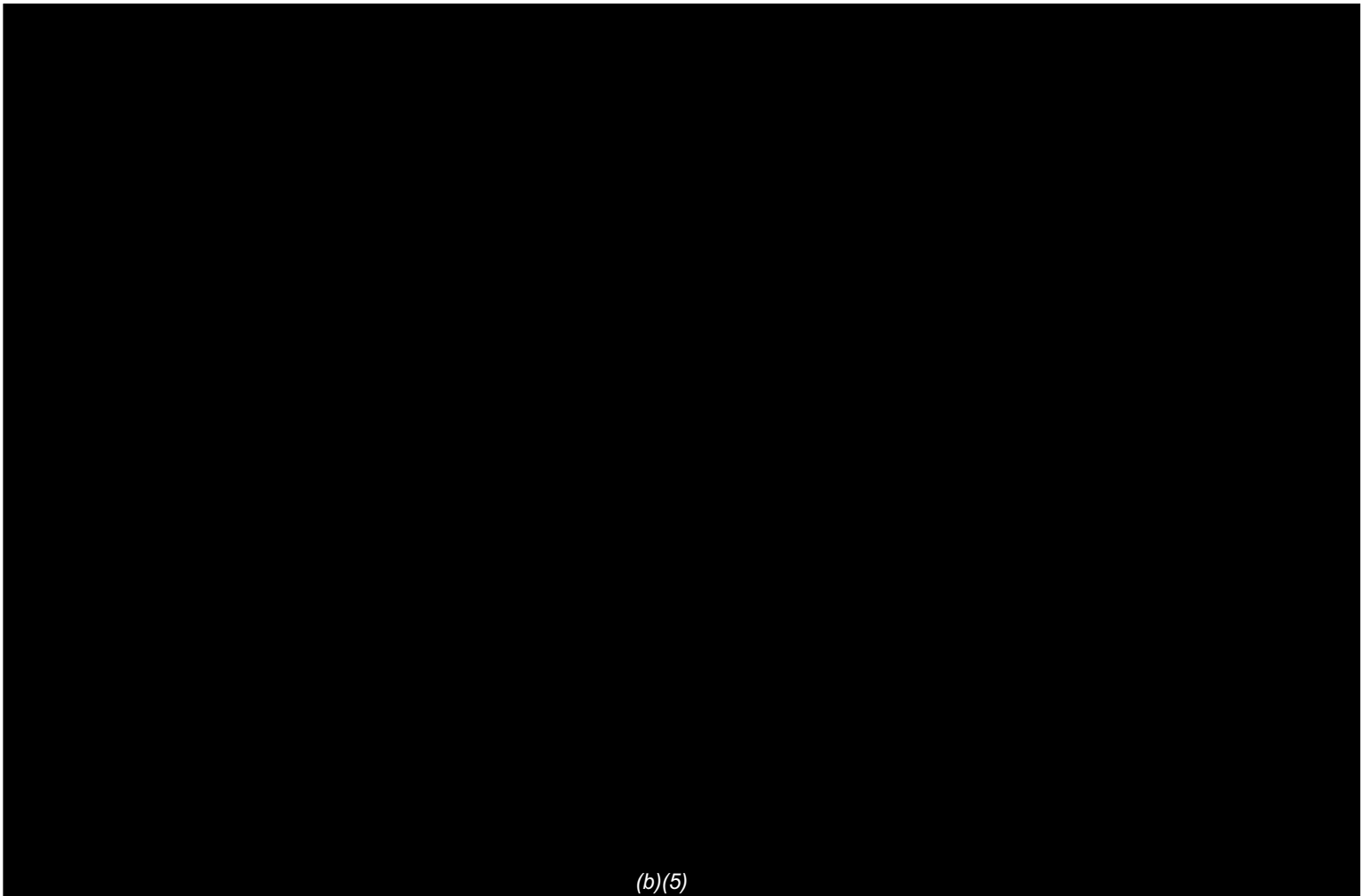
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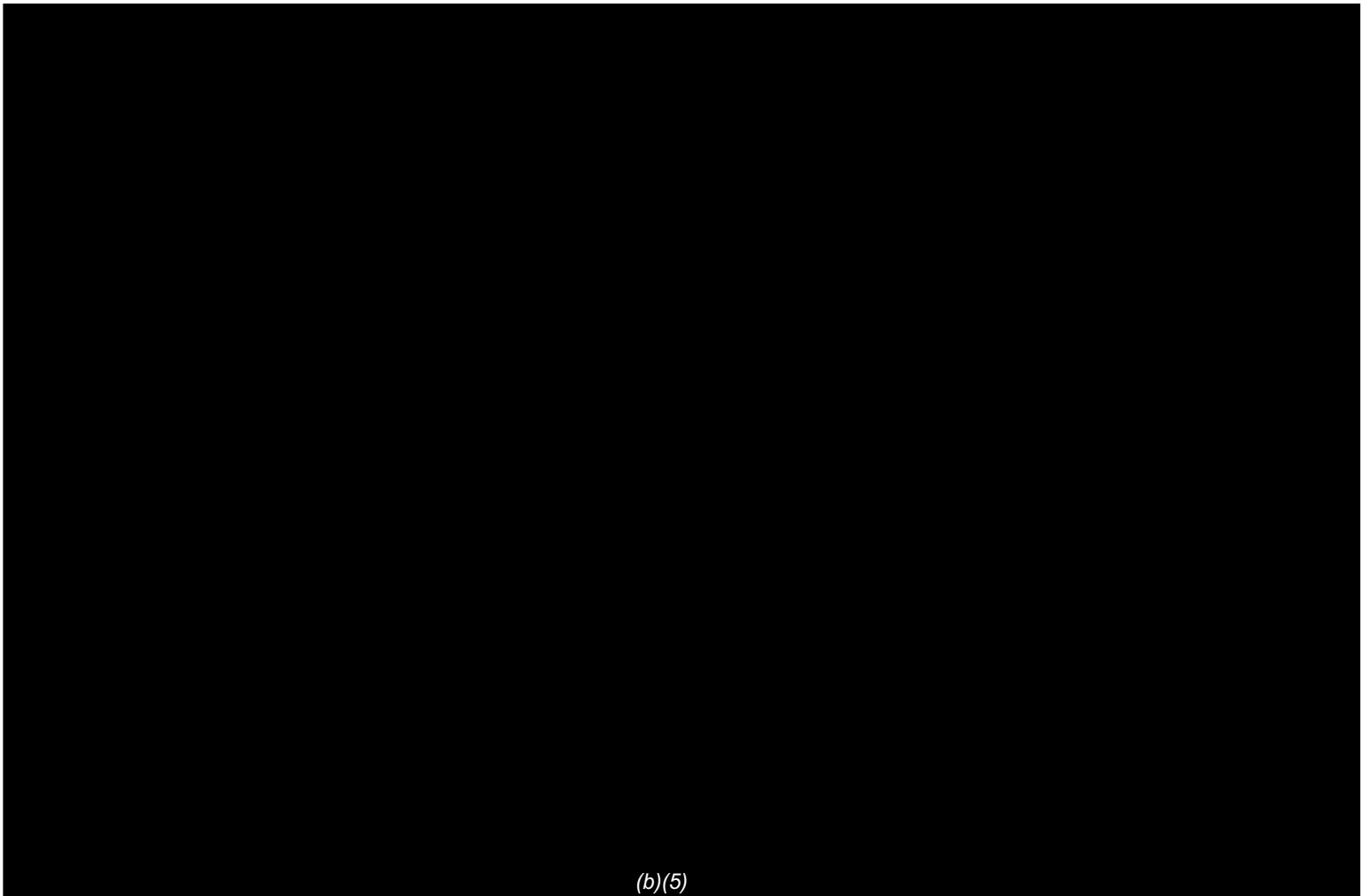
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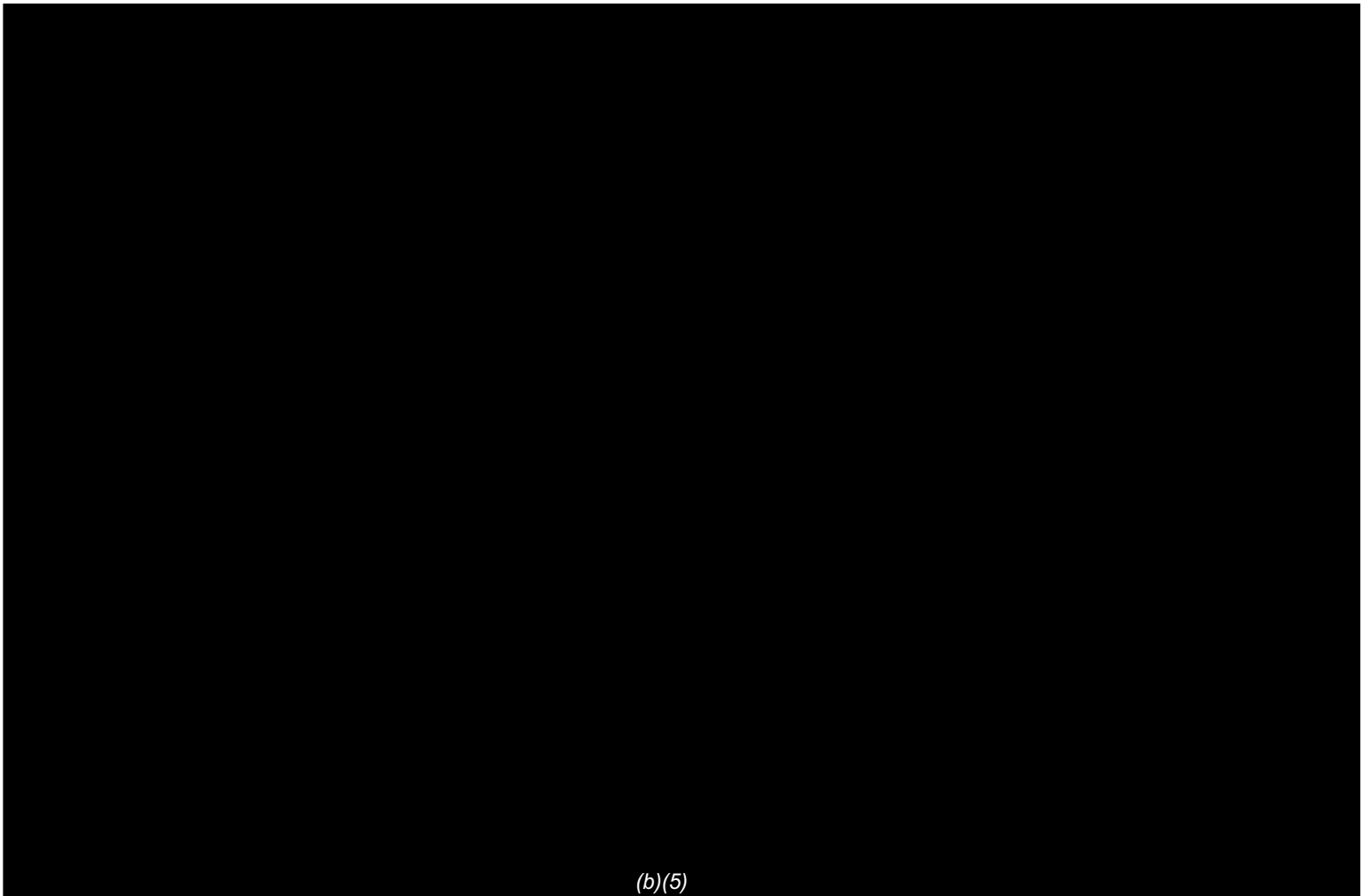
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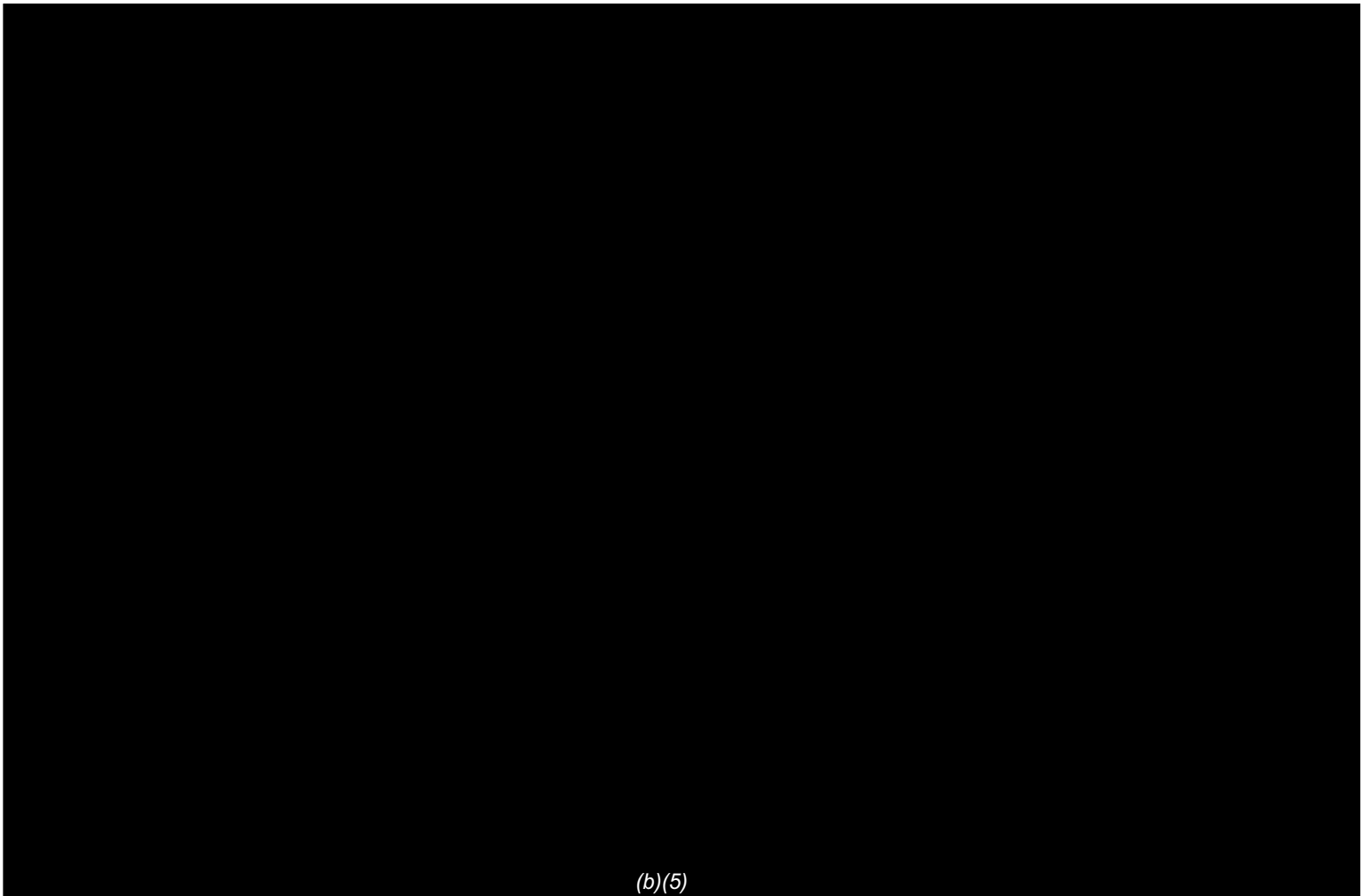
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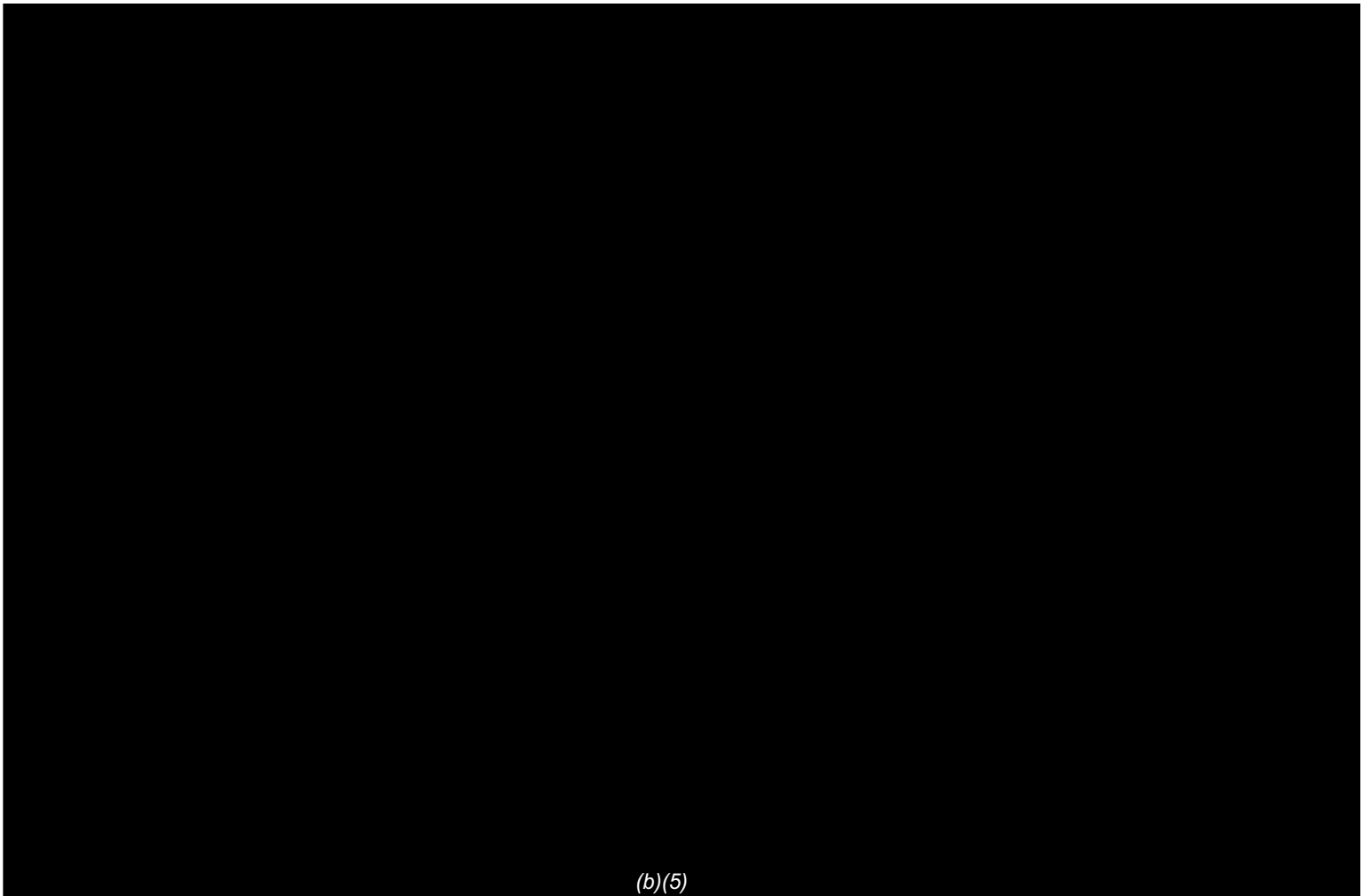
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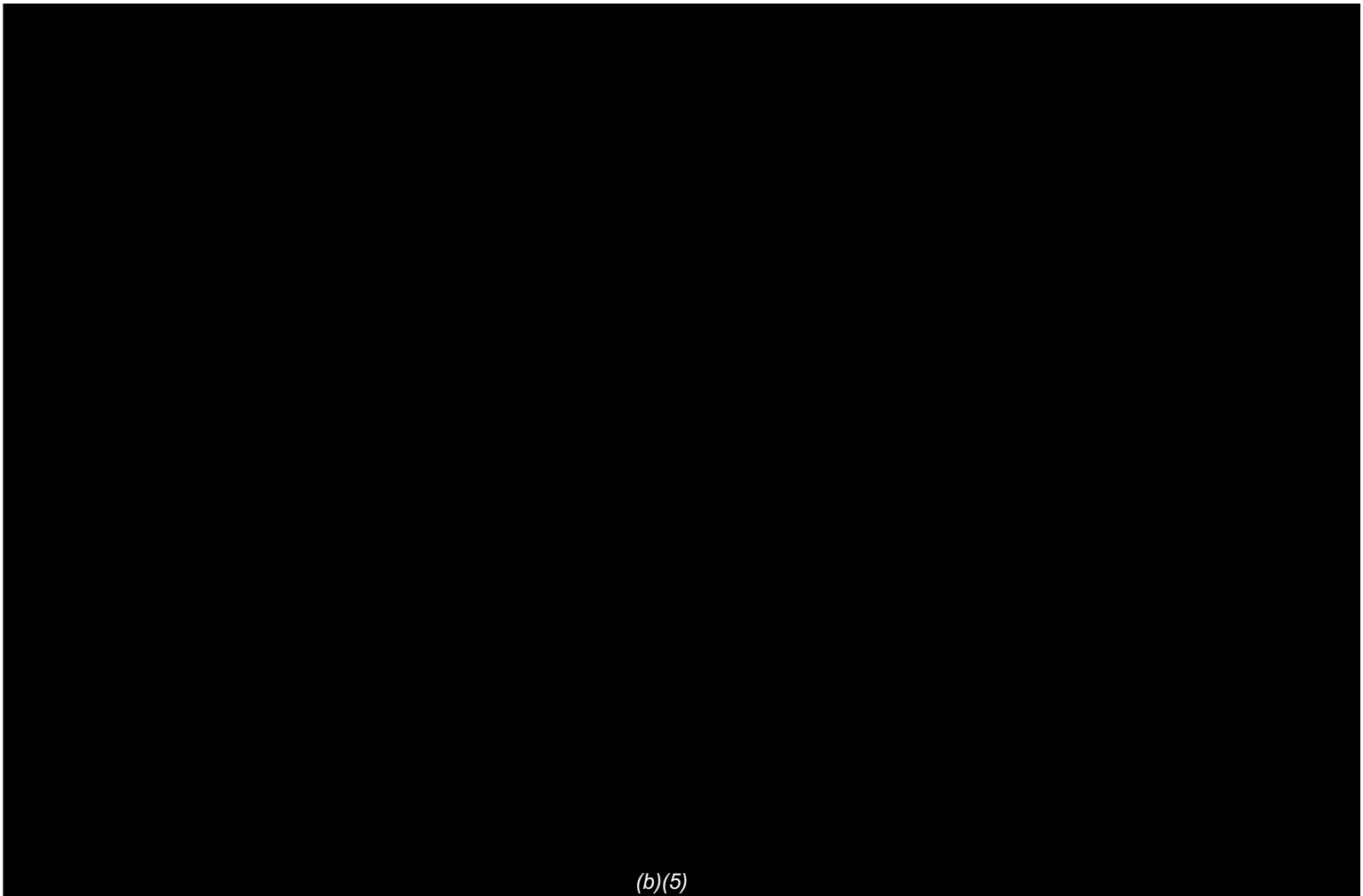
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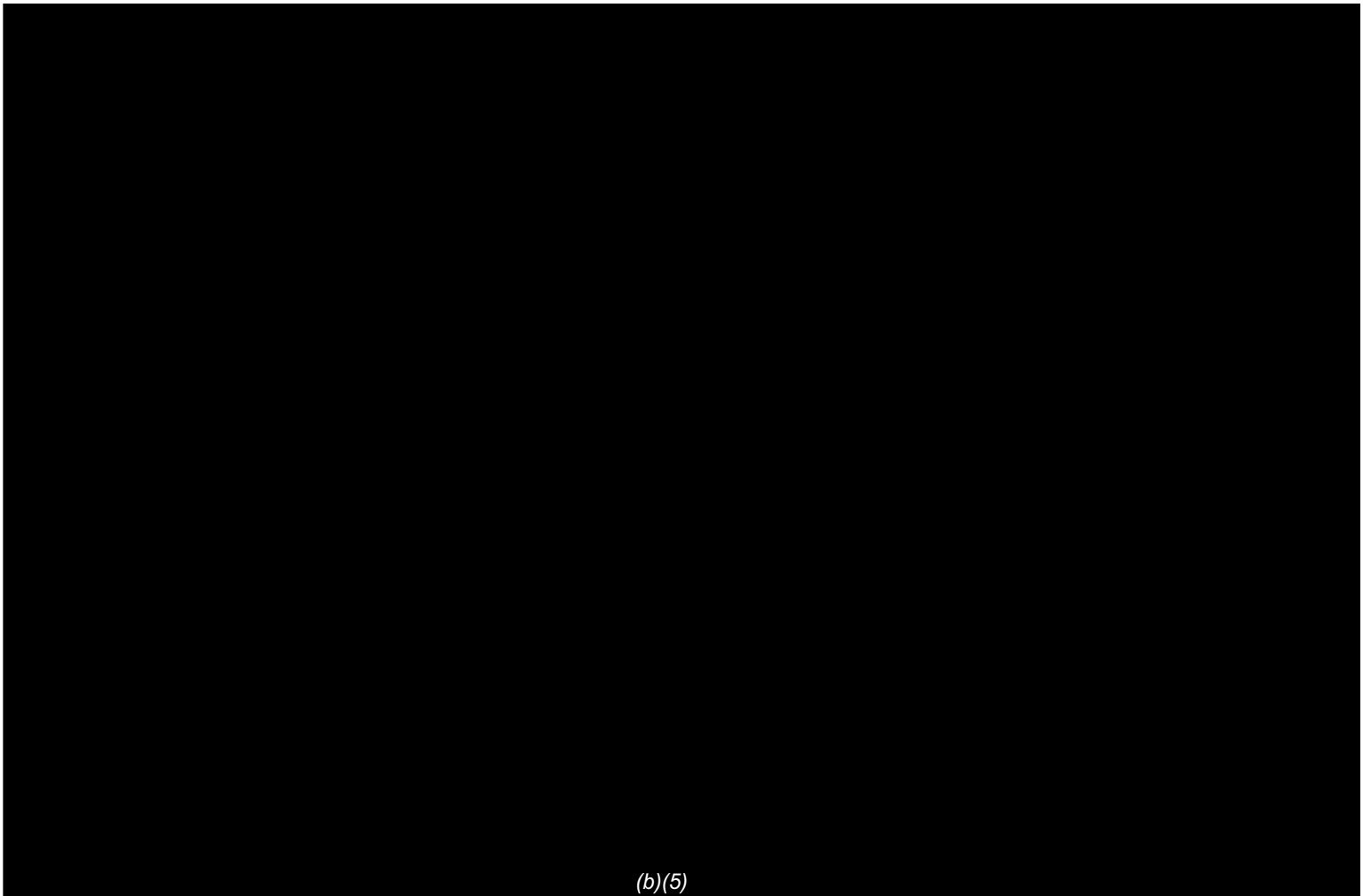
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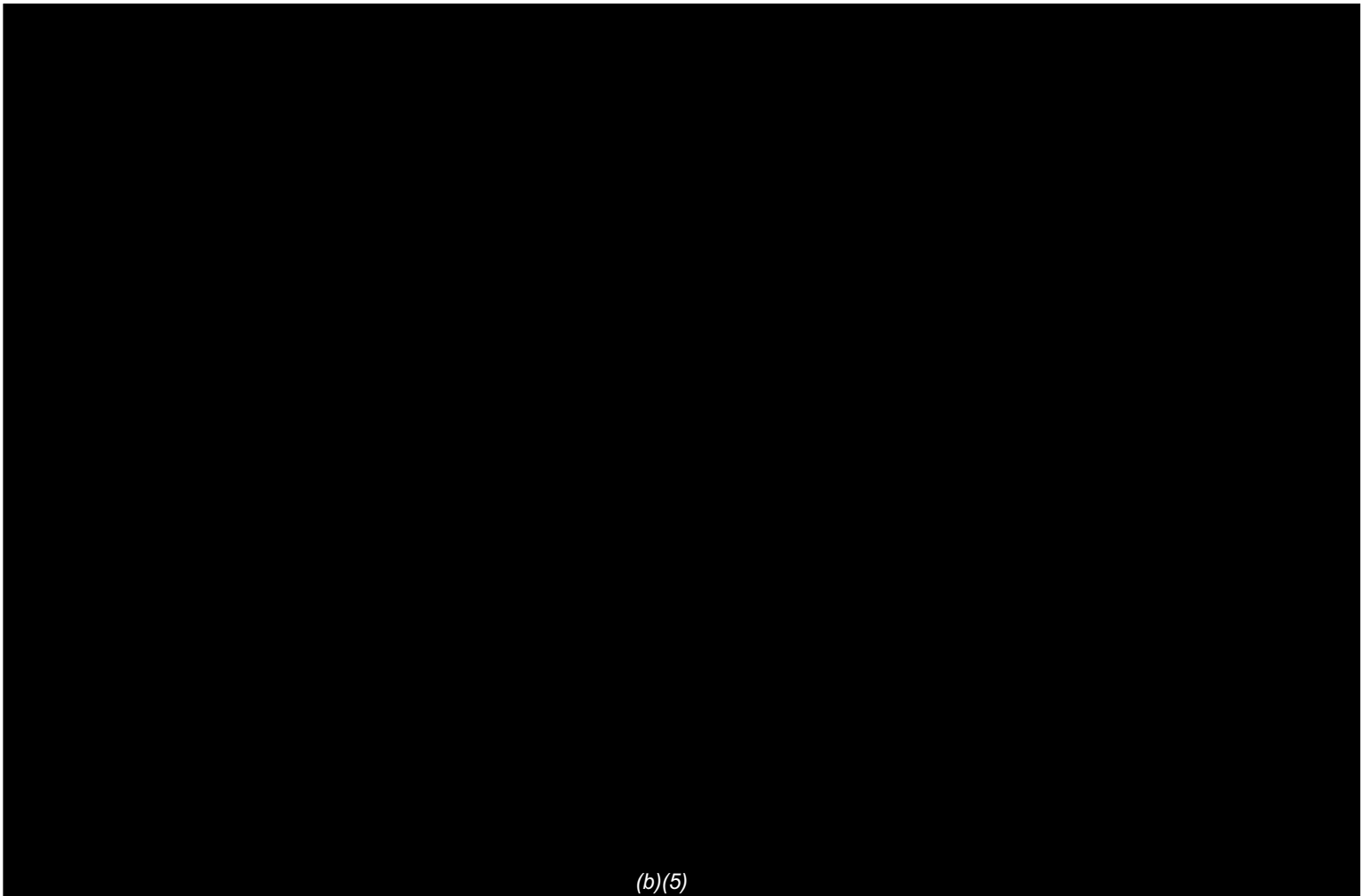
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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No.

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceedings Below ii
Corporate Disclosure Statement ii
Opinions Below.....1
Jurisdiction.....1
Statutes and Regulations Involved 1
Statement 2
A. The Statutory And Regulatory Scheme.....5
B. The ESA's Critical Habitat Provisions 6
C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog 9
D. The District Court Decision 12
E. The Fifth Circuit's Divided Panel Decision And En Banc Vote 13
Reasons For Granting The Petition.....14
I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.....14
A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat. 15
B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit. 24
II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance. 26
A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.....26

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review. 30

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law" 31

Conclusion 33

Appendix A — Opinion of the court of appeals (June 30, 2016).....1a

Appendix B — Opinion of the district court (Aug. 22, 2014) 78a

Appendix C — Order denying rehearing en banc (Feb. 13, 2017) 123a

Appendix D — Statutes Involved 163a

Appendix E — Regulations Involved.....166a

TABLE OF AUTHORITIES

Page(s)

Cases

All. for Wild Rockies v. *Lyder*,
728 F.Supp.2d 1126 (D. Mont. 2010).....25

Am. Forest Res. Council v. *Ashe*,
946 F. Supp. 2d 1 (D.D.C. 2013), *aff'd*,
601 F. App'x 1 (D.C. Cir. 2015).....25

Arizona Cattle Growers' Ass'n v. *Salazar*,
606 F.3d 1160 (9th Cir. 2010).....4, 24

Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*,
515 U.S. 687 (1995).....6, 20

Bennett v. *Spear*,
520 U.S. 154 (1997).....5, 6, 14, 32, 33

Cape Hatteras Access Pres. All. v. *U.S. Dep't of Interior*,
344 F.Supp.2d 108 (D.D.C. 2004).....25

Chevron, U.S.A., Inc. v. *N.R.D.C.*,
467 U.S. 837 (1984).....18

Clark v. *Martinez*,
543 U.S. 371 (2005).....21

Ctr. for Biological Diversity v. *Kelly*,
93 F.Supp.3d 1193 (D. Idaho 2015).....25

Esquivel-Quintana v. *Sessions*,
137 S. Ct. 1562 (2017) 18

Home Builders Ass'n of N. Cal. v. *U.S. Fish & Wildlife Services*,
616 F.3d 983 (9th Cir. 2010) 24

Mach Mining, LLC v. *EEOC*,
135 S. Ct. 1645 (2015) 32

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 32, 33

Nat'l Ass'n of Home Builders v. *Babbitt*,
130 F.3d 1041 (D.C. Cir. 1997) 22

Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*,
551 U.S. 644 (2007) 6, 18

Nat'l Fed. of Indep. Business v. *Sebelius*,
567 U.S. 519 (2012) 22

Rapanos v. *United States*,
547 U.S. 715 (2006) 4, 22, 23

Solid Waste Agency of N. Cook Cty. v. *Army Corps*,
531 U.S. 159 (2001) 5, 21, 22, 23

Tenn. Valley Auth. v. *Hill*,
437 U.S. 153 (1978) 6, 7

Util. Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014) 20

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

Statutes, Rules, and Regulations

15 U.S.C. § 1536(a)(2) 18

16 U.S.C.
§ 1531 1
§ 1531(c)(2) 23
§ 1532(5)(A) 7, 17
§ 1532(5)(A)(i) 17
§ 1532(5)(A)(ii) 3, 8
§ 1532(5)(C) 7, 19
§ 1532(6) 20
§ 1533(a) 5, 15
§ 1533(a)(1)(A) 20
§ 1533(a)(3)(A) 7
§ 1533(a)(3)(A)(i) 3, 15
§ 1533(b)(2) 11, 32
§ 1533(b)(5)(A)(ii) 20
§ 1533(c)(1) 19, 20
§ 1534 20
§ 1535(c)(1)(A)-(E) 20
§ 1535(d)(1)(C) 20
§ 1536(a)(2) 5, 19
§ 1536(a)(3) 6
§ 1536(b)(3) 6
§ 1536(b)(4) 6

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1344 6

50 C.F.R.
§ 424.12 (2011) 2, 30
§ 424.12(b) (2012) 8
§ 424.12(e) 8

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

62 Fed. Reg. 39129 (July 22, 1997).....28

68 Fed. Reg. 46684 (Aug. 6, 2003) 28

75 Fed. Reg. 31387 (June 3, 2010).....10

76 Fed. Reg. 59774 (Sept. 27, 2011) 10, 20

77 Fed. Reg. 35118 (June 12, 2012)..... *passim*

81 Fed. Reg. 7414 (Feb.11, 2016).....8, 30, 31

Miscellaneous

AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) 16, 19

Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961 (2015).....29

BLACK'S LAW DICTIONARY (5th ed. 1979) 17

Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013).....33

H.R. Rep. No. 95-1625 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453.....4, 7, 8, 21

IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog* (Apr. 6, 2012).....11, 23

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1 (2016).....6

Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499 (2007).....28

Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).....28

OXFORD ENGLISH DICTIONARY (2d ed. 1989).....19

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987).....16, 18, 19

St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).....11

S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980 (COMM. PRINT 1982).....8, 21

Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE (10th ed. 2013).....16

Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678 (2013) 26

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) 16, 18

Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67 (2006).....28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra.* Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

> Under the arbitrary-and-capricious standard,
>
> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

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[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20*.

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity–of–Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

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

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

> fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

* * *

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill,* 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.,* 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club,* 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.,* 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson,* 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear,* 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor,* 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler,* 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA,* 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft,* 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA,*—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour,* 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior,* 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA,* 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson,* 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York,* 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.,* 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin,* 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar,* 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior,* 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton,* 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez,* 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez,* which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States,* 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF,* 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez,* 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service,* 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar,* 606 F.3d 1160 (2010), *cert. denied,* 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne,* 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.,* 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.,* 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White,* 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436–39 (10th

[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall,* 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant
v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

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ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

tionate costs that are likely to result from the designation." *Id*. at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id. See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non–Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

17-01174_018465;17-01174_018465;17-01174_018466;17-01174_018467;17-01174_018468;17-01174_018469;1...

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

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its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

To: Daniel Jorjani[daniel_jorjani@ios.doi.gov]; Kevin Haugrud[jack.haugrud@sol.doi.gov]
Cc: Rebekah Krispinsky[rebekah.krispinsky@sol.doi.gov]
From: Shepard, Eric
Sent: 2017-08-15T16:31:24-04:00
Importance: Normal
Subject: Murphy v. Royal briefing
Received: 2017-08-15T16:31:37-04:00
2017.08.15 Briefing Paper Re Murphy Final.docx
Murphy v. Royal (Creek Res.) -- CA10 Opin.pdf
2006.12.12 Solicitor to AAG.pdf

Dan & Jack,
Last week the 10th Circuit Court of Appeals issued a decision holding that Congress did not disestablish the Muscogee Creek Nation reservation in Oklahoma. The decision was based, in part on the recent decision of the Supreme Court in Nebraska v. Parker but is contrary to longstanding positions of both the Department and the Solicitor General. Attached please find our briefing, the decision, and the Department's 2006 views on the issues raised in an earlier iteration of this case.

We have some time to determine the position of the Department and are coordinating with Jim Cason, AS-IA, and BIA to make sure we have their input. We look forward to discussing this with you further during our check-in tomorrow.

Thank you,
Eric

--
Eric Shepard
Associate Solicitor
Division of Indian Affairs
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Department of the Interior
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United States Department of the Interior

OFFICE OF THE SOLICITOR
Washington, D.C. 20240

IN REPLY REFER TO:

DEC 12 2006

Honorable Sue Ellen Wooldridge
Assistant Attorney General
Environment and Natural Resources Division
U.S. Department of Justice
950 Pennsylvania Avenue, N.W., Room 2143
Washington, D.C. 20530

Re: *Murphy v. Oklahoma,* No.05-10787, United States Supreme Court

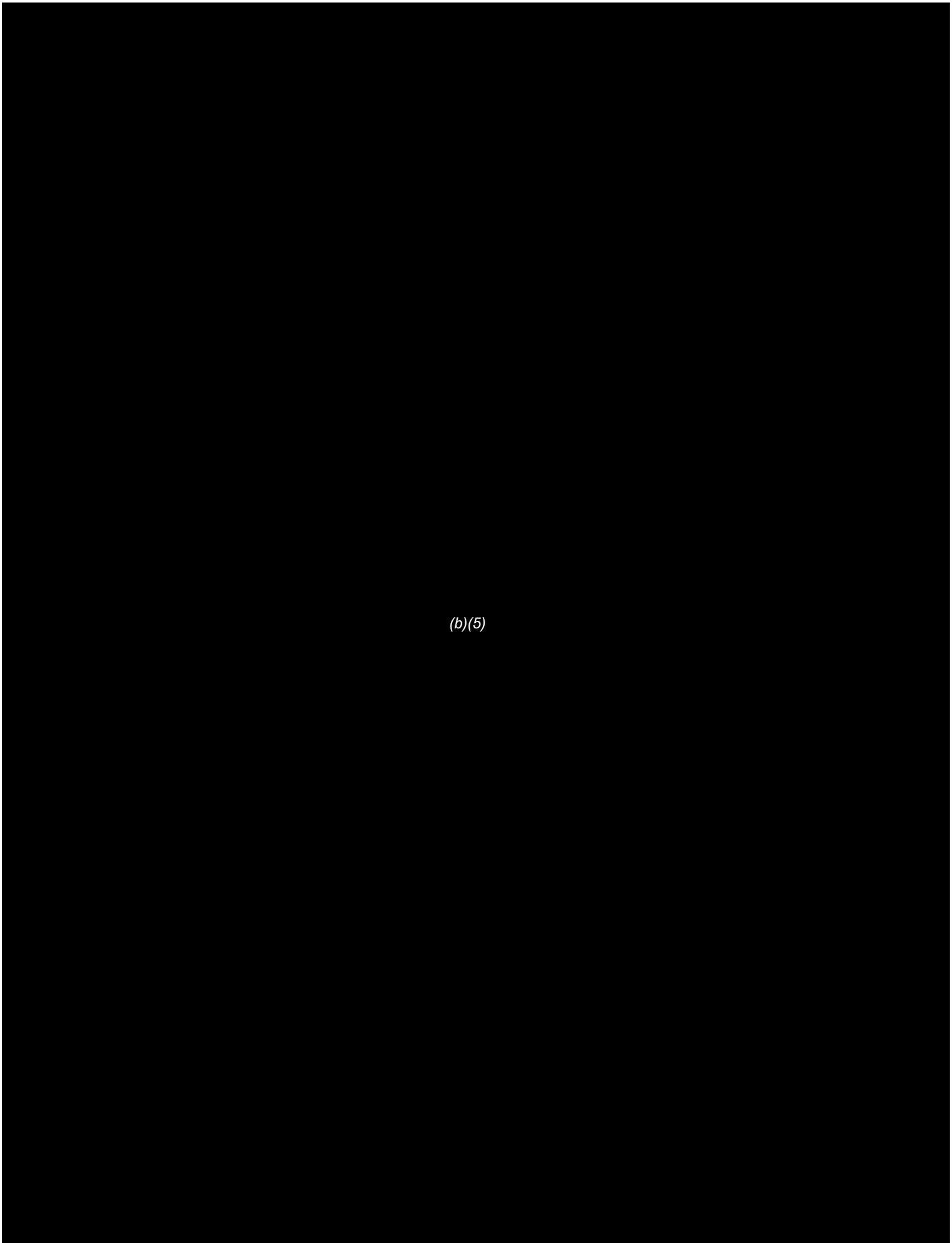
Dear Ms. Wooldridge:

I am writing to share with you the Department of the Interior's views on the issues raised in the petition for *certiorari* in the case of *Murphy v. Oklahoma.* (b)(5)

(b)(5)

Introduction

(b)(5)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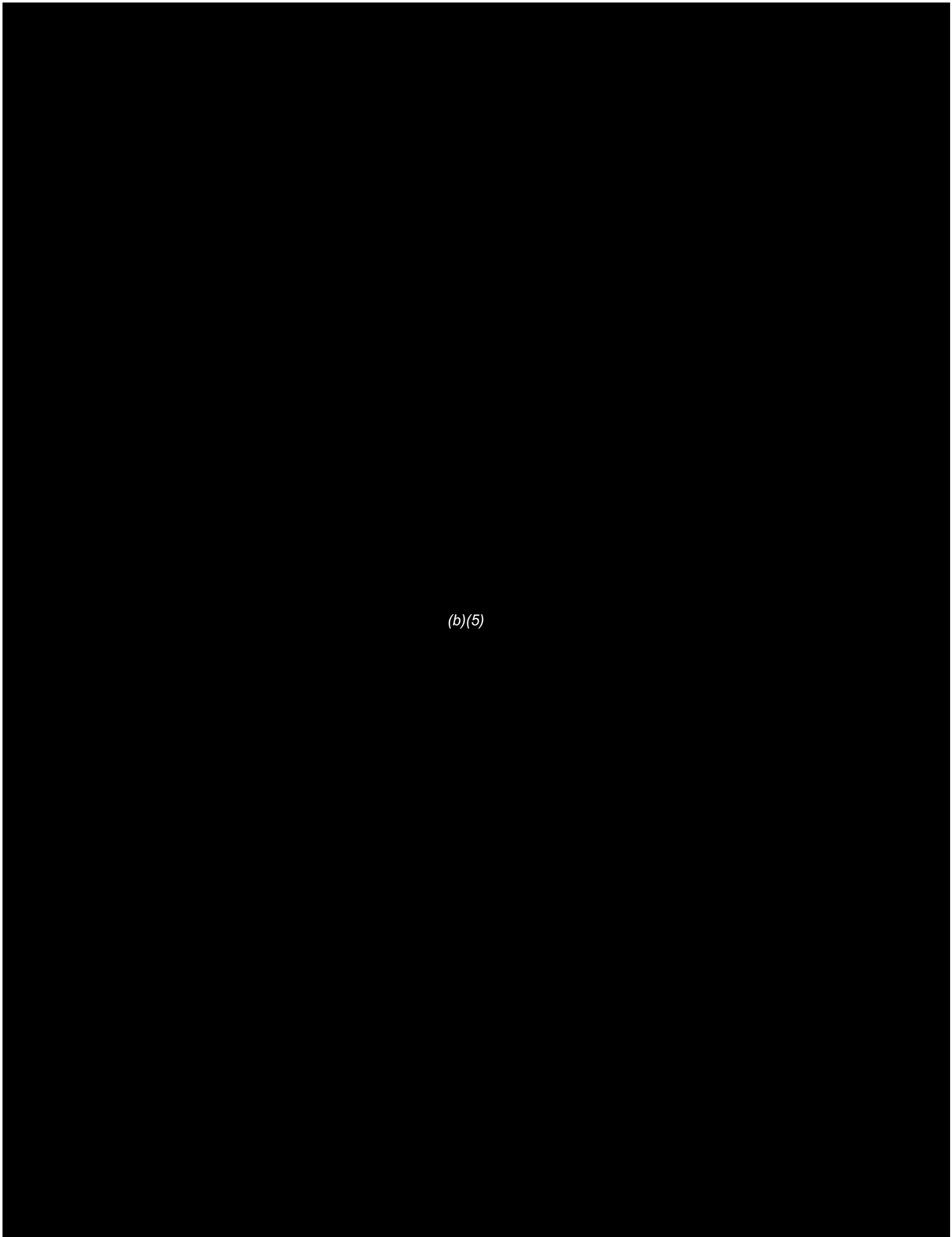
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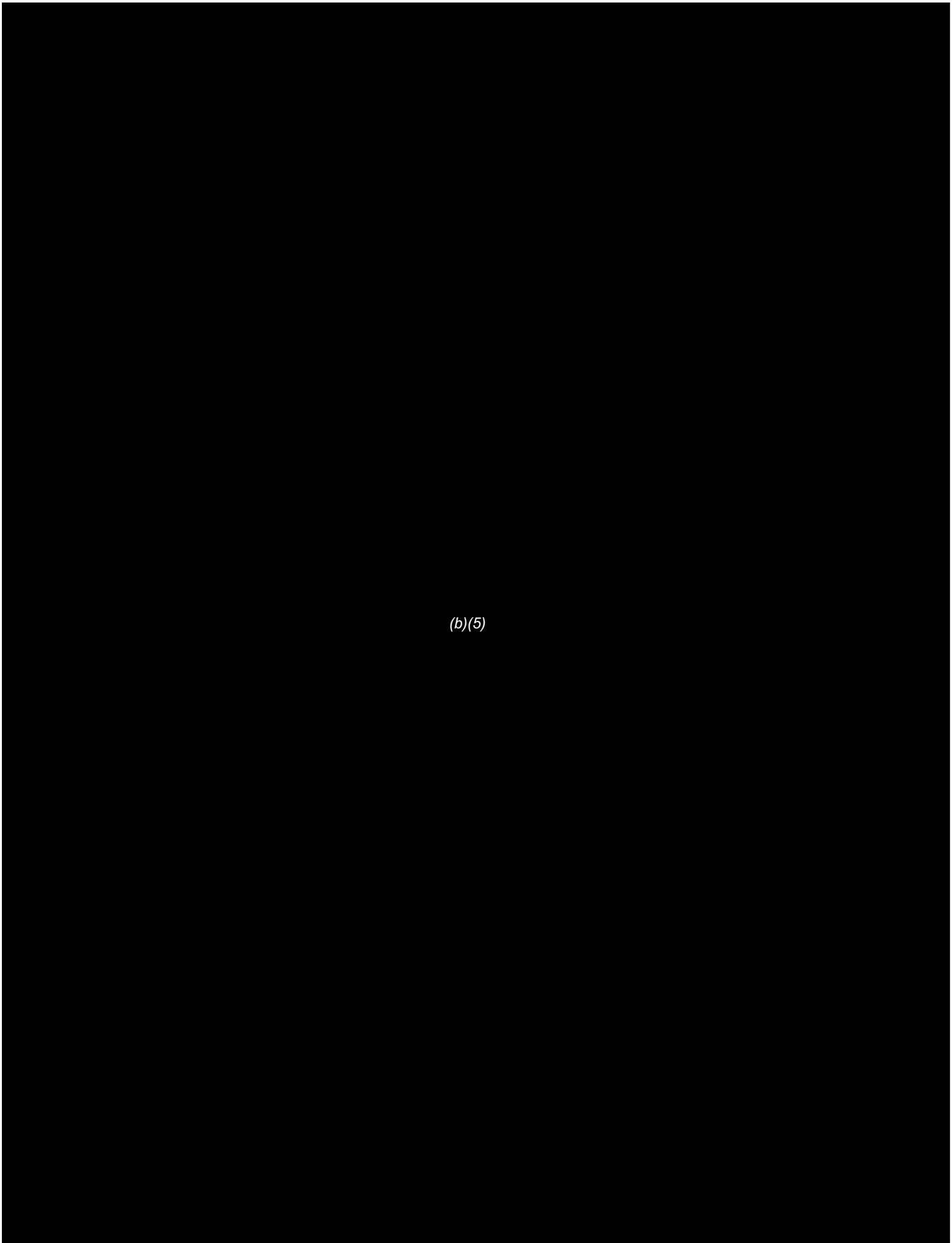
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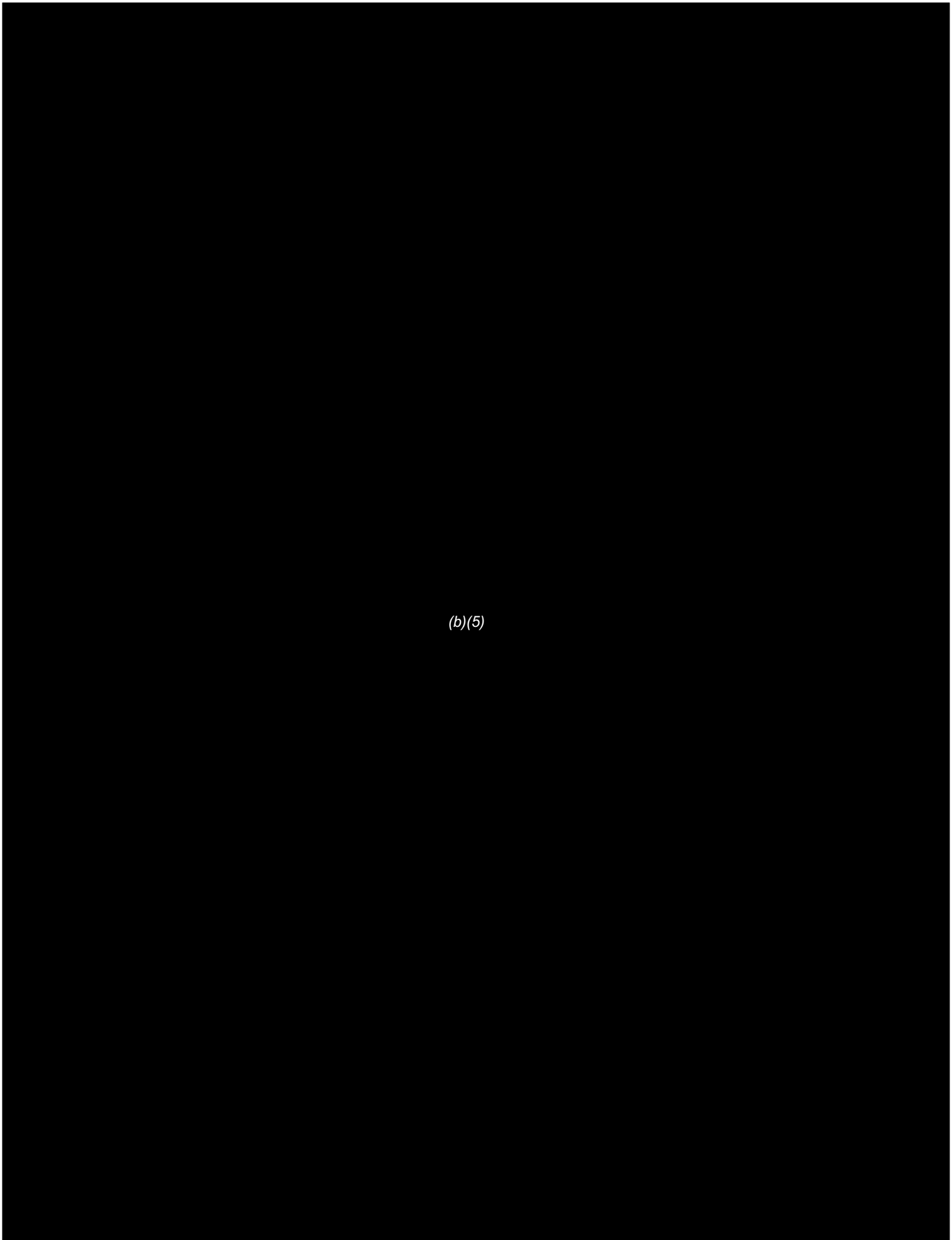
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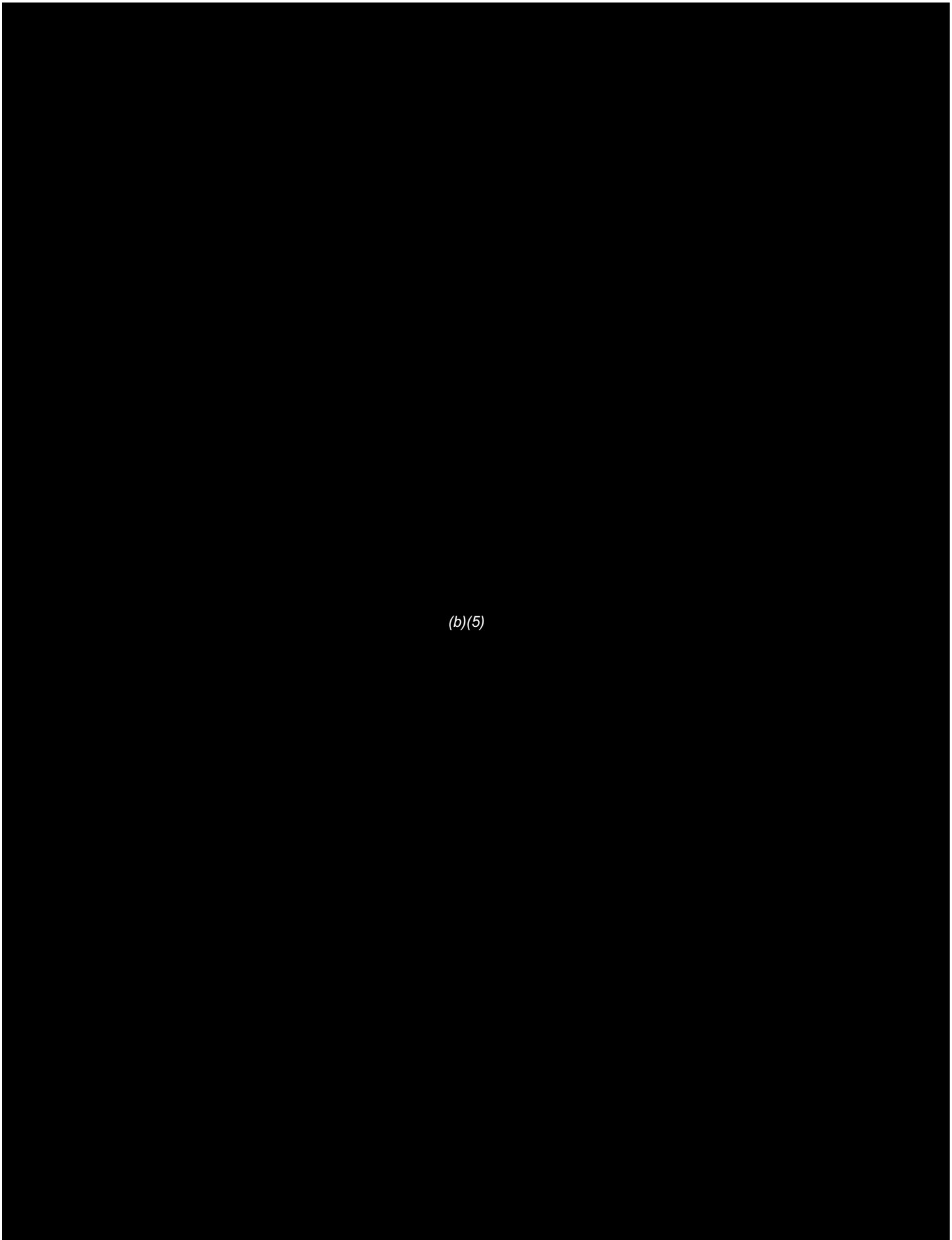
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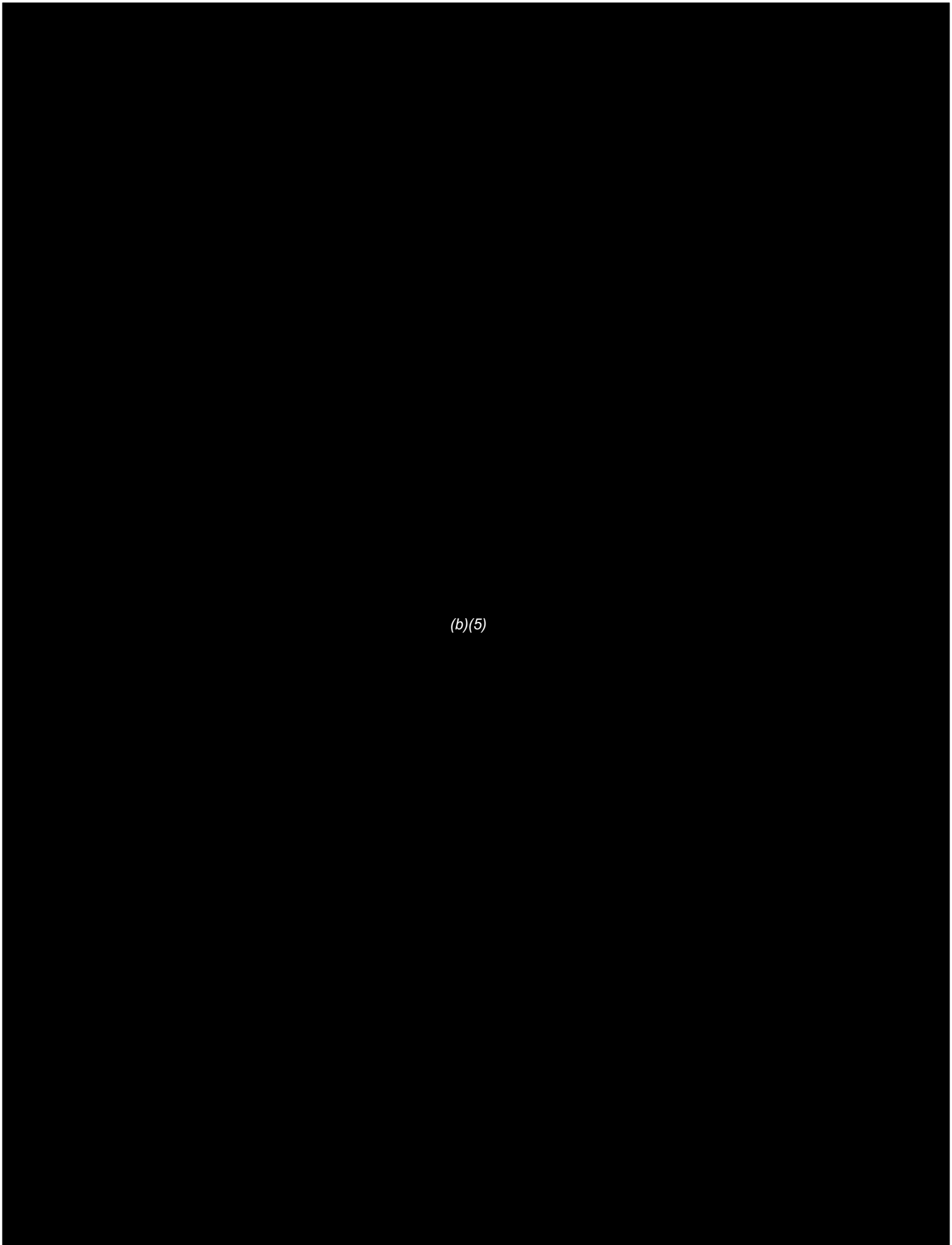
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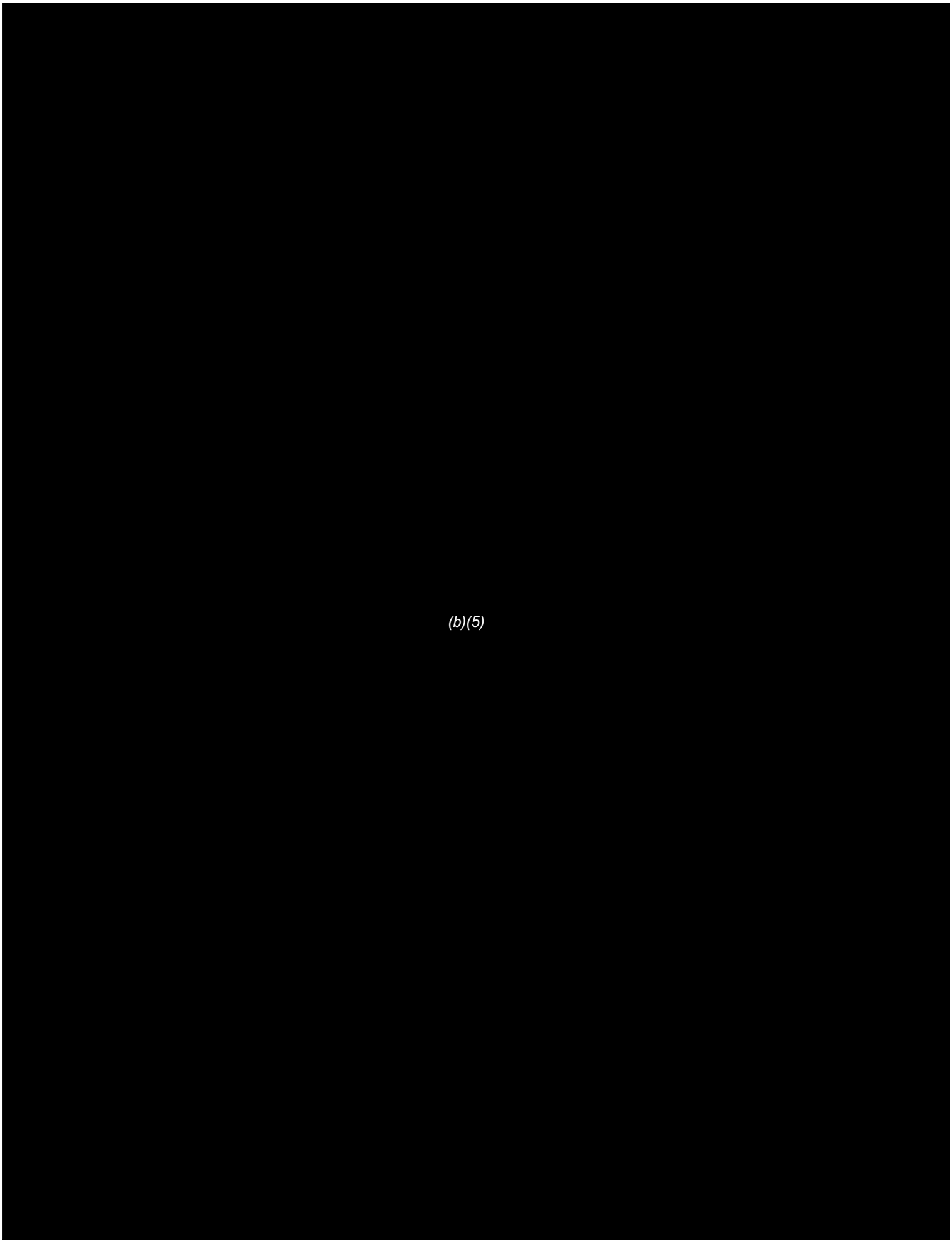
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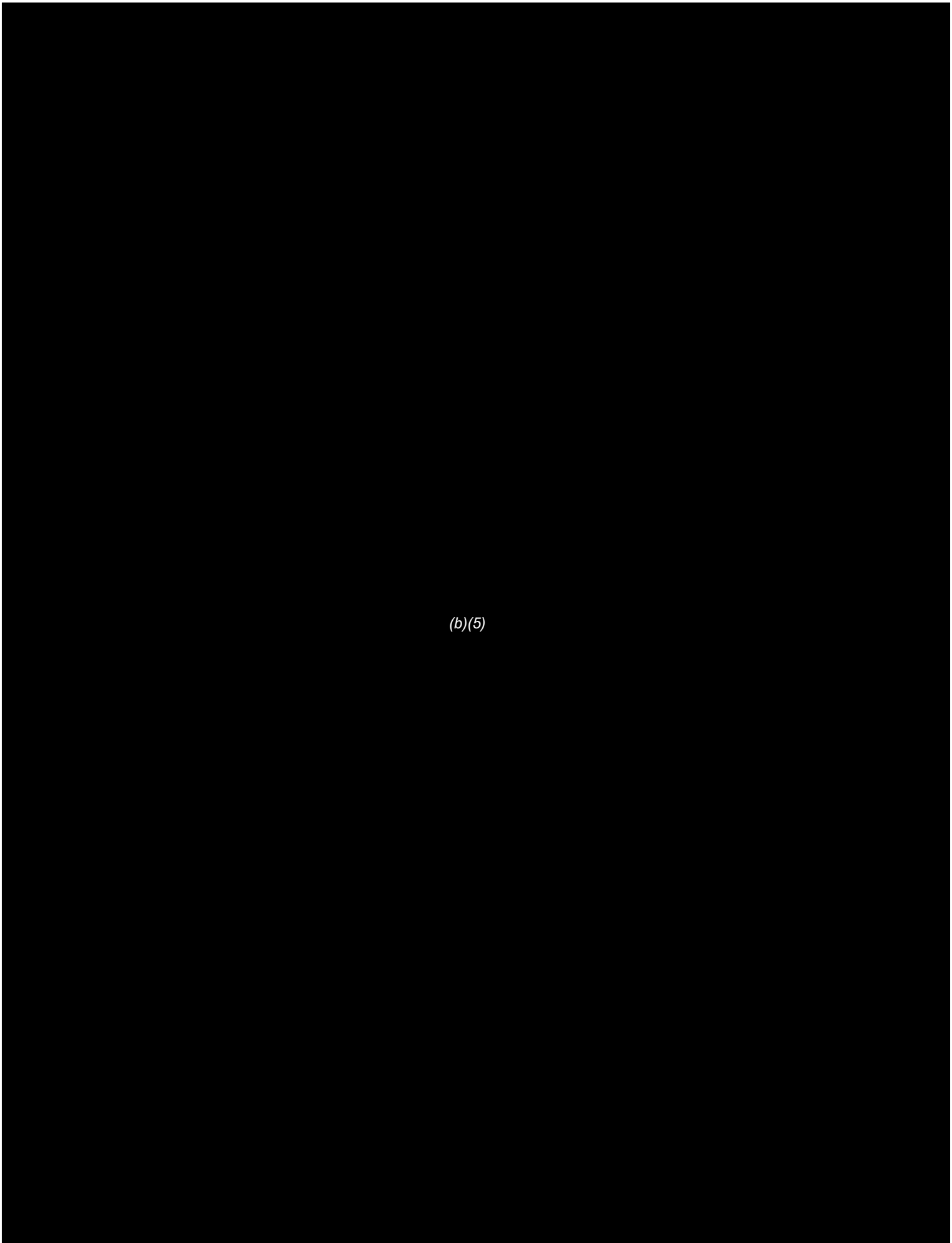
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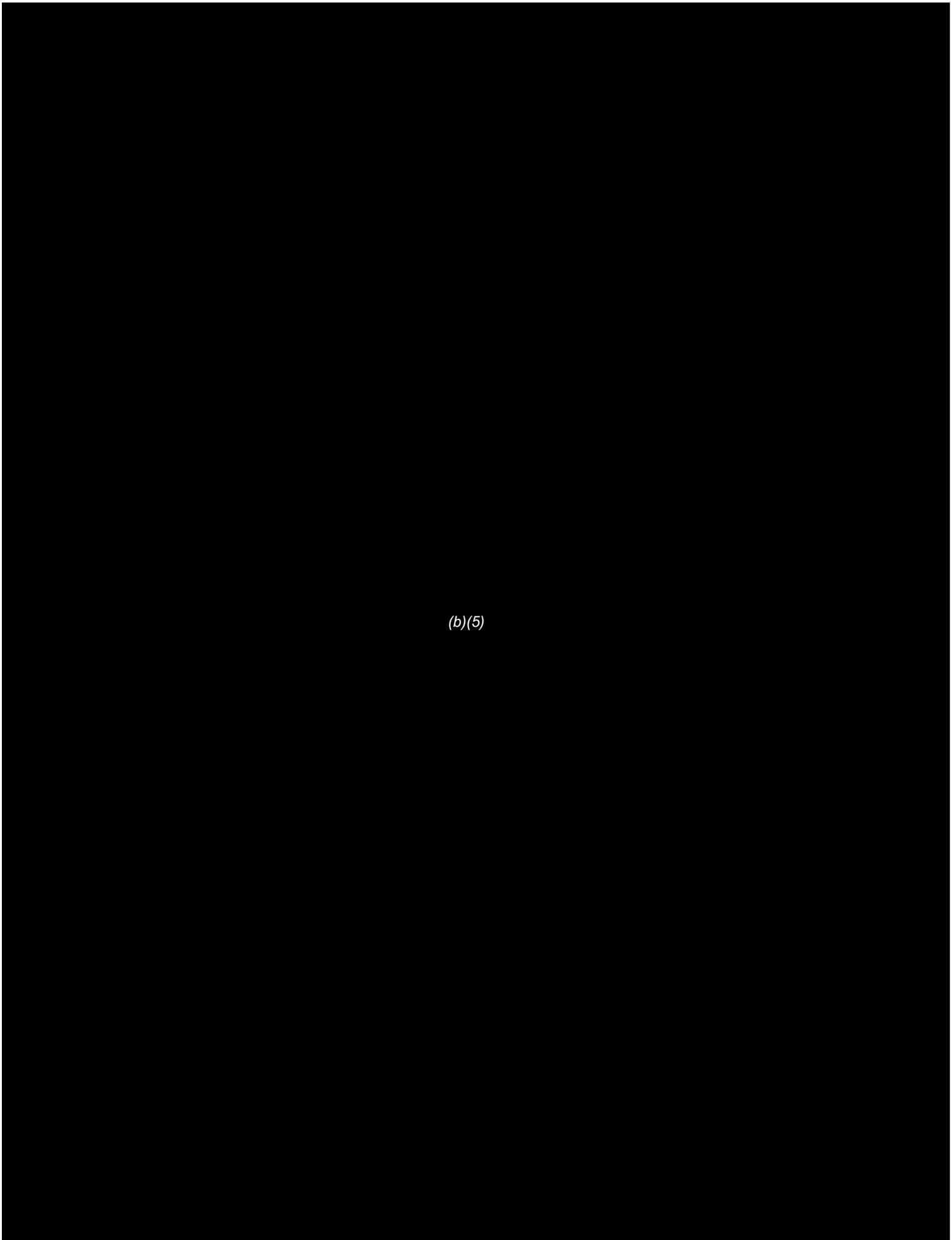
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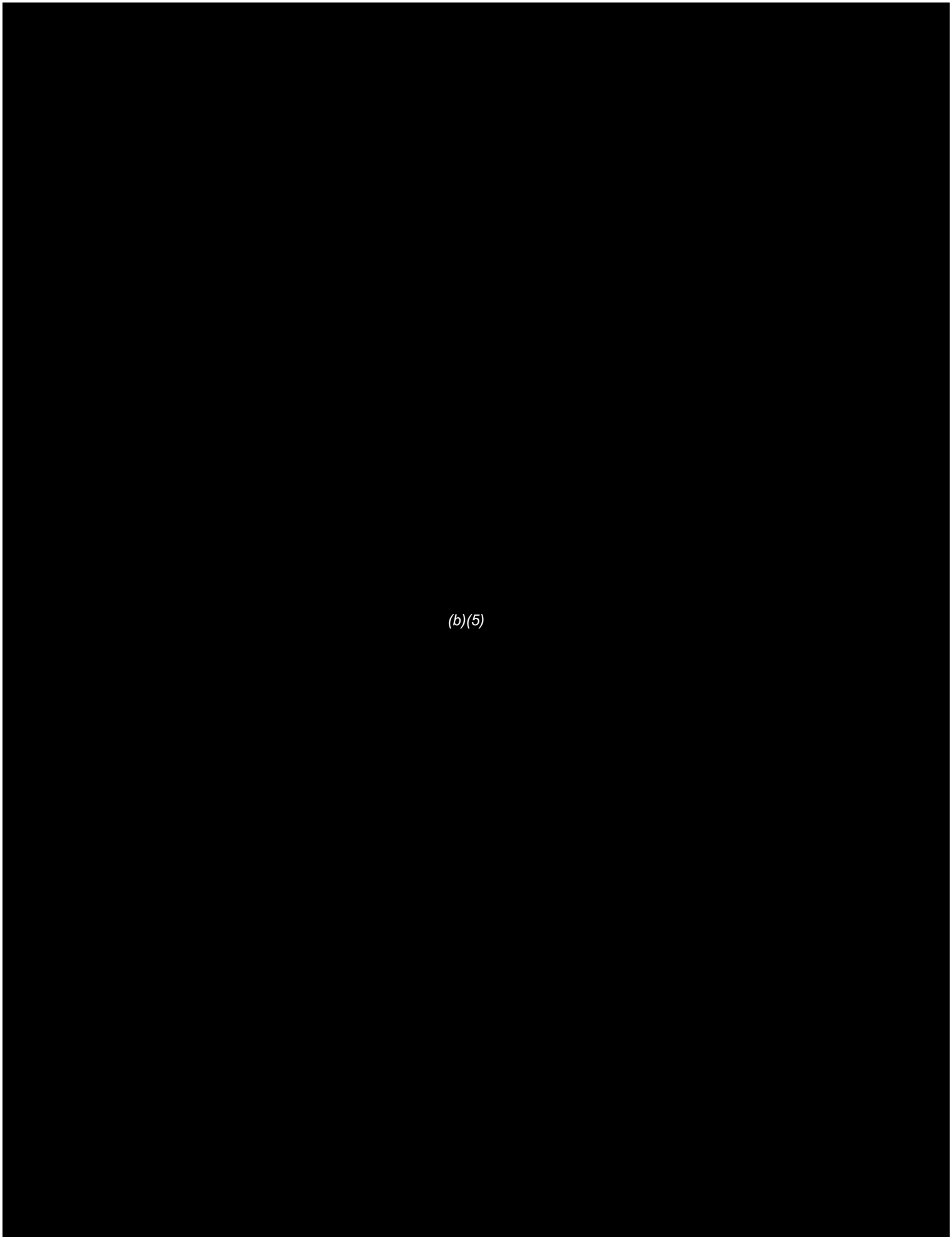
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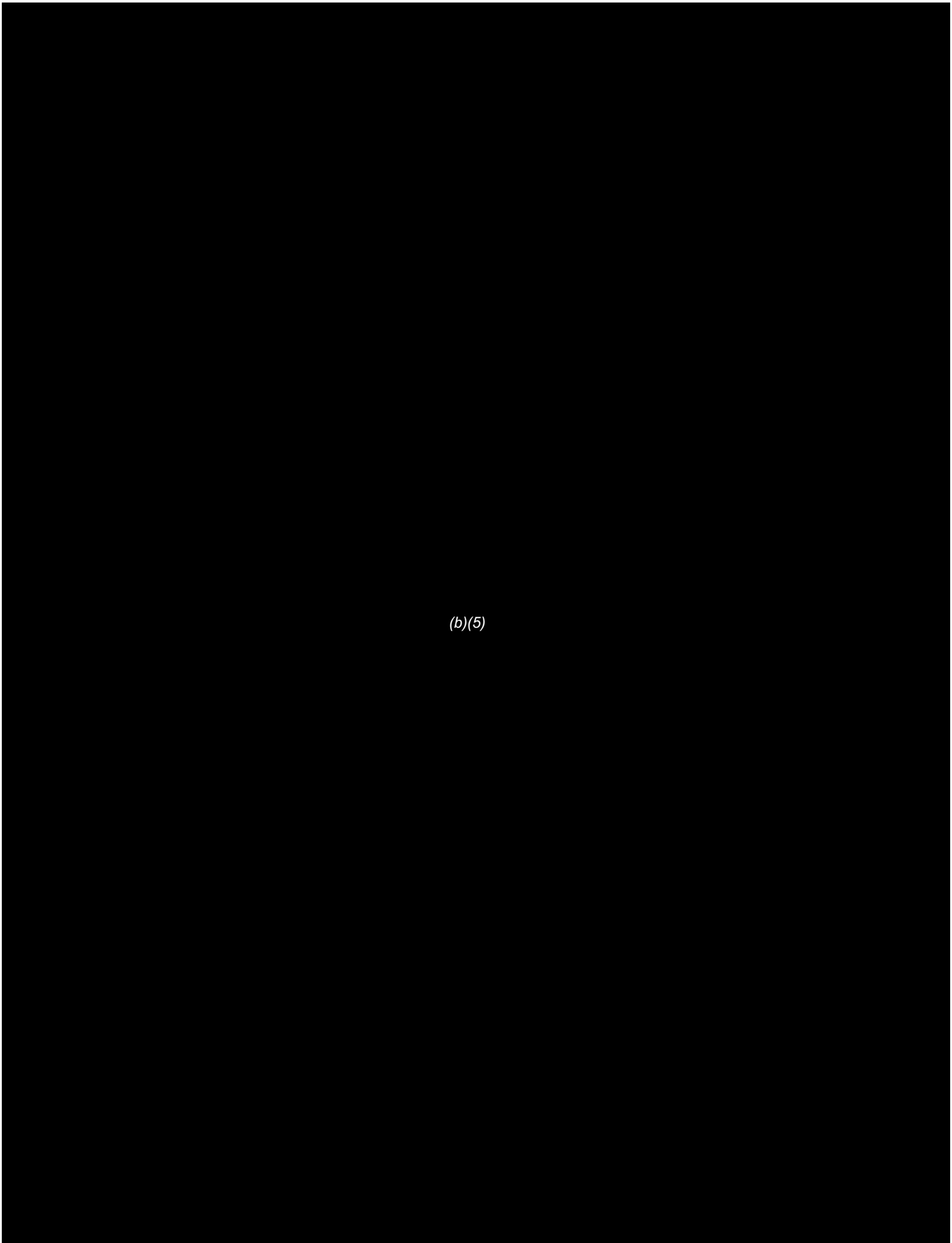
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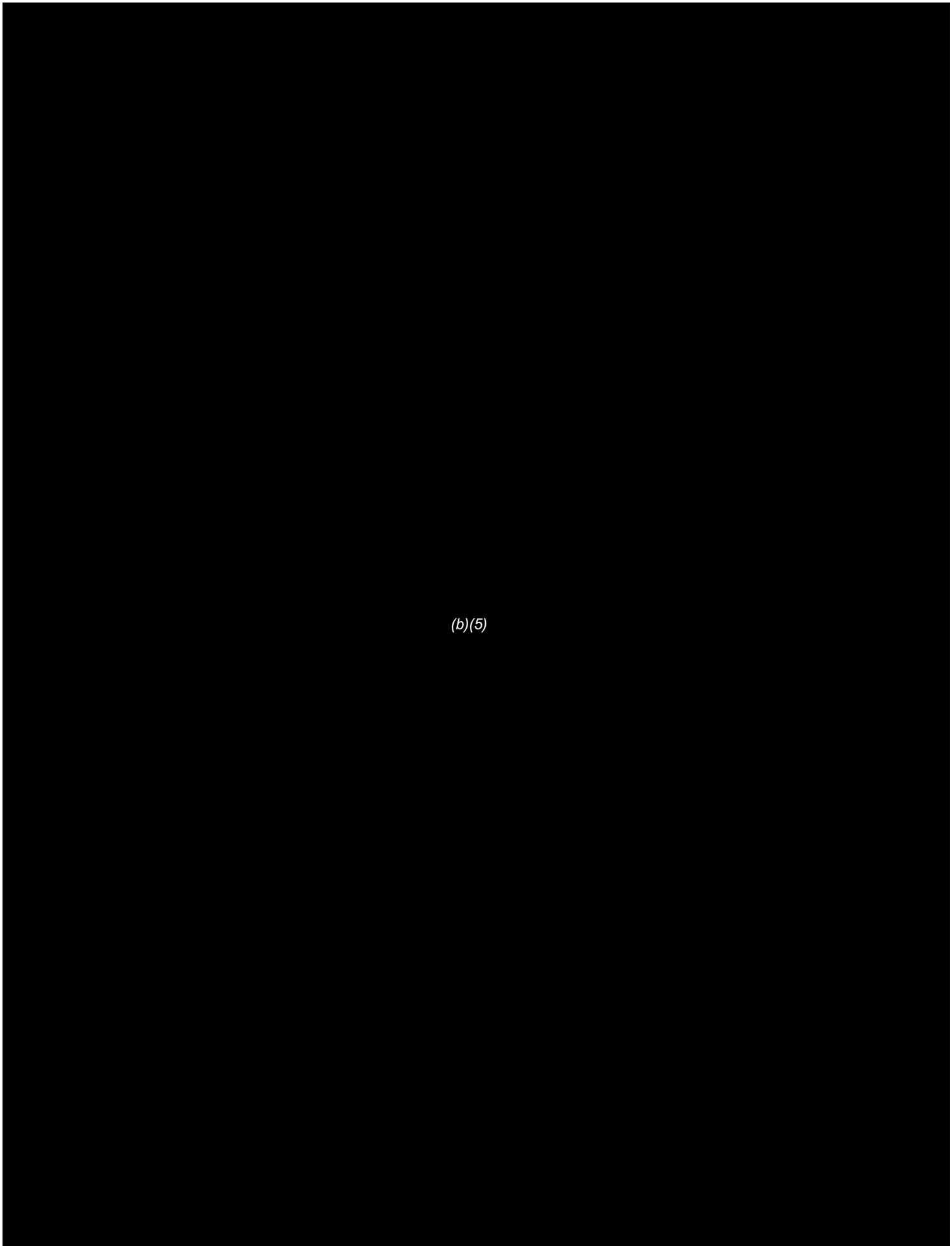
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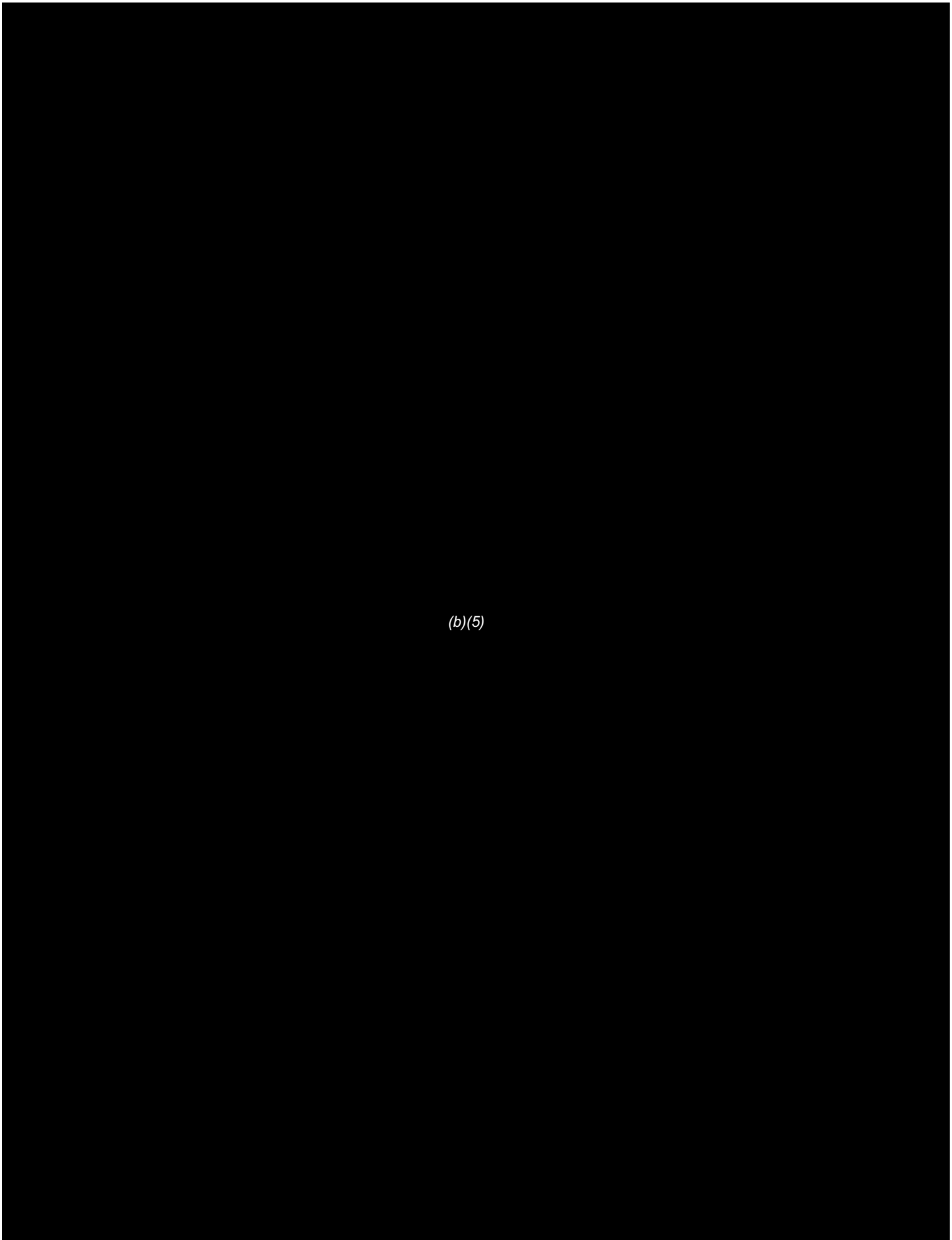
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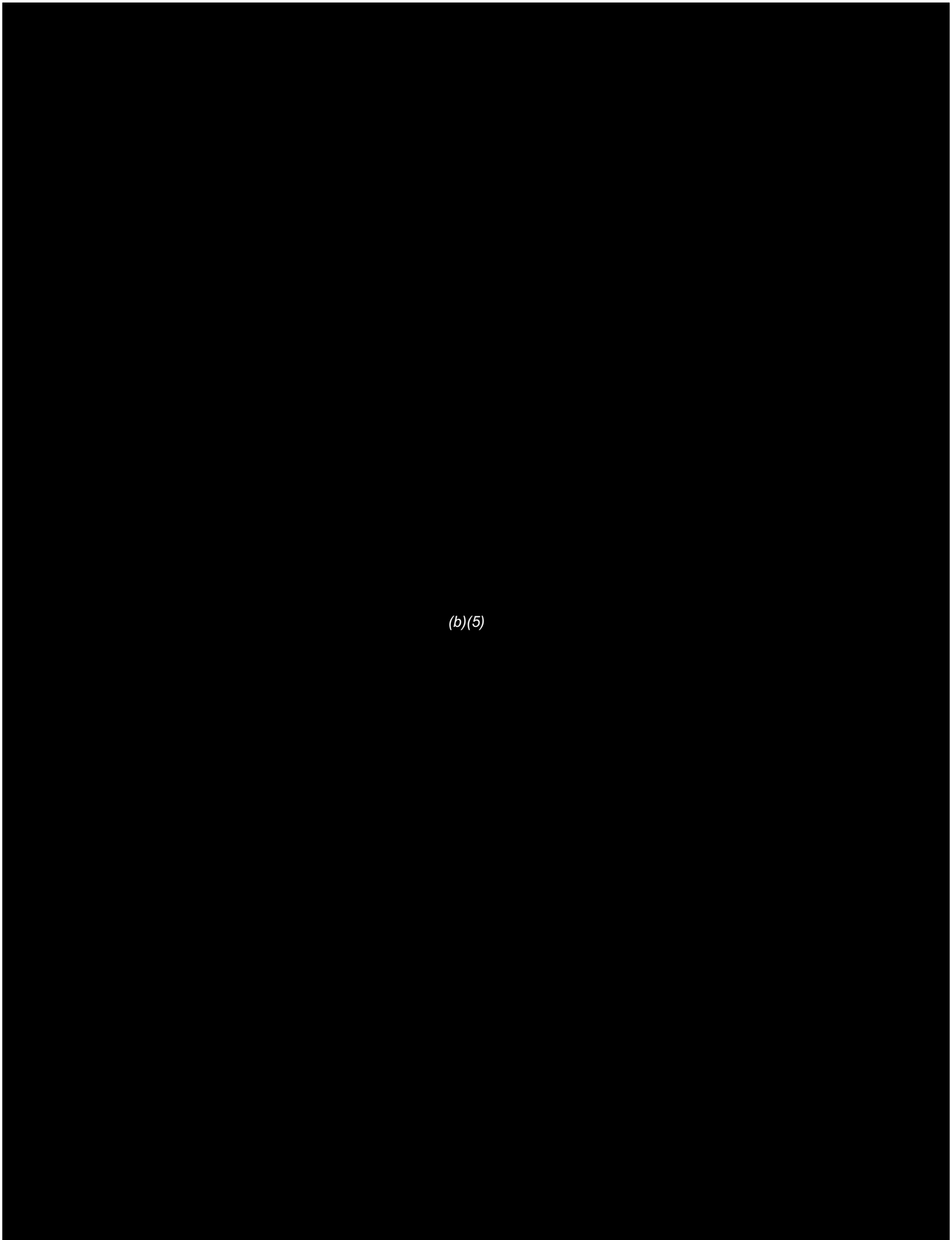
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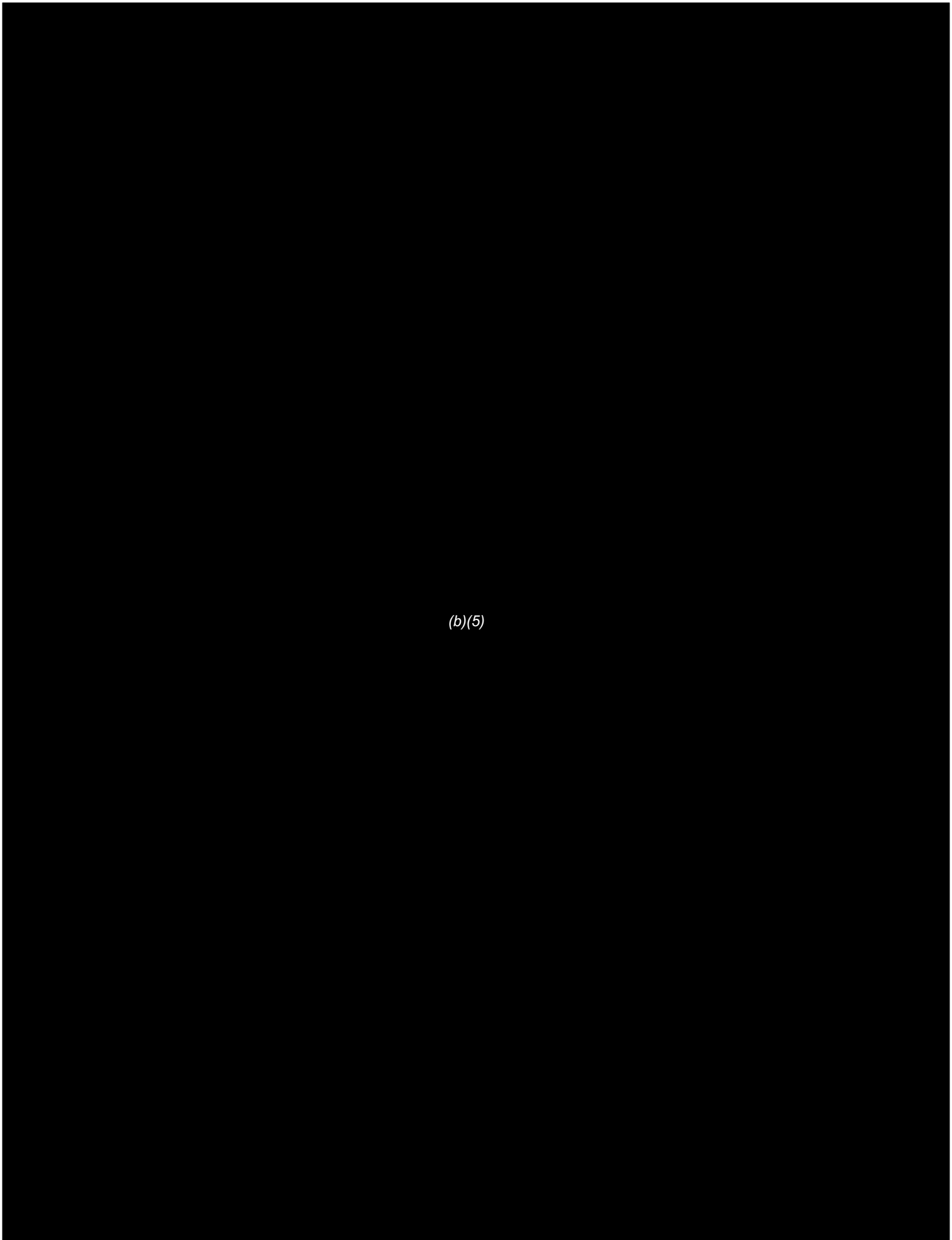
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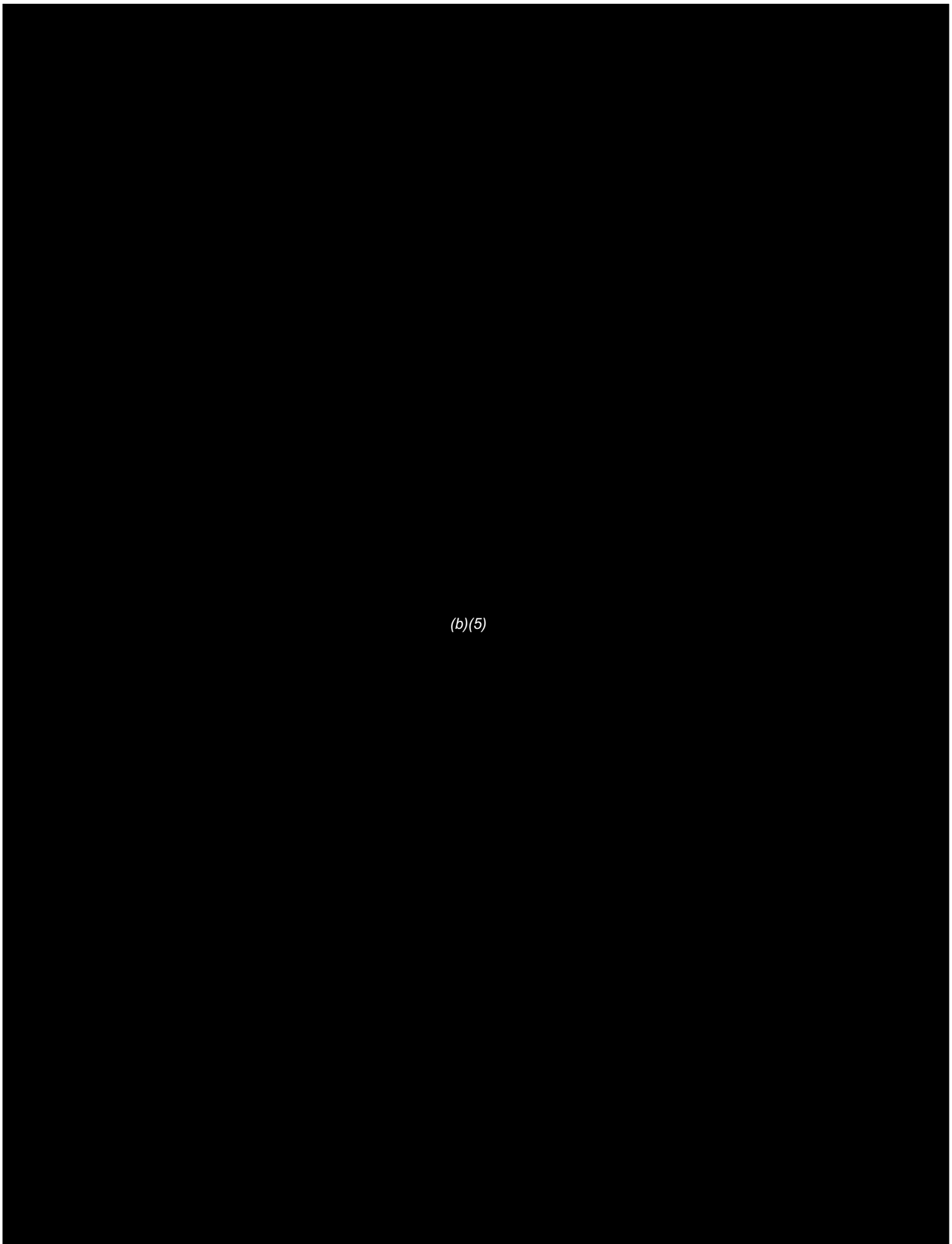
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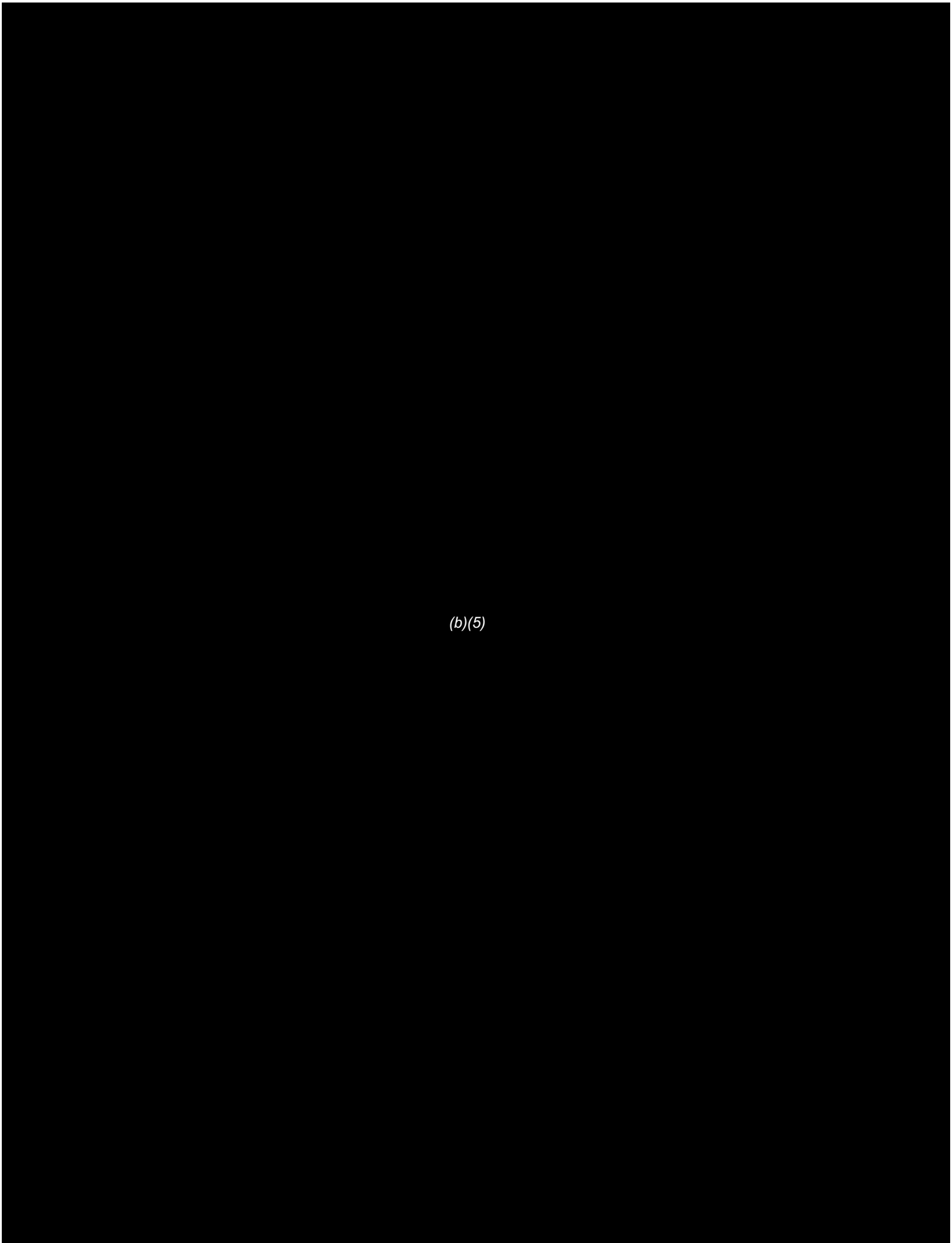
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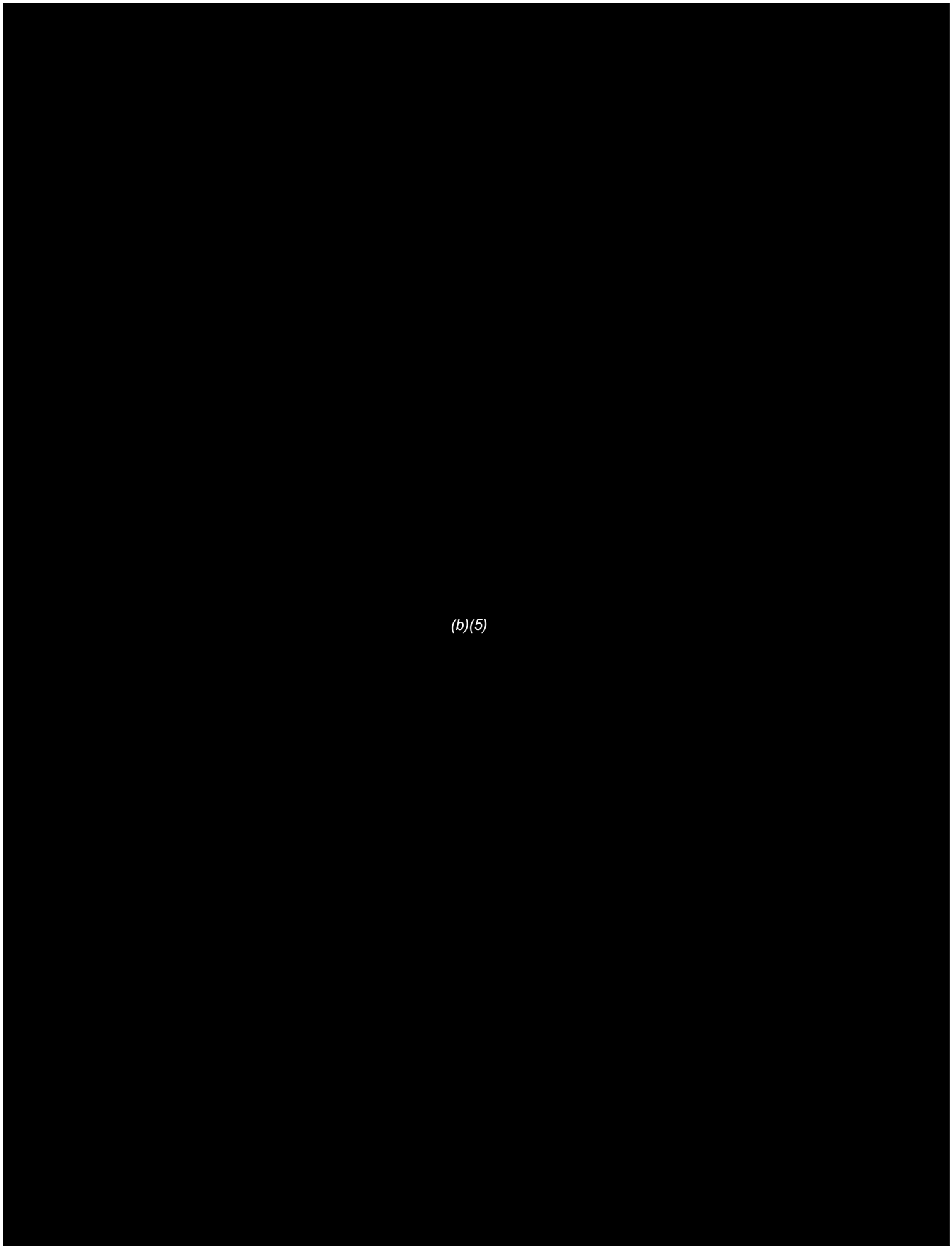
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Conclusion

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Sincerely,

David L. Bernhardt
Solicitor

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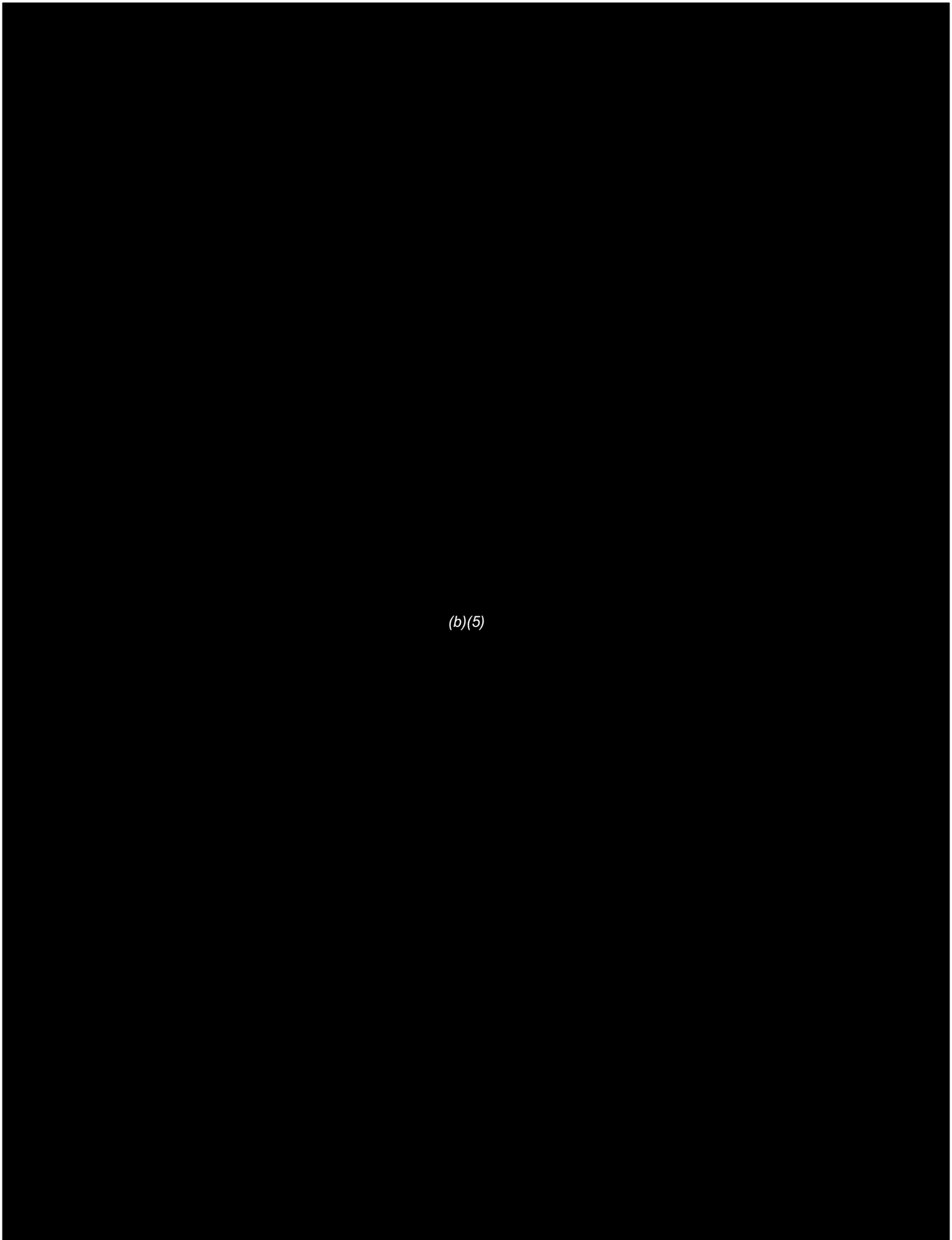
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FILED
United States Court of Appeals
Tenth Circuit

August 8, 2017

Elisabeth A. Shumaker
Clerk of Court

PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

PATRICK DWAYNE MURPHY,

Petitioner - Appellant,

v.

TERRY ROYAL, Warden, Oklahoma State Penitentiary,

Respondent - Appellee.

MUSCOGEE (CREEK) NATION; SEMINOLE NATION OF OKLAHOMA; UNITED KEETOOWAH BAND OF CHEROKEE INDIANS IN OKLAHOMA,

Amici Curiae.

Nos. 07-7068 & 15-7041

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA
(D.C. Nos. 6:03-CV-00443-RAW-KEW and 6:12-CV-00191-RAW-KEW)

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Before **TYMKOVICH**, Chief Judge, **MATHESON**, and **PHILLIPS**, Circuit Judges.

MATHESON, Circuit Judge.

TABLE OF CONTENTS

I. BACKGROUND 2
A. Factual History 3
B. Procedural History 5
1. Trial 5
2. Direct appeal 6
3. First Application for State Post-Conviction Relief 6
4. Filing of First Application for Federal Habeas Relief 7
5. Second Application for State Post-Conviction Relief 8
a. Evidentiary hearing 9
b. Appeal to the OCCA 11
c. *Atkins* trial and appeal 14
6. Federal District Court Proceedings on First Federal Habeas Application 14
7. First Appeal to the Tenth Circuit (No. 07-7068) 16
8. Second Application for Federal Habeas Relief 16
9. This Consolidated Appeal 16
II. LEGAL BACKGROUND 17
A. Standard of Review 17
1. The Parties' Dispute 18
2. The AEDPA Standard 19
a. Overview 20
b. The "contrary to" clause 21
B. Indian Country Jurisdiction 23
1. Reservations 23
2. The Major Crimes Act 24
3. Indian Country 27
4. Reservation Disestablishment and Diminishment 29
a. Presumption against disestablishment and diminishment 30
b. The policy of allotment 32

c. *Solem* factors 34
III. DISCUSSION 37
A. Clearly Established Federal Law 37
1. *Solem*—Clearly Established Law in 2005 38
2. The State's Arguments 40
B. The OCCA Decision—Contrary to Clearly Established Federal Law 41
1. The OCCA's Merits Decision 42
2. The OCCA's Decision Was Contrary to *Solem* 46
a. No citation to *Solem* 46
b. Failure to apply *Solem* 47
c. The State's arguments 49
C. Exclusive Federal Jurisdiction 52
1. Additional Legal Background 54
a. Supreme Court authority 54
b. Tenth Circuit authority 56
2. Additional Factual Background—Creek Nation History 58
a. Original homeland and forced relocation 58
b. Nineteenth century diminishment 60
c. 1867 Constitution and government 61
d. Early congressional regulation of modern-day Oklahoma 61
e. The push for allotment 62
f. Allotment and aftermath 64
g. Creation of Oklahoma 65
h. Away from allotment 66
i. Public Law 280 67
j. A new Creek Constitution 68
k. Our decision in *Indian Country, U.S.A.* 69
3. Applying *Solem* 70
a. Step One: Statutory Text 70

i. The statutes 73
1) Act of March 3, 1893, ch. 209, 27 Stat. 612 ("1893 Act") 73
2) Act of June 10, 1896, ch. 398, 29 Stat. 321 ("1896 Act") 75
3) Act of June 7, 1897, ch. 3, 30 Stat. 62 ("1897 Act") 75
4) "Curtis Act," ch. 517, 30 Stat. 495 (June 28, 1898)....76
5) "Original Allotment Agreement," ch. 676, 31 Stat. 861 (March 1, 1901)....77
a) Allotment....77
b) Town sites....80
c) Lands reserved for tribal purposes 81
d) Future governance....81
6) "Supplemental Allotment Agreement," ch. 1323, 32 Stat. 500 (June 30, 1902)....84
7) "Five Tribes Act," ch. 1876, 34 Stat. 137, April 26, 1906....85
8) "Oklahoma Enabling Act," ch. 3335, 34 Stat. 267 (June 16, 1906).89
ii. Analysis 90
1) No hallmarks of disestablishment or diminishment....91
2) Signs Congress continued to recognize the Reservation....95
3) The State's title and governance arguments 97
a) Title 98
b) Governance....99
b. Step Two: Contemporary Historical Evidence....101
i. The State's evidence....103
1) 1892 Senate debate....104
2) 1894 Senate committee report....105
3) Other sources 107
ii. Mr. Murphy's and the Creek Nation's evidence 108
1) 1894 Dawes Commission records....108
2) 1895 Dawes letter....108

3) 1900 Attorney General opinion 109
4) Post-allotment evidence 110
iii. Analysis 112
c. Step Three: Later History 113
i. Treatment of the area 114
1) Congress 114
2) Executive 117
3) Federal courts 118
4) Oklahoma 120
5) Creek Nation 123
ii. Demographics 124
iii. Step-three concluding comment 125
IV. CONCLUSION 126

Patrick Dwayne Murphy asserts he was tried in the wrong court. He challenges the jurisdiction of the Oklahoma state court in which he was convicted of murder and sentenced to death. He contends he should have been tried in federal court because he is an Indian and the offense occurred in Indian country. We agree and remand to the district court to issue a writ of habeas corpus vacating his conviction and sentence.

The question of whether the state court had jurisdiction is straightforward but reaching an answer is not. We must navigate the law of (1) federal habeas corpus review of state court decisions, (2) Indian country jurisdiction generally, (3) Indian reservations specifically, and (4) how a reservation can be disestablished or diminished. Our discussion on each of these topics reaches the following conclusions.

First, we assume that a federal habeas court must give deference to a state court's determination that it had jurisdiction. Nonetheless, in this case, the Oklahoma court applied a rule that was contrary to clearly established Supreme Court law. We must apply the correct law.

Second, when an Indian is charged with committing a murder in Indian country, he or she must be tried in federal court. Mr. Murphy is a member of the Muscogee (Creek) Nation. Because the homicide charged against him was committed in Indian country, the Oklahoma state courts lacked jurisdiction to try him.

Third, Congress has defined Indian country broadly to include three categories of areas: (a) Indian reservations, (b) dependent Indian communities, and (c) Indian allotments. *See* 18 U.S.C. § 1151. The reservation clause concerns us here. All land

within the borders of an Indian reservation—regardless of whether the tribe, individual Indians, or non-Indians hold title to a given tract of land—is Indian country unless Congress has disestablished the reservation or diminished its borders.

Fourth, only Congress may disestablish or diminish an Indian reservation. Applying the Supreme Court's test to determine whether Congress has done so as to the Creek Reservation, we conclude it has not.

Mr. Murphy and the State agree that the offense in this case occurred within the Creek Reservation if Congress has not disestablished it. We conclude the Reservation remains intact and therefore the crime was committed in Indian country. Mr. Murphy, a Creek citizen, should have been charged and tried in federal court.[1]

I. BACKGROUND

We begin with the facts of the crime as presented by the Oklahoma Court of Criminal Appeals ("OCCA").[2] We then discuss the procedural journey Mr. Murphy's case has traveled.

[1] Mr. Murphy raises eight issues in this appeal. Because we resolve his first issue by concluding the state courts lacked jurisdiction over this case, we do not address his other seven issues.

[2] *See* 28 U.S.C. § 2254(e)(1) (providing federal habeas court must presume state court's factual determinations are correct); *see also Al-Yousif v. Trani*, 779 F.3d 1173, 1181 (10th Cir. 2015) ("The presumption of correctness also applies to factual findings made by a state court of review based on the trial record." (quotations omitted)).

A. ***Factual History***

In August 1999, Mr. Murphy lived with Patsy Jacobs. *Murphy v. State*, 47 P.3d 876, 879 (Okla. Crim. App. 2002). Ms. Jacobs was previously in a relationship with the victim in this case, George Jacobs, and had a child with him, George, Jr. *Id.* at 879-80. Mr. Murphy had an argument with her about Mr. Jacobs and said he was "going to get" Mr. Jacobs and his family. *Id.* at 879.

On August 28, 1999, Mr. Jacobs spent the day drinking with his cousin, Mark Sumka. *Id.* Around 9:30 p.m., Mr. Sumka was driving to a bar in Henryetta, Oklahoma, with Mr. Jacobs passed out in the back seat. *Id.* Mr. Murphy was driving on the same road in the opposite direction with two passengers—Billy Long and Kevin King. *Id.* After the cars passed each other, they stopped. *Id.* Mr. Murphy backed up and told Mr. Sumka to turn off the car, but Mr. Sumka drove off. *Id.*

Mr. Murphy and his passengers pursued and forced Mr. Sumka off Vernon Road, which runs through an area that is "remarkably rural [and] heavily treed . . . without any sort of improvement . . . except perhaps a rickety barbed wire fence." *Murphy v. State*, 124 P.3d 1198, 1206 (Okla. Crim. App. 2005); *see also* 47 P.3d at 879.

Mr. Murphy exited the car and confronted Mr. Sumka. 47 P.3d at 879. Mr. Long and Mr. King began hitting Mr. Jacobs. *Id.* at 880. Mr. Murphy approached Mr. Jacobs, trading places with Mr. Long, who went over and hit Mr. Sumka. *Id.* at 880. Mr. Sumka briefly ran off but came back about five minutes later. *Id.*

When he did, he saw Mr. Murphy throw a folding knife into the woods, and he saw Mr. Jacobs lying in a ditch along the road, barely breathing. *Id.* Mr. Murphy and his companions threatened to kill Mr. Sumka and his family if he said anything, and Mr. King struck Mr. Sumka in the jaw. *Id.*

Following Mr. Murphy's instructions, Mr. Sumka left the scene with the other men. *Id.* During the car ride away, they told Mr. Sumka they had cut Mr. Jacobs's throat and chest and had severed his genitals. *Id.* The group later went to Mr. King's home, where Mr. Jacobs's son, George, Jr., was staying, in an apparent attempt to kill him. *Id.* Mr. King's mother intervened and "thwarted [their] plan." *Id.* Mr. King went inside, and the rest of the group left. *Id.*

A passerby found Mr. Jacobs in the ditch with his face bloodied and slashes across his chest and stomach. *Id.* His genitals had been cut off and his throat slit. *Id.* According to a state criminalist, Mr. Jacobs had been dragged off the road after his genitals were severed. *Id.* His neck and chest had been cut on the side of the road, where he bled to death over the course of four to twelve minutes, though it may have taken longer. *Id.*

After Mr. Murphy returned home and confessed to Ms. Jacobs, he was arrested. *Id.* The State of Oklahoma charged him with Mr. Jacobs's murder and sought the death penalty.

B. ***Procedural History***

A jury convicted Mr. Murphy of murder in Oklahoma state court and imposed the death penalty. His appeal and post-conviction proceedings have since moved through the Oklahoma and federal courts as recounted below.

Although the overall history of Mr. Murphy's case is complex, the history of the jurisdictional claim we resolve here can be succinctly summarized. After Mr. Murphy's conviction and death sentence were affirmed on direct appeal, he applied for state post-conviction relief in 2004, arguing the Oklahoma state courts had lacked jurisdiction to try him. The OCCA ordered an evidentiary hearing. Following the hearing, the state district court concluded Oklahoma's jurisdiction was proper because the crime did not occur in Indian country. The OCCA affirmed that conclusion in 2005. Mr. Murphy then sought federal habeas relief, but the federal district court denied relief in 2007. Mr. Murphy now appeals.

In the interest of thoroughness, and because Mr. Murphy's case has until now proceeded in a disjointed fashion, we provide a complete procedural history below.

1. **Trial**

In 2000, a jury in McIntosh County, Oklahoma, convicted Mr. Murphy of first degree murder under Okla. Stat. tit. 21 § 701.7(A) (1999). In the penalty phase, the jury found aggravating circumstances supported the death penalty. *Murphy*, 47 P.3d at 879. In accordance with the jury's verdict, the trial court imposed a death sentence. *Id.*

2. **Direct appeal**

Mr. Murphy raised a variety of trial issues in a direct appeal to the OCCA. On May 22, 2002, the OCCA affirmed his conviction. *Id.* at 888. The court also performed a statutorily mandated sentencing review in which the court considered the aggravating circumstances in light of the mitigating evidence, including Mr. Murphy's "mild mental retardation," and concluded his death sentence was "factually substantiated and appropriate." *Id.* at 887-88.[3]

3. **First Application for State Post-Conviction Relief**

On February 7, 2002, while his direct appeal was pending in the OCCA, Mr. Murphy filed his first application for state post-conviction relief. *See Murphy v. State*, 54 P.3d 556, 560 (Okla. Crim. App. 2002). He asked that his application be held in abeyance, *id.* at 566, until the Supreme Court decided its then-pending case of *Atkins v. Virginia*, 536 U.S. 304 (2002), which addressed whether the Eighth Amendment prohibits the execution of "mentally retarded persons," *id.* at 306.

On June 20, 2002, about a month after the OCCA affirmed on direct appeal, the Supreme Court held in *Atkins* that the Eighth Amendment "places a substantive restriction on the State's power to take the life of a mentally retarded offender." *Id.* at 321 (quotations omitted). *Atkins* "[left] to the States the task of developing appropriate ways to enforce the constitutional restriction." *Id.* at 317 (brackets and quotations omitted).

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[3] On April 21, 2003, the U.S. Supreme Court denied Mr. Murphy's petition for a writ of certiorari. *See Murphy v. Oklahoma*, 538 U.S. 985 (2003).

On September 4, 2002, the OCCA denied relief on all of the issues Mr. Murphy had raised in his first application for state post-conviction relief except his *Atkins* claim. 54 P.3d at 570. The OCCA used Mr. Murphy's case to adopt new, post-*Atkins* procedures to shield "mentally retarded" persons from execution. *See id.* at 567-69. These procedures, the OCCA explained, would govern "until such time" as the Oklahoma legislature enacted an alternative framework. *Id.* at 568. The OCCA remanded to the state district court "for an evidentiary hearing on the sole issue of [Mr. Murphy's] claim of mental retardation in accordance with" the OCCA's newly announced procedures. *Id.* at 570.

On remand, the state district court concluded Mr. Murphy "had not raised sufficient evidence to create a fact question on the issue of mental retardation." *Murphy v. State*, 66 P.3d 456, 458 (Okla. Crim. App. 2003). On March 21, 2003, the OCCA ruled this conclusion was "not clearly erroneous" and affirmed Mr. Murphy's death sentence. *Id.* at 458, 461.

4. **Filing of First Application for Federal Habeas Relief**

On March 5, 2004, Mr. Murphy filed a federal habeas application under 28 U.S.C. § 2254 asserting 13 grounds for relief.

On August 30, 2004, the U.S. District Court for the Eastern District of Oklahoma concluded Mr. Murphy's application contained some claims that had not been exhausted in Oklahoma state court. The federal district court directed Mr. Murphy to drop his unexhausted claims.

On September 10, 2004, Mr. Murphy did so by filing an amended application containing eight claims, all of which were exhausted. His amended application remained pending in the federal district court while he pursued additional relief in state court.[4]

5. **Second Application for State Post-Conviction Relief**

On March 29, 2004—shortly after he filed his original federal habeas application—Mr. Murphy returned to state court and filed a second application for post-conviction relief to exhaust claims he had dropped from his federal habeas application. His second application for state post-conviction relief alleged:

1. Oklahoma lacked jurisdiction because the Major Crimes Act gives the federal government exclusive jurisdiction to prosecute murders committed by Indians in Indian country.[5]

2. The OCCA's earlier denial of a jury trial on the issue of his "mental retardation" had violated his constitutional rights.

3. Oklahoma's lethal injection protocol violated the Eighth Amendment.

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[4] The same day he filed his amended application, Mr. Murphy launched a short-lived appeal. He sought our review of the district court's order denying his request to stay the federal proceedings while he pursued his unexhausted claims in state court. Another panel of this court dismissed the appeal for lack of jurisdiction. *See Murphy v. Mullin*, No. 04-7094 (10th Cir. Dec. 16, 2004).

[5] In Oklahoma, "issues of subject matter jurisdiction are never waived and can therefore be raised on a collateral appeal." *Wallace v. State*, 935 P.2d 366, 372 (Okla. Crim. App. 1997); *see also Triplet v. Franklin*, 365 F. App'x 86, 95 (10th Cir. 2010) (unpublished) (recognizing that, in Oklahoma, issues of subject matter jurisdiction are not waivable and can be raised for the first time in collateral proceedings); *Wackerly v. State*, 237 P.3d 795, 797 (Okla. Crim. App. 2010) (considering jurisdictional claim that crime occurred on federal land raised in prisoner's second application for post-conviction relief); *Magnan v. State*, 207 P.3d 397, 402 (Okla. Crim. App. 2009) (considering Indian country jurisdictional challenge and explaining subject matter jurisdiction may be challenged at any time).

See Murphy, 124 P.3d at 1200, 1208-09. The OCCA ordered an evidentiary hearing on the jurisdictional claim. *Id.* at 1199.[6]

a. *Evidentiary hearing*

The state district court held a one-day evidentiary hearing. *Id.* at 1201. Mr. Murphy argued Oklahoma lacked jurisdiction because the crime occurred in Indian country and 18 U.S.C. § 1153 provides for exclusive federal jurisdiction over murders committed by Indians in Indian country.[7] The parties agreed that Mr. Murphy and Mr. Jacobs, both members of the Muscogee (Creek) Nation, were Indians, but they disputed whether the crime occurred in Indian country, a term defined in 18 U.S.C. § 1151:

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[6] The OCCA ordered that the hearing answer the following six questions:

> (1) Where exactly did the crime occur?
>
> (2) Who "owns" title to the property upon which the crime occurred?
>
> (3) If some or all of the crime occurred on an easement, how does that factor into the ownership question?
>
> (4) How much of the crime occurred, if any, on an easement?
>
> (5) Did the crime occur in "Indian County," as defined by 18 U.S.C. § 1151?
>
> (6) Is jurisdiction over the crime exclusively federal?

124 P.3d at 1201 n.3 (paragraph breaks added).

[7] "Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States." 18 U.S.C. § 1153(a).

> [T]he term "Indian country" . . . means
>
> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (paragraph breaks added). An area qualifies as Indian country if it fits within any of these three categories. Mr. Murphy argued the crime occurred in Indian country under all three categories.[8]

In December 2004, the state district court concluded state jurisdiction was proper because the crime had occurred on state land. *See* 124 P.3d at 1200, 1202. The court, however, addressed only one of Mr. Murphy's three theories. *Id.* at 1207. It concluded the land was not an Indian allotment under § 1151(c), but it failed to address whether the location was (a) part of the Creek Reservation or (b) part of a dependent Indian community. *See id.* (noting the state district court failed to address these questions although the OCCA had "clearly asked" it to do so). Although the state district court viewed these matters as outside the scope of the evidentiary hearing, it allowed Mr.

[8] In this appeal, however, he argues the location of the crime qualifies under the reservation clause of subsection (a) and the allotment clause of subsection (c). Because we agree with him that the crime occurred on an Indian reservation, we do not reach his allotment argument.

Murphy to make an offer of proof on his other two theories. *Id.*[9] The court ultimately ruled the State's exercise of criminal jurisdiction was proper and denied relief. *Id.* at 1202.

b. *Appeal to the OCCA*

Mr. Murphy appealed to the OCCA. On December 7, 2005, the OCCA denied relief on his jurisdictional and Eighth Amendment claims but granted limited relief on the *Atkins* claim. *See id.* at 1209.

On the jurisdictional issue, the OCCA found the record did not support some of the state district court's determinations, but it affirmed the ultimate determination that Oklahoma's jurisdiction was proper. *Id.* at 1201-08. The OCCA accepted the state district court's findings regarding where the crime unfolded, but it rejected the court's conclusion that Oklahoma owned the road and the ditch abutting it. *Id.* at 1202. Rather, the OCCA concluded, Oklahoma's "interest in the area in question is in the nature of an easement or right-of way." *Id.* The Creek Nation had long owned

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[9] On the reservation question that concerns us here, Mr. Murphy argued:

> [T]he homicide occurred within the boundaries of the Creek Nation, which qualifies as Indian county because of its status as a reservation under federal jurisdiction. Unlike some other tribes, the Creek treaty lands were not disestablished or diminished by the acts of allotment and other federal legislation adopted in the early 20th century. As of 1999, the entirety of the historic Creek Nation lands thus remained Indian country, regardless of non-Indian ownership of particular tracts within those boundaries.

Def. Tr. Br. at 12 (filed Nov. 16, 2004), State Post-Conviction Record, OCCA Case No. PCD-2004-321, Vol. 1 at 66 (citing *Solem v. Bartlett*, 465 U.S. 463 (1984)).

the land in question when, under a statute enacted in 1902, Oklahoma received the right to build a public highway. *Id.* at 1203. Tracing the history of the specific tract where the crime occurred, the OCCA concluded it had passed in the early twentieth century from the Creek Nation to Lizzie Smith, a member of the Creek Nation, and that all interest in the land—except for a restricted 1/12 mineral interest—had since been conveyed to non-Indians. *See id.* at 1204-06. The OCCA concluded this Indian interest was insufficient to qualify the land as an Indian allotment under § 1151(c): "A fractional interest in an unobservable mineral interest is insufficient contact with the situs in question to deprive the State of Oklahoma of criminal jurisdiction." *Id.* at 1206.[10]

The OCCA criticized the state district court for not addressing whether the crime was committed within the Creek Reservation or within a dependent Indian community, but it concluded the error was harmless because Mr. Murphy had been afforded a chance "to make an extended offer of proof." *Id.* at 1207. The OCCA said that the evidence, had it been admitted, was "insufficient" to show "that the tract in question qualifies as a reservation or dependent Indian community." *Id.*

With respect to the reservation theory, the OCCA acknowledged our decision in *Indian Country, U.S.A., Inc. v. Oklahoma ex rel. Oklahoma Tax Commission*, 829 F.2d 967 (10th Cir. 1987), *cert. denied*, 487 U.S. 1218 (1988), where we recognized the Creek

[10] We discuss the OCCA's decision regarding Mr. Murphy's allotment theory under § 1151(c) because it forms part of the procedural history of this case, but we offer no comment on the merits of the OCCA's decision on this front. Our opinion is limited to the reservation question under § 1151(a).

Reservation still exists but reserved the question whether its 1866 boundaries remain intact, 829 F.2d at 975-76. *See* 124 P.3d at 1207-08 (discussing *Indian Country, U.S.A.*). The OCCA stated: "If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here." *Id.* at 1208.[11]

As for the two non-jurisdictional issues Mr. Murphy raised in his second post-conviction application, the OCCA granted limited relief on one and denied relief on the other. First, it reversed course on the *Atkins* issue and found Mr. Murphy *had* provided sufficient evidence to create a factual question for a jury on his "mental retardation claim." *Id.* It therefore ordered the case remanded. *Id.* Second, the OCCA ruled Mr. Murphy had waived his Eighth Amendment challenge to Oklahoma's lethal injection protocol by failing to raise it earlier. *Id.* at 1209.

In summary, the OCCA rejected the jurisdictional challenge and the Eighth Amendment claim, but it remanded for a jury trial on Mr. Murphy's *Atkins* claim.[12]

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[11] The OCCA also rejected the dependent Indian community theory under § 1151(b). *See* 124 P.3d at 1208. That ruling is not before us because Mr. Murphy now raises only the allotment and reservation theories.

[12] Mr. Murphy petitioned the U.S. Supreme Court for certiorari on two aspects of the OCCA's jurisdictional decision: (1) whether Oklahoma lacked jurisdiction because the crime occurred on a restricted Indian allotment under § 1151(c) and (2) whether Oklahoma lacked jurisdiction because the crime occurred within the limits of an Indian reservation under § 1151(a). The Supreme Court called for the views of the United States, and the Solicitor General filed a brief arguing the Court should deny Mr. Murphy's petition because the OCCA had correctly determined that the crime was not within the exclusive jurisdiction of the federal government. *See* Brief for the United States as Amicus Curiae, *Murphy v. Oklahoma*, No. 05-10787, 2007 WL 1319320, at *4. The Supreme Court denied Mr. Murphy's petition for certiorari without comment. *Murphy v. Oklahoma*, 551 U.S. 1102 (2007).

c. Atkins *trial and appeal*

Following a September 2009 trial in the state district court, a jury in McIntosh County rejected Mr. Murphy's claim of "mental retardation." *Murphy v. State*, 281 P.3d 1283, 1287 (Okla. Crim. App. 2012) (discussing jury trial). But the trial judge declared a mistrial based on an error of state law and reset the case for a new trial. *Id.*[13]

Before the re-trial, the State moved to terminate further proceedings. A state statute had supplanted the OCCA's *Atkins* procedures and provided that no defendant who received an intelligence quotient ("I.Q.") score of 76 or above could "be considered mentally retarded." Okla. Stat. tit. 21 § 701.10b(C); *see also* 281 P.3d at 1287-89. Because Mr. Murphy had received an I.Q. score of 80 on one test and 82 on another, the trial court granted the State's motion and terminated proceedings on January 27, 2011. 281 P.3d at 1288.

Mr. Murphy appealed and raised four propositions of error to the OCCA. *Id.* at 1287. On April 5, 2012, the OCCA ruled the district court had properly relied on the new state law. *Id.* at 1289. The OCCA rejected all of Mr. Murphy's claims, thus concluding proceedings on the second post-conviction application. *Id.* at 1294.

6. **Federal District Court Proceedings on First Federal Habeas Application**

On December 28, 2005, after the OCCA rejected his jurisdictional and Eighth Amendment claims but before the conclusion of the *Atkins* proceedings, Mr. Murphy

[13] The court declared a mistrial because neither side had been afforded its full complement of peremptory challenges—a structural error under Oklahoma law at the time. *See* 281 P.3d at 1287 & n.1.

moved to amend his federal habeas application. The district court granted the motion and allowed Mr. Murphy to add two newly exhausted claims: (1) the challenge to Oklahoma's jurisdiction, and (2) the Eighth Amendment lethal-injection challenge. These two claims were added to Mr. Murphy's eight previously exhausted federal claims, which were still pending.

On August 1, 2007, the district court entered an opinion and order denying all ten claims in Mr. Murphy's habeas application. *Murphy v. Sirmons*, 497 F. Supp. 2d 1257, 1294-95 (E.D. Okla. 2007).

On the jurisdictional claim, Mr. Murphy argued the crime had occurred in Indian country under just two theories: (1) the land was part of the Creek Reservation under § 1151(a) and (2) the land was an Indian allotment under § 1151(c). *Id.* at 1288. Applying the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. § 2254(d), the district court ruled that the OCCA's decisions against Mr. Murphy on these theories were neither contrary to nor an unreasonable application of clearly established federal law. *See* 497 F. Supp. 2d at 1286-92.

The district court rejected Mr. Murphy's other claims but granted him three certificates of appealability ("COAs")[14] to challenge his counsel's effectiveness, one of the death-eligibility aggravating circumstances, and the trial court's failure to define life without parole for the jury.

[14] "[A] prisoner who was denied habeas relief in the district court must first seek and obtain a COA from a circuit justice or judge" before an appeal can be heard. *Miller-El v. Cockrell*, 537 U.S. 322, 335-36 (2003); *see* 28 U.S.C. § 2253(c).

7. **First Appeal to the Tenth Circuit (No. 07-7068)**

Mr. Murphy appealed to this court. On November 16, 2007, we abated the appeal to await resolution of Mr. Murphy's then-pending *Atkins* claim in Oklahoma state court.

8. **Second Application for Federal Habeas Relief**

On April 26, 2012, following the OCCA's final denial of his *Atkins* claim, Mr. Murphy filed a second § 2254 application in the Eastern District of Oklahoma that challenged the OCCA's resolution of the *Atkins* issue.[15] The district court denied relief. *Murphy v. Trammell*, No. CIV-12-191-RAW-KEW, 2015 WL 2094548, at *13 (E.D. Okla. May 5, 2015) (unpublished).

9. **This Consolidated Appeal**

Mr. Murphy sought to appeal from the district court's denial of relief on his second § 2254 habeas application. We consolidated that appeal (No. 15-7041) with his appeal from the denial of his first habeas application (No. 07-7068) to form this case.

Mr. Murphy raises eight issues. Because he obtained COAs for each one,[16] our jurisdiction is proper under 28 U.S.C. § 2253(a), (c)(1)(A).

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[15] The district court treated the application as second and successive and transferred it to this court. We concluded that at least a portion of Mr. Murphy's *Atkins* challenge could proceed and ordered a partial remand. *In re Murphy*, No. 12-7055, at 2 (10th Cir. Nov. 1, 2012) (unpublished order).

[16] The district court granted Mr. Murphy three COAs and we granted five more. The district court granted COAs for Mr. Murphy's arguments regarding: (1) ineffective assistance of counsel, (2) the "heinous, atrocious, or cruel" aggravating circumstance, and (3) the trial court's failure to define "life without parole" for the jury. In June 2015, we ordered Mr. Murphy to file a motion for additional COAs across both appeals. We granted COAs for his claims regarding: (1) victim-impact statements, (2) Oklahoma's

Continued . . .

As to one of the issues—whether Oklahoma or the federal government had jurisdiction over the murder case—we granted the motion of the Muscogee (Creek) Nation and the Seminole Nation of Oklahoma to file a joint amici brief.[17] We likewise permitted the United Keetoowah Band of Cherokee Indians in Oklahoma to file an amicus brief. The Tribes also participated at oral argument.

II. **LEGAL BACKGROUND**

We conclude the crime occurred on the Creek Reservation and therefore the Oklahoma courts lacked jurisdiction. This section addresses the law applicable to the jurisdictional issue. We begin with (A) our standard of review and then address (B) the substantive law of Indian country jurisdiction.

A. ***Standard of Review***

The parties disagree over the standard of review that should apply to Mr. Murphy's jurisdictional claim. The State contends AEDPA's deferential standard should apply. Mr. Murphy disagrees and argues we should review his claim de novo. We begin by discussing this disagreement, but we choose not to resolve it because Mr. Murphy

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jurisdiction, (3) the district court's refusal to stay and abate proceedings on his first federal habeas application, (4) Oklahoma's procedural handling of his *Atkins* claim, and (5) cumulative error. *Murphy v. Warrior*, Nos. 07-7068 & 15-7041, at 1-2 (10th Cir. Jan. 6, 2016) (unpublished order). All eight issues are properly before us in this appeal, but our resolution of the jurisdictional claim obviates the need to address the other seven issues.

[17] Because this case concerns the Creek Reservation, we refer to the Tribes' joint brief with the shorthand "Creek Nation Br."

prevails even under AEDPA review. Because we assume the AEDPA standard applies, we then go on to describe it.

1. **The Parties' Dispute**

As we discuss in greater detail below, AEDPA generally requires federal habeas courts to defer to state court decisions. Mr. Murphy argues AEDPA does not apply when, as here, a state court denies a defendant's challenge to the state court's subject matter jurisdiction. AEDPA deference, he maintains, "presupposes" the state court had jurisdiction to decide a given claim in the first place. Aplt. Br. at 26. Because the question of Indian country jurisdiction implicates tribal and federal sovereignty interests, he also contends that federal courts, unconstrained by AEDPA, must make the final determination over the jurisdictional issue. And he argues that applying AEDPA to jurisdictional claims would pose separation-of-powers and other constitutional problems.

The State responds that nothing in AEDPA says subject matter jurisdiction claims should be reviewed de novo. It notes Mr. Murphy has failed to cite a case in support of his view that AEDPA does not apply to jurisdictional questions. It argues Mr. Murphy has waived any argument against AEDPA's application because he supported the district court's application of AEDPA below. The State also disputes his constitutional arguments.

We need not decide whether this issue is waivable, whether Mr. Murphy has waived it here, or even whether AEDPA is the appropriate standard. We choose to assume without deciding that AEDPA applies.

We took this approach in *Magnan v. Trammell*, 719 F.3d 1159 (10th Cir. 2013). Both sides agree *Magnan* left open the question of whether AEDPA applies to Indian country jurisdictional claims. *Magnan* concerned an Indian defendant whom an Oklahoma state court had sentenced to death. *Id.* at 1160-61. The defendant challenged the state court's jurisdiction. *Id.* at 1163. We assumed without deciding that AEDPA applied and concluded that, even under AEDPA's deferential standard, the OCCA had erred in concluding Oklahoma had jurisdiction over the case. *Id.* at 1160-61, 1164.[18] We held the crime occurred in Indian country, making jurisdiction exclusively federal. We ordered Mr. Magnan released from state custody without resolving the "difficult question" of whether AEDPA constrains federal court review of a state court's jurisdictional ruling regarding Indian country. *Id.* at 1164, 1176-77.[19] As in *Magnan*, we can assume without deciding that AEDPA applies because Mr. Murphy is entitled to relief even under that formidable standard of review.

2. **The AEDPA Standard**

We first discuss AEDPA's general framework and then focus on the statute's "contrary to" clause because that provision guides our analysis.

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[18] *See also Yellowbear v. Att'y Gen. of Wyo.*, 380 F. App'x 740, 743 (10th Cir. 2010) (unpublished) (leaving open the question of whether AEDPA applies and concluding on federal habeas review of state murder case that Wyoming Supreme Court's ruling on Indian reservation issue in favor of state jurisdiction should be affirmed regardless of whether de novo or AEDPA standard applied).

[19] Mr. Magnan was later convicted in federal court of three counts of murder in Indian country. We affirmed his convictions. *See United States v. Magnan*, __ F.3d __, No. 16-7043, 2017 WL 3082157, at *1, *4 (10th Cir. July 20, 2017).

a. *Overview*

"AEDPA erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow*, 134 S. Ct. 10, 16 (2013). When a state court adjudicates a claim on the merits, AEDPA prohibits federal courts from granting habeas relief unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2). "If this standard is difficult to meet, that is because it was meant to be." *Harrington v. Richter*, 562 U.S. 86, 102 (2011).[20]

Section 2254(d) provides three ways to overcome AEDPA deference. Two appear in § 2254(d)(1), which provides that a state prisoner can qualify for habeas relief by showing a state court decision was (1) "contrary to" or (2) "involved an unreasonable application of" federal law that was clearly established by the Supreme Court. 28 U.S.C. § 2254(d)(1); *see Bell v. Cone*, 535 U.S. 685, 694 (2002) (explaining the "contrary to" and "unreasonable application" clauses each carry "independent meaning"). The third way, in § 2254(d)(2), requires a state prisoner to show that a state court decision was

[20] AEDPA concerns federal court deference to the decisions of state courts. Our review of the federal district court's application of AEDPA is de novo. *See Frost v. Pryor*, 749 F.3d 1212, 1223 (10th Cir. 2014) ("[W]e review the district court's legal analysis of the state court decision de novo and its factual findings, if any, for clear error." (quotations omitted)).

based on an unreasonable factual determination. *See* 28 U.S.C. § 2254(d)(2). Thus, "[e]ach of AEDPA's three prongs—contrary to clearly established federal law, unreasonable application of clearly established federal law, and unreasonable determination of the facts—presents an independent inquiry." *Budder v. Addison*, 851 F.3d 1047, 1051 (10th Cir. 2017).

Mr. Murphy makes arguments based on all three, but because we need apply only § 2254(d)(1)'s "contrary to" provision to resolve this case, we restrict our discussion to that clause.

b. *The "contrary to" clause*

When a state court adjudicates a prisoner's federal claim on the merits, review under § 2254(d)(1)'s "contrary to" clause proceeds in three steps.

First, we must decide whether there is clearly established federal law that applies to the claim. *See House v. Hatch*, 527 F.3d 1010, 1015 (10th Cir. 2008) ("Whether the law is clearly established is *the* threshold question under § 2254(d)(1)."). In discerning what law is "clearly established," we must look only to the decisions of the Supreme Court, *see Parker v. Matthews*, 567 U.S. 37, 48-49 (2012) (per curiam) (explaining circuit precedent "cannot form the basis for habeas relief under AEDPA"), and we must "measure state-court decisions against [the Supreme] Court's precedents as of the time the state court renders its decision,"

Greene v. Fisher, 565 U.S. 34, 38 (2011) (emphasis and quotations omitted).[21] Within this set of cases, "'clearly established Federal law' for purposes of § 2254(d)(1) includes only the holdings, as opposed to the dicta, of [the Supreme] Court's decisions." *White v. Woodall*, 134 S. Ct. 1697, 1702 (2014) (brackets and quotations omitted).

Second, if we can identify clearly established law, we then must assess whether the state court's decision was "contrary to" that law. *See* 28 U.S.C. § 2254(d)(1); *see also House*, 527 F.3d at 1018. "The word 'contrary' is commonly understood to mean 'diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Williams v. Taylor*, 529 U.S. 362, 405 (2000) (controlling opinion of O'Connor, J.) (quoting Webster's Third New International Dictionary 495 (1976)). A state court decision violates the "contrary to" clause if it "applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases." *Id.* If the state court identifies and applies "the correct legal rule," its decision will not be "contrary to" federal law, but the state court's application of the correct rule can still be evaluated under § 2254(d)(1)'s "unreasonable application" clause. *Id.* at 406.

Third, if the state court rendered a decision that was "contrary to" clearly established Supreme Court precedent by applying the wrong legal test, we do not necessarily grant relief; rather, we review the claim applying the correct law. Put

[21] Similarly, "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

differently, "it is . . . a necessary prerequisite to federal habeas relief that a prisoner satisfy the AEDPA standard of review," but habeas relief does not "automatically issue if a prisoner satisfies the AEDPA standard." *Horn v. Banks*, 536 U.S. 266, 272 (2002). By showing the state court decision was "contrary to" clearly established federal law, the prisoner surmounts AEDPA, and the federal habeas court "must then resolve the claim without the deference AEDPA otherwise requires." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007); *see also Williams*, 529 U.S. at 406 (explaining that if "the state-court decision falls within" the "contrary to" clause, "a federal court will be unconstrained by § 2254(d)(1)"); *Milton v. Miller*, 744 F.3d 660, 670-71 (10th Cir. 2014) (concluding OCCA's decision was "contrary to" clearly established federal standard and reviewing claim de novo).

As previously mentioned, we choose to assume that AEDPA supplies our standard of review and now turn to the substantive law governing Indian country jurisdiction.

B. ***Indian Country Jurisdiction***

Understanding the Indian country jurisdiction issue in this case requires background knowledge about (1) reservations, (2) the Major Crimes Act, (3) the meaning of "Indian country," and (4) how a reservation can be disestablished or diminished. We address these topics below.

1. **Reservations**

The federal government began creating Indian reservations during the nineteenth century. *See* Felix S. Cohen's Handbook of Federal Indian Law 60 (Nell Jessup Newton ed., 2012) [hereinafter "Cohen"]. "During the 1850s, the modern

meaning of Indian reservation emerged, referring to land set aside under federal protection for the residence or use of tribal Indians, regardless of origin." *Id.* at 190-91. "[T]he term ['Indian reservation'] has come to describe federally-protected Indian tribal lands, meaning those lands which Congress has set apart for tribal and federal jurisdiction." *Indian Country, U.S.A.*, 829 F.2d at 973 (citation and quotations omitted). As we explain further below, the term "Indian country" includes not only reservations but other lands as well.

2. **The Major Crimes Act**

The Major Crimes Act is the jurisdictional statute at the heart of this case. It applies to enumerated crimes committed by Indians in "Indian country." When the Major Crimes Act applies, jurisdiction is exclusively federal. *See Negonsott v. Samuels*, 507 U.S. 99, 103 (1993) ("[F]ederal jurisdiction over the offenses covered by the Indian Major Crimes Act is exclusive of state jurisdiction." (quotations omitted)); *United States v. Sands*, 968 F.2d 1058, 1062 (10th Cir. 1992) ("The State of Oklahoma does not have jurisdiction over a criminal offense committed by one Creek Indian against another in Indian country."); *Cravatt v. State*, 825 P.2d 277, 279 (Okla. Crim. App. 1992) ("[Q]uite simply the State of Oklahoma does not have jurisdiction over crimes committed by or against an Indian in Indian Country." (quotations omitted)). "The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history." *Rice v. Olson*, 324 U.S. 786, 789 (1945) (citing *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832)).

The current version of the Major Crimes Act provides in relevant part:

> Any Indian who commits against the person or property of another Indian or other person any of the following offenses, namely, murder . . . within the Indian country, shall be subject to the same law and penalties as all other persons committing any of the above offenses, within the exclusive jurisdiction of the United States.

18 U.S.C. § 1153(a). If the Major Crimes Act applies to an Indian defendant, he or she "shall be tried in the same courts and in the same manner as are all other persons committing such offense within the exclusive jurisdiction of the United States." 18 U.S.C. § 3242.

The parties agree that Mr. Murphy and Mr. Jacobs, both members of the Creek Nation, qualify as Indians for purposes of the Major Crimes Act. *See* 124 P.3d at 1200; *see also* Aplt. Br. at 20; Aplee. Br. at 11.[22] Murder is among the Act's enumerated offenses. *See* 18 U.S.C. § 1153(a). The dispute centers on whether the crime occurred in Indian country, in particular on the Creek Reservation. Before we discuss the meaning of Indian country, we provide the following history of the Major Crimes Act because it aids our analysis.

In *Ex parte Crow Dog*, 109 U.S. 556 (1883), the Supreme Court held that federal and territorial courts lacked jurisdiction to try an Indian for the murder of another Indian committed in Indian country. *Id.* at 572. In response, Congress passed the Major Crimes Act in 1885. *See* Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385; *Keeble v. United*

[22] Whether the Major Crimes Act applies does not depend on whether the victim is an Indian. *See* 18 U.S.C. § 1153(a) (reaching crimes against an Indian "or other person").

States, 412 U.S. 205, 209-10 (1973) (discussing *Ex parte Crow Dog* and legislative response). As originally enacted, the Major Crimes Act provided:

> [A]ll Indians, committing against the person or property of another Indian or other person any of the following crimes, namely, murder . . . within any Territory of the United States, and either within or without an Indian reservation, shall be subject therefor to the laws of such Territory relating to said crimes . . . ; and all such Indians committing any of the above crimes against the person or property of another Indian or other person within the boundaries of any State of the United States, and within the limits of any Indian reservation, shall be subject to the same laws, tried in the same courts and in the same manner, and subject to the same penalties as are all other persons committing any of the above crimes within the exclusive jurisdiction of the United States.

§ 9, 23 Stat. at 385. Thus, unlike the current law, which applies in "Indian country," the original Act applied to crimes committed in federal territories and "within the boundaries of any State of the United States, and within the limits of any Indian *reservation*." *Id.* (emphasis added); *see also United States v. Kagama*, 118 U.S. 375, 377-78, 383-85 (1886) (discussing original Act and upholding its constitutionality).

In cases decided in the late nineteenth and early twentieth centuries, the Supreme Court explained that the Major Crimes Act applied to crimes committed within the boundaries of Indian reservations regardless of the ownership of the particular land on which the crimes were committed. *See United States v. Celestine*, 215 U.S. 278, 284-87 (1909); *United States v. Thomas*, 151 U.S. 577, 585-86 (1894). The Court explained in *Celestine* that reservation status depends on the boundaries Congress draws, not on who owns the land inside the reservation's boundaries: "[W]hen Congress has once established a reservation, all tracts included within it remain a part of the reservation until separated therefrom by Congress." 215 U.S. at

285. This understanding of reservations has continued. *See Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." (citing *Celestine*, 215 U.S. at 285)).

3. **Indian Country**

In 1948, Congress amended the Major Crimes Act and codified the definition of "Indian country." *See* Act of June 25, 1948, ch. 645, 62 Stat. 683, 757; *see also Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 528-30 (1998) (discussing term's case-law origins); Cohen at 189-90 (discussing codification). Within the definition, Congress included the boundaries-based concept of reservations that had developed in the case law under the Major Crimes Act.[23] Under 18 U.S.C. § 1151, "Indian country" means:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation,
>
> (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and
>
> (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

[23] Before the 1948 codification, Congress in 1932 had also provided that the Major Crimes Act would apply to enumerated crimes committed by Indians "on and within any Indian reservation under the jurisdiction of the United States Government, including rights of way running through the reservation." Act of June 28, 1932, 47 Stat. 336, 337.

18 U.S.C. § 1151 (paragraph breaks added).[24] If an area qualifies under any of these definitions, it is Indian country. *See Okla. Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993) ("Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States."); *see also Indian Country, U.S.A.*, 829 F.2d at 973 ("A formal designation of Indian lands as a 'reservation' is not required for them to have Indian country status."). *Id.*

At the same time Congress enacted this definition of Indian country, it also amended the Major Crimes Act so that it would apply in Indian country as defined in the statute. *See* 62 Stat. at 758. Thus, the Major Crimes Act now applies in all of Indian country, *see* 18 U.S.C. § 1153(a), not only reservation land.

Within § 1151's definition of Indian country, the § 1151(a) reservation clause concerns us here. Congress provided that "Indian country" includes "*all land within the limits of any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a) (emphasis added). Thus, land within the boundaries of an Indian reservation is in "Indian country."

[24] "Indian country" carries a different meaning for certain laws relating to intoxicants. *See* 18 U.S.C. §§ 1154, 1156; *see also* 18 U.S.C. § 1151 (defining "Indian country" "[e]xcept as otherwise provided in sections 1154 and 1156 of this title"). These exceptions are not relevant here.

The Supreme Court confirmed this understanding in *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351 (1962). In that case, an Indian sought federal habeas relief after being convicted in Washington state court of burglary, one of the Major Crimes Act's enumerated offenses. *See* 18 U.S.C. § 1153(a); *see also Seymour*, 368 U.S. at 352 n.2. He argued the United States had exclusive jurisdiction because the crime occurred within an Indian reservation and therefore within Indian country. *See* 368 U.S. at 352-54. The State of Washington argued that even though the crime occurred on land within the reservation's borders, the particular parcel was owned by a non-Indian. *See id.* at 357. Ruling for the Indian petitioner, the Supreme Court said Congress's definition of Indian country in § 1151(a) "squarely put to rest" this argument. *Id.* "Since the burglary with which [the defendant] was charged occurred on property plainly located within the limits of [the] reservation, the courts of Washington had no jurisdiction to try him for that offense." *Id.* at 359. Under § 1151(a), therefore, all lands within the boundaries of a reservation have Indian country status.

4. **Reservation Disestablishment and Diminishment**

Only Congress can disestablish or diminish a reservation.[25] In *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903), the Supreme Court said Congress has the power to

[25] The terms "disestablished" and "diminished" "have at times been used interchangeably," but "disestablishment generally refers to the relatively rare elimination of a reservation while diminishment commonly refers to the reduction in size of a reservation." *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1017 (8th Cir. 1999). Here, the State argues Congress disestablished the Creek Reservation.

unilaterally abrogate treaties made with Indian tribes. *Id.* at 566. "Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). This includes the power to eliminate or reduce a reservation against a tribe's wishes and without its consent. *See Solem*, 465 U.S. at 470 n.11 (explaining the *Lone Wolf* Court "decided that Congress could diminish reservations unilaterally"). Because "only Congress can alter the terms of an Indian treaty by diminishing a reservation," the Supreme Court has said the "touchstone" of whether a reservation's boundaries have been altered is congressional purpose. *Yankton Sioux Tribe*, 522 U.S. at 343; *see also Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 588 n.4 (1977) ("The focus of our inquiry is congressional intent.").

Having recognized Congress's power to disestablish and diminish Indian reservations, the Supreme Court also has developed a framework to determine whether Congress has exercised its power with respect to a given reservation. We next discuss (a) the presumption against disestablishment and diminishment, (b) Congress's pursuit of a policy called allotment and its relationship to reservation borders, and (c) the Supreme Court's three-part *Solem* test for determining whether Congress has altered a reservation's boundaries.

a. *Presumption against disestablishment and diminishment*

Courts do not lightly infer that Congress has exercised its power to disestablish or diminish a reservation. *See DeCoteau v. Dist. Cty. Court for the Tenth Judicial Dist.*, 420 U.S. 425, 444 (1975) ("[The Supreme] Court does not lightly conclude that

an Indian reservation has been terminated."). Indeed, the Supreme Court has said courts must approach these issues with a "presumption" that Congress did not intend to disestablish or diminish a reservation. *Solem*, 465 U.S. at 481; *see also Absentee Shawnee Tribe v. Kansas*, 862 F.2d 1415, 1417 (10th Cir. 1988) ("With regard to acts of Congress subsequent to the establishment of the reservation, the courts adopt an interpretational policy against diminishing an Indian reservation.").[26] Congress can do so, but its intent "must be 'clear and plain.'" *Yankton Sioux Tribe*, 522 U.S. at 343 (quoting *United States v. Dion*, 476 U.S. 734, 738-39 (1986)); *see also Solem*, 465 U.S. at 470 (explaining Congress must "clearly evince an intent to change boundaries before diminishment will be found" (quotations omitted)); *id.* at 476 (discussing a statute's lack of "explicit expression of congressional intent to diminish" and finding reservation preserved); *DeCoteau*, 420 U.S. at 444 ("[The Supreme Court] requires that the congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history." (ellipsis in original) (quotations omitted)).

[26] The presumption against reservation disestablishment and diminishment accords with the general principle that an intent "to abrogate or modify a treaty is not to be lightly imputed to the Congress." *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 413 (1968) (quotations omitted); *see also South Dakota v. Bourland*, 508 U.S. 679, 687 (1993).

b. *The policy of allotment*

The Supreme Court's test, discussed below, for determining whether Congress intended to disestablish or diminish a reservation developed after Congress pursued a policy known as allotment.

Following decades of setting aside "large sections of the western States and Territories . . . for Indian reservations," Congress in the late nineteenth century adopted "the view that the Indians tribes should abandon their nomadic lives on the communal reservations and settle into an agrarian economy on privately-owned parcels of land." *Solem*, 465 U.S. at 466.[27] This policy involved Congress dividing, or "allotting," communal Indian lands into individualized parcels for private ownership by tribal members. Not incidentally, the policy also "open[ed] up unallotted lands for non-Indian settlement," allowing these "surplus" lands to be sold to non-Indians. *Id.* at 467. Laws designed "to force Indians onto individual allotments carved out of reservations and to open up unallotted lands for non-Indian settlement" are often referred to as "surplus land acts." *Id.*

Allotment on its own does not disestablish or diminish a reservation. *See Mattz v. Arnett*, 412 U.S. 481, 497 (1973) (explaining allotment can be "completely consistent with continued reservation status"). But Congress, in passing surplus land

[27] Or, as the Supreme Court described the policy at the time, "Of late years a new policy has found expression in the legislation of Congress,[] a policy which looks to the breaking up of tribal relations, the establishing of the separate Indians in individual homes . . . ." *In re Heff*, 197 U.S. 488, 499 (1905), *overruled in part by United States v. Nice*, 241 U.S. 591, 601 (1916).

acts, has altered the boundaries of some reservations. *See Solem*, 465 U.S. at 469 ("[S]ome surplus land acts diminished reservations, and other surplus land acts did not." (citations omitted)).

Congress pursued the allotment policy on a national scale in the 1887 General Allotment Act. *See* Act of Feb. 8, 1887, ch. 119, 24 Stat. 388.[28] That law, however, did not affect all Indian tribes and reservations. The Creek Nation was not included in the General Allotment Act. *See* § 8, 24 Stat. at 391. By the early twentieth century, "Congress was dealing with the surplus land question on a reservation-by-reservation basis, with each surplus land act employing its own statutory language, the product of a unique set of tribal negotiation and legislative compromise." *Solem*, 465 U.S. at 467.

During the allotment era, Congress "anticipated the imminent demise" of reservations. *Id.* at 468; *see also id.* ("[M]embers of Congress voting on the surplus land acts believed to a man that within a short time—within a generation at most—the Indian tribes would enter traditional American society and the reservation system would cease to exist."); *see also Yankton Sioux Tribe*, 522 U.S. at 343 (explaining Congress "assumed that the reservation system would fade over time").

[28] The policy of the General Allotment Act, the Supreme Court has said, "was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished." *Mattz*, 412 U.S. at 496.

The Supreme Court has said this general hostility to reservations and Indian communal life does not establish that a particular reservation was disestablished:

> Although the Congresses that passed the surplus land acts anticipated the imminent demise of the reservation and, in fact, passed the acts partially to facilitate the process, we have never been willing to extrapolate from this expectation a specific congressional purpose of diminishing reservations with the passage of every surplus land act. Rather, it is settled law that some surplus land acts diminished reservations, and other surplus land acts did not.

Solem, 465 U.S. at 468-69 (citations omitted); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1395 (10th Cir. 1990) (explaining congressional belief "that all reservations would be temporary is irrelevant in determining whether the boundaries of a *specific* reservation were being diminished by the language of a given statute"). Whether there was "a specific congressional purpose" to disestablish or diminish a particular reservation "depends on the language of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469. To distinguish congressional acts that changed a reservation's borders from those "that simply offered non-Indians the opportunity to purchase land within established reservation boundaries," the Supreme Court has developed a three-part framework. *Id.* at 470.

c. Solem *factors*

In *Solem v. Bartlett*, a member of the Cheyenne River Sioux Tribe sought habeas relief after a state court in South Dakota convicted him of attempted rape. *Id.* at 465; *see also id.* at 465 n.2 (explaining offense fell within Major Crimes Act). The defendant argued the state court lacked jurisdiction because the crime occurred on the

reservation. *Id.* The Supreme Court developed and applied its three-part framework to assess whether the reservation had been diminished. *See id.* at 470-80. It concluded the reservation had not been diminished and granted habeas relief because the federal government had exclusive jurisdiction. *Id.* at 481. *Solem*'s three factors are as follows:

First, *Solem* instructs courts to examine the text of the statute purportedly disestablishing or diminishing the reservation. Statutory language is "[t]he most probative evidence of congressional intent." *Id.* at 470. "Explicit reference to cession or other language evidencing the present and total surrender of all tribal interests strongly suggests that Congress meant to divest from the reservation all unallotted opened lands." *Id.* When such language is combined with language committing Congress to compensate the tribe for its land with a fixed sum, Congress's intent to diminish a reservation is especially clear. *Id.* at 470-71. No "particular form of words," however, is necessary to diminish a reservation. *Hagen v. Utah*, 510 U.S. 399, 411 (1994).

Second, *Solem* requires courts to consider "events surrounding the passage" of the statute. 465 U.S. at 471. Even when the statutory language "would otherwise suggest reservation boundaries remained unchanged," the Court has been willing to find that Congress altered the borders if evidence at step two "unequivocally reveal[s] a widely-held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation." *Id.* Step-two contemporary

historical evidence includes "the manner in which the transaction was negotiated with the tribes . . . and the tenor of legislative reports presented to Congress." *Id.*

Third, *Solem* considers, though "[t]o a lesser extent," "events that occurred after the passage" of the relevant statute. *Id.* This evidence can include "Congress's own treatment of the affected areas" as well as "the manner in which the Bureau of Indian Affairs and local judicial authorities dealt with unallotted open lands." *Id.* Later demographic history—evidence of "who actually moved onto opened reservation lands"—also offers a "clue as to what Congress expected would happen once land on a particular reservation was opened to non-Indian settlers." *Id.* at 471-72.

In conducting this three-part inquiry, "[t]here are . . . limits to how far" courts can "go to decipher Congress's intention in any particular surplus land act." *Id.* at 472. "Throughout the inquiry," courts must "resolve any ambiguities in favor of the Indians" and remember that disestablishment and diminishment are not to be lightly found. *Hagen*, 510 U.S. at 411. The "rule by which legal ambiguities are resolved to the benefit of the Indians" is applied to its "broadest possible scope" in disestablishment and diminishment cases. *DeCoteau*, 420 U.S. at 447. Absent "substantial and compelling evidence" courts are "bound by . . . traditional solicitude for the Indian tribes" to conclude "that the old reservation boundaries survived." *Solem*, 465 U.S. at 472.

* * * *

Having addressed AEDPA, the substantive law of Indian country jurisdiction, and reservation disestablishment and diminishment, we turn now to our analysis.

III. **DISCUSSION**

Our analysis addresses three issues:

(A) Whether there was clearly established federal law as determined by the Supreme Court when the OCCA addressed Mr. Murphy's jurisdictional claim. We conclude the *Solem* framework constituted clearly established law.

(B) Whether the OCCA rendered a decision contrary to this clearly established law when it resolved Mr. Murphy's jurisdictional claim. We conclude that it did because the OCCA failed to apply the *Solem* framework and took an approach incompatible with it.

(C) Whether the federal government has exclusive jurisdiction over Mr. Murphy's case. We conclude that it does because, under the *Solem* framework, Congress has not disestablished the Creek Reservation.

Because the crime occurred in Indian country, Oklahoma lacked jurisdiction. We therefore reverse the district court's denial of habeas relief and remand with instructions to grant Mr. Murphy's application for a writ of habeas corpus under 28 U.S.C. § 2254.

A. ***Clearly Established Federal Law***

Our first inquiry under § 2254(d)(1) is whether clearly established federal law governed Mr. Murphy's claim. *See House*, 527 F.3d at 1015. The OCCA issued its jurisdictional decision on December 7, 2005. *See Murphy*, 124 P.3d 1198. Our survey of clearly established federal law is therefore limited to decisions of the Supreme Court

before that date. *See* 28 U.S.C. § 2254(d)(1); *Greene*, 565 U.S. at 38. We conclude the three-part *Solem* framework supplied the OCCA with clearly established federal law to decide Mr. Murphy's claim.

1. ***Solem*—Clearly Established Law in 2005**

The Supreme Court decided *Solem* in 1984, more than two decades before the OCCA decided Mr. Murphy's case. Even in 1984, the *Solem* Court recognized the three-part framework it applied was not a new development in the law. The *Solem* Court explained its precedent had already "established a fairly clean analytical structure" for deciding whether Congress altered a reservation's borders. 465 U.S. at 470. The Court's pre-*Solem* decisions relied on the factors discussed in *Solem* to assess reservation disestablishment and diminishment. *See Rosebud Sioux Tribe*, 430 U.S. at 587 (reservation diminished); *DeCoteau*, 420 U.S. at 427-28 (reservation disestablished); *Mattz*, 412 U.S. at 505 (reservation not disestablished); *Seymour*, 368 U.S. at 359 (reservation not disestablished); *see also Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1476 n.30 (10th Cir. 1987) ("Although the Tribe refers to *Solem* as 'significant new authority,' *Solem* is rather one of a line of cases construing the dimensions of 'Indian country.'" (citation omitted)).

Between 1984 when *Solem* was decided and 2005 when the OCCA issued its decision in Mr. Murphy's case, the Supreme Court did nothing to call *Solem* into doubt. Rather, it reaffirmed *Solem*'s three-part framework and applied it to other reservations in the 1990s. *See Yankton Sioux Tribe*, 522 U.S. at 333, 344 (discussing three factors and concluding reservation was diminished); *Hagen*, 510 U.S. at 410-11, 421 (concluding

Congress diminished reservation and explaining *Solem* directs courts "to look to three factors").

In the years before the OCCA's decision, federal appeals courts, including this court, recognized *Solem* provided the governing framework. *See, e.g.*, *Shawnee Tribe v. United States*, 423 F.3d 1204, 1221 (10th Cir. 2005) (discussing *Solem* and explaining that "we look to three factors to determine whether a reservation's boundaries have been altered"); *United States v. Webb*, 219 F.3d 1127, 1131 (9th Cir. 2000) (identifying *Solem* as "well established Supreme Court precedent"); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1022-23 (8th Cir. 1999) (explaining *Solem* provides "the standard rules of interpretation"); *Yazzie*, 909 F.2d at 1395 ("The current analytic structure has been summarized in *Solem*."). So did state high courts. *See, e.g.*, *State v. Greger*, 559 N.W.2d 854, 860-61 (S.D. 1997) (explaining *Hagen* retained *Solem*'s "traditional approach to diminishment questions"); *State v. Davids*, 534 N.W.2d 70, 72 (Wis. 1995) (noting *Solem* Court "identif[ied] the governing principles of diminishment"); *State v. Perank*, 858 P.2d 927, 935-36 (Utah 1992) (reciting *Solem* framework as governing law).

The Supreme Court has recognized that a legal framework for evaluating a given type of claim can constitute clearly established law under § 2254(d)(1). For example, the Court's decision in *Strickland v. Washington*, 466 U.S. 668 (1984), announced a two-part test for evaluating claims of ineffective assistance of counsel, *see id.* at 687 (discussing performance and prejudice), and the Court has since said this framework constitutes clearly established law, *Williams*, 529 U.S. at 391 (controlling opinion of Stevens, J.) ("It is past question that the rule set forth in

Strickland qualifies as 'clearly established Federal law, as determined by the Supreme Court of the United States.'" (quoting 28 U.S.C. § 2254(d)(1))). Although claims of lawyer ineffectiveness are each unique and require fact-intensive analysis, *Strickland*'s framework still applies, and the variety of fact patterns "obviates neither the clarity of the rule nor the extent to which the rule must be seen as 'established' by [the Supreme] Court." *Id.*

We conclude *Solem*'s three-part framework for evaluating whether Congress has disestablished or diminished an Indian reservation was clearly established when the OCCA rendered its decision. The State's arguments to the contrary miss the mark.

2. **The State's Arguments**

The State acknowledges the Supreme Court has applied the *Solem* framework to "surplus land acts, which provided for the sale of large areas of land for white settlement," but it argues that, with respect to the Creek Nation, Congress allotted almost all of the Reservation to tribal members. Aplee. Br. at 46-47. This point has nothing to do with whether the *Solem* framework applies, though it does suggest Congress did not intend to disestablish the Creek Reservation. The State offers no explanation for why the proportion of land allotted to tribal members relative to the land opened to non-Indian settlement makes a difference to whether *Solem* applies. In making its disestablishment case, the State relies on statutes that allotted the Creek Reservation, and we discuss these laws below. Those statutes, like the statute in *Solem*, "force[d] Indians onto individual allotments carved out of [a] reservation[] and . . . open[ed] up unallotted lands for non-Indian settlement." *Solem*, 465 U.S. at 467. Whether Congress disestablished the Creek

Reservation through those statutes is the kind of question the *Solem* framework was built to answer.

The State also argues that Congress, in addition to allotting Creek lands, "took a number of steps toward[] the complete abolition of the Creek Nation as a political entity." Aplee. Br. at 46; *see also id.* at 47. Below, we consider the State's arguments about political dissolution as they relate to reservation disestablishment. But the State offers no explanation or legal authority for why legislation dealing with a tribe's political status would make the *Solem* framework anything less than clear when it comes to reservation disestablishment—the issue before us.

Despite its arguments that there is no clearly established law, the State's brief recognizes *Solem* is controlling. It defends the substantive correctness of the OCCA's decision by reference to *Solem*'s three-part test. Nowhere does the State argue that some other legal framework applies.

* * * *

Because clearly established Supreme Court law governs Mr. Murphy's Indian country jurisdictional claim, we proceed to the next step of the § 2254(d)(1) inquiry: whether the OCCA rendered a decision that was "contrary to" the *Solem* framework.

B. ***The OCCA Decision—Contrary to Clearly Established Federal Law***

Before we address whether the OCCA's decision was "contrary to" *Solem*, we consider—and reject—Mr. Murphy's threshold argument that the OCCA failed to adjudicate his reservation claim on the merits. We then consider whether the OCCA's

merits decision was "contrary to" the clearly established *Solem* framework discussed above. We conclude it was.

1. **The OCCA's Merits Decision**

The following is the entirety of the OCCA's discussion of the jurisdictional issue with respect to the Reservation:

> The remaining issue, under proposition one, is whether or not the land in question is part of a Creek Nation reservation that has never been disestablished or is part of a dependent Indian community.[29] Unfortunately, the District Court decided, based upon the Assistant District Attorney's urging, that these questions were beyond the scope of the evidentiary hearing, even though we clearly asked the Court to determine if the tract in question was Indian country under 18 U.S.C. § 1151.
>
> Be that as it may, the error was alleviated when the District Court allowed Petitioner's[30] counsel to make an extended offer of proof regarding the testimony and evidence that would have been presented on these two questions had that opportunity been given. Accordingly, we find the error was harmless. Even if the evidence had been admitted, it is insufficient to convince us that the tract in question qualifies as a reservation or dependent Indian community.
>
> Petitioner's proffered expert, Monta Sharon Blackwell, stated by affidavit that "[t]here was never a formal Creek Nation 'reservation' but for practical purposes" certain treaty language was "tantamount to a reservation under Federal law." Thus, the "Creek Nation, historically and traditionally, is a

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[29] As already mentioned, Mr. Murphy pursued three theories for Indian country jurisdiction before the OCCA. This part of the OCCA's discussion addressing Mr. Murphy's reservation argument under § 1151(a) followed its rejection of his allotment theory under § 1151(c). We omit the OCCA's discussion of the "dependent Indian community" theory under § 1151(b) because that issue is not before us. And although Mr. Murphy again raises the allotment theory in this appeal, we do not reach that issue because we agree with him that the crime occurred within the Creek Reservation.

[30] The OCCA referred to Mr. Murphy as "Petitioner."

> confederacy of autonomous tribal towns, or Talwa, each with its own political organization and leadership."[31]
>
> Ms. Blackwell and Jeff Dell[32] both took the position that the historical boundaries of the Creek Nation remained intact even after the various Creek lands were subjected to the allotment process, but no case is cited for the position that the individual Creek allotments remain part of an overall Creek reservation that still exists today.[18]
>
> > 18 It seems redundant, however, to treat lands as both a reservation and an allotment. Section 1151 clearly makes a distinction between the two.
>
> The best authority on this point is *Indian Country, U.S.A., Inc. v. State of Oklahoma*, 829 F.2d at 975, which treats the Creek Nation lands as a "reservation" as of 1866.[19] However, the Tenth Circuit declined to answer the question of whether the exterior boundaries of the 1866 Creek Nation have been disestablished and expressly refused to express an opinion in that regard concerning allotted Creek lands. *See id.* at 975 n. 3, 980 n. 5.
>
> > 19 The case finds the term "reservation," for purposes of defining Indian country, "simply refers to those lands which

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[31] As part of his offer of his proof on the reservation issue, Mr. Murphy submitted an affidavit from Ms. Blackwell, an attorney with more than two decades of experience practicing Indian law with the U.S. Department of the Interior. *See* Blackwell Aff. ¶¶ 3-4, State Post-Conviction Record, Vol. 1 at 151. Ms. Blackwell stated the tract of land where the crime occurred "falls within the territorial boundaries of the Muscogee (Creek) Nation." *Id.* ¶ 13. As the OCCA pointed out, she stated "[t]here was never a formal Creek Nation 'reservation'" because the Creek Nation had "acquired the land at issue in this case through treaty with the United States." *Id.* ¶ 14. But there is no dispute that the Creek Nation had a reservation; the State agrees it was intact in 1900, *see* Aplee. Br. at 75 n.25. Rather, the dispute is whether Congress has disestablished the Creek Reservation. In Ms. Blackwell's opinion, "[t]he exterior territorial boundaries of the Creek Nation were not altered" by congressional acts around the turn of the twentieth century. Blackwell Aff. ¶ 21. She concluded "the Muscogee (Creek) Nation has not been disestablished" and that "regardless of title ownership as Indian or non-Indian, the [tract where the crime occurred] is Indian country within the meaning of Federal Law." *Id.* ¶ 22.

[32] Mr. Dell, "an Assistant Realty Officer for the Creek Nation, rendered a title opinion on behalf of the State." 124 P.3d at 1203.

> Congress intended to reserve for a tribe and over which Congress intended primary jurisdiction to rest in the federal and tribal governments." 829 F.2d at 973.
>
> If the federal courts remain undecided on this particular issue, we refuse to step in and make such a finding here.

Murphy, 124 P.3d at 1207-08 (paragraph numbers omitted).

Mr. Murphy, focusing mainly on the court's last sentence, argues the OCCA refused to adjudicate his reservation claim on the merits. The State maintains the OCCA decided the reservation issue on the merits because it considered Mr. Murphy's evidence, found it insufficient, and denied relief.

Whether the OCCA adjudicated the jurisdictional claim "on the merits" as that phrase is used in 28 U.S.C. § 2254(d) determines our standard of review. As discussed above, we have chosen to assume (without deciding) that AEDPA applies to jurisdictional claims of the type Mr. Murphy raises. But even when a type of claim can qualify for AEDPA review, federal courts do not apply AEDPA deference when the state court did not adjudicate the specific claim "on the merits." *See Cone v. Bell*, 556 U.S. 449, 472 (2009); *Stouffer v. Duckworth*, 825 F.3d 1167, 1179 (10th Cir. 2016) ("[I]f the state court did not decide the claim on the merits, the stringent principles of deference under 28 U.S.C. § 2254 are inapplicable." (quotations omitted)), *cert. denied*, 137 S. Ct. 1226 (2017). If the state court did not adjudicate the claim "on the merits," there is no decision to which the federal court can defer. *See Stouffer v. Trammell*, 738 F.3d 1205, 1213 (10th Cir. 2013) (explaining that, when AEDPA does not apply, "[w]e consider legal questions de novo and factual findings, if any, for clear error").

The Supreme Court has explained that a state court's decision is "on the merits" even when it denies the prisoner's claim "without an accompanying statement of reasons." *Richter*, 562 U.S. at 92. Indeed, "it may be *presumed* that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary." *Id.* at 99 (emphasis added); *see also Johnson v. Williams*, 133 S. Ct. 1088, 1091, 1094-96 (2013). Thus, outside of the "unusual circumstances" when the presumption of a merits adjudication is rebutted, *Johnson*, 133 S. Ct. at 1096, federal habeas relief is available to state prisoners only under the limited circumstances stated in § 2254(d).

Although the OCCA's opinion gives both sides something to draw on, we agree with the State that the court rendered a merits decision.[33] The OCCA remarked in conclusion that it "refuse[d] to step in," 124 P.3d at 1208, but Mr. Murphy's argument ignores the rest of the OCCA's discussion in which the court discussed his offer of proof on the reservation issue and said his argument was unpersuasive. We do not read the OCCA's final sentence as a refusal to decide the reservation question at all but rather as a refusal to decide it in Mr. Murphy's favor. Even if Mr. Murphy's reading is plausible, ambiguity is insufficient to overcome the presumption that the OCCA's adjudication was on the merits. *See Richter*, 562 U.S. at 92 (discussing presumption of merits adjudication). Thus, because the OCCA's adjudication of the reservation issue was on the merits, AEDPA applies and Mr. Murphy cannot receive habeas relief without

[33] Because we agree with the State, we need not address its alternative contention that Mr. Murphy waived his merits-determination argument.

showing the OCCA's decision meets the standard set out in § 2254(d). *See Lay v. Royal*, 860 F.3d 1307, 1317 (10th Cir. 2017) ("Because the OCCA addressed the merits . . . we may only grant habeas relief if we find that the OCCA's decision was contrary to . . . settled federal law . . . ." (citation omitted)). We turn to that question next.

2. **The OCCA's Decision Was Contrary to *Solem***

Mr. Murphy argues that, if the OCCA decided the reservation jurisdiction issue, its decision was "contrary to" clearly established Supreme Court authority. We agree.

a. *No citation to* Solem

Nowhere in its discussion of the reservation issue—nor anywhere else in its opinion—did the OCCA cite *Solem*, *Hagen*, *Yankton Sioux Tribe*, or any of the Supreme Court's other Indian reservation disestablishment precedent.[34] This failure to cite governing law, however, does not on its own mark the OCCA decision as "contrary to" that law. *See Mitchell v. Esparza*, 540 U.S. 12, 16 (2003) (per curiam) ("A state court's decision is not contrary to clearly established Federal law simply because the court did not cite [the Supreme Court's] opinions." (alterations and quotations omitted)). State courts can apply clearly established federal law without citing to it. *See Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Indeed, AEDPA "does not even require [state court] *awareness* of [Supreme Court] cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.*

[34] The OCCA included *Rosebud Sioux Tribe*, 430 U.S. 584, in one footnoted string citation, but it was in the context of the allotment issue, not the reservation question. *See* 124 P.3d at 1205 n.14.

Here, the OCCA did not merely fail to cite controlling Supreme Court authority, it failed to apply it, and in deviating from *Solem*, the OCCA's reasoning contradicted clearly established law.

b. *Failure to apply* Solem

Setting aside the absence of citations, the substance of the OCCA's analysis lacks even cursory engagement with any of the three *Solem* factors. The OCCA did not evaluate any statute to see if Congress had disestablished the Creek Reservation. It also did not evaluate the historical context of any laws. Nor did the OCCA evaluate later treatment of the area in question or demographic history. The OCCA's decision failed to apply the required legal standard to the facts.

What the OCCA did say in its analysis contradicted *Solem*. Instead of heeding *Solem*'s "presumption" that an Indian reservation continues to exist until Congress acts to disestablish or diminish it, *see* 465 U.S. at 481, the OCCA flipped the presumption by requiring evidence that the Creek Reservation had *not* been disestablished—that it "still exists today," 124 P.3d at 1207. In other words, the OCCA improperly required Mr. Murphy to show the Creek Reservation had *not* been disestablished instead of requiring the State to show that it had been. This "contradicts" governing law. *Williams*, 529 U.S. at 405 (controlling opinion of O'Connor, J.); *see id.* ("A state-court decision will certainly be contrary to our clearly established precedent if the state court applies a rule that contradicts the governing law set forth in our cases."); *see also Lafler v. Cooper*, 566 U.S. 156, 173 (2012) ("[T]he [State] Court of Appeals identified respondent's ineffective-assistance-of-counsel claim but failed to apply *Strickland* to assess it. . . . By

failing to apply *Strickland* to assess the ineffective-assistance-of-counsel claim respondent raised, the state court's adjudication was contrary to clearly established federal law."). The OCCA applied the wrong law.

Instead of applying the *Solem* factors, the OCCA looked for federal court decisions holding that the Reservation continues to exist. This yielded the OCCA's single citation to legal authority—our decision in *Indian Country, U.S.A.*, which was not a disestablishment case. *See* 829 F.2d at 975 ("In the present case, we need not decide whether the exterior boundaries of the 1866 Creek Nation have been disestablished."). The OCCA called *Indian Country, U.S.A.*, the "best authority" for the position that there is still a Creek Reservation. 124 P.3d at 1207. Indeed, we held there *is* still a Creek Reservation, but we had no occasion to determine whether the Reservation's 1866 boundaries remained intact. *See* 829 F.2d at 975 n.3, 976 (holding lands at issue "still retain their reservation status within the meaning of 18 U.S.C. § 1151(a)"); *id.* at 980 n.5 (setting aside boundary question).

The Supreme Court has occasionally faulted federal habeas courts for concluding state courts issued decisions that were "contrary to" federal law when the federal court failed to give the "benefit of the doubt" to the state court. *See, e.g.*, *Holland v. Jackson*, 542 U.S. 649, 655 (2004) (per curiam); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (per curiam). In those cases, state courts properly articulated the governing legal test in one part of their opinions but went on to misstate the standard or give the impression that what was actually applied deviated from binding federal law. *See Holland*, 542 U.S. at 654; *Woodford*, 537 U.S. at 22-24.

This is not one of those cases. The OCCA failed to articulate or apply the proper legal framework anywhere in its opinion, and its analysis is incompatible with the *Solem* framework. At oral argument, we questioned the State about whether the OCCA had applied *Solem*:

> THE COURT: Is there anything to indicate [the OCCA] applied [*Solem*]? Anything? Did they mention steps one, two, and three?
>
> THE STATE: They did not, Your Honor.
>
> THE COURT: Did [the OCCA] say anything that would fit in steps one, two, and three?
>
> THE STATE: They—No.

Oral Arg. at 46:00-46:13. The State argues the OCCA's decision was not contrary to *Solem*. But the OCCA applied the wrong law in adjudicating Mr. Murphy's reservation claim. Its adjudication was "contrary to" clearly established law.

c. *The State's arguments*

The State, repeating the OCCA's mistake in reversing the presumption against disestablishment, argues Mr. Murphy "failed to present evidence that Congress did *not* intend disestablishment." Aplee. Br. at 48 (emphasis added). But under *Solem*, that is not the test.

The State further argues that Mr. Murphy "bears the burden of establishing federal jurisdiction, and the burden under AEDPA." *Id.* Of course, the burden of showing federal jurisdiction—our jurisdiction in this proceeding—is on Mr. Murphy. He has carried that burden. Our jurisdiction is proper under 28 U.S.C. § 2253(a), (c)(1)(A), because he secured COAs for the issues on appeal. And his burden under AEDPA is to

show that the OCCA rendered a decision that was "contrary to" clearly established federal law. He has. For the reasons discussed above, the OCCA's analysis of the reservation issue ignored and contradicted *Solem*'s governing framework.

But as to the principal issue before us in this appeal, the burden of establishing jurisdiction in the murder prosecution rests with the State. As the party bringing the prosecution, the State has the burden to show that the court in which it wishes to litigate has jurisdiction over the case. *See Sweden v. State*, 172 P.2d 432, 435 (Okla. Crim. App. 1946) ("[T]he burden is upon the state to prove the guilt of [the] defendant beyond a reasonable doubt, and this includes the proving of venue and all other essentials necessary to show jurisdiction and sustain a judgment of conviction."). The issue here is whether the state court or the federal court in Oklahoma had jurisdiction. On that score, the presumption against disestablishment and diminishment aligns with the State's burden to show jurisdiction in its chosen forum—state court.

The State also argues that our deference to the OCCA should be "at its apex" when the clearly established law states a general standard. Aplee. Br. at 52. Although the State is correct that "the more general the rule at issue . . . the more leeway state courts have in reaching outcomes in case-by-case determinations," *Renico v. Lett*, 559 U.S. 766, 776 (2010) (brackets and quotations omitted), and although we further agree *Solem* supplies a general standard meant for application to various disestablishment and diminishment cases, these principles do not entitle the OCCA's decision to deference. The State's argument concerns § 2254(d)(1)'s "unreasonable application" clause, but that clause does not come into play here because, to benefit from the wide berth federal courts

give state courts in applying general standards, the state court must actually apply the standard. *See Eizember v. Trammell*, 803 F.3d 1129, 1140 (10th Cir. 2015) ("The Supreme Court has long recognized that a state court's identification of the correct governing legal standard and the reasonableness of its application of that standard to the facts are two distinct statutory inquiries."). The OCCA did not unreasonably apply *Solem*; it didn't apply it at all.

The State reminds us that our review under AEDPA is limited to the record before the OCCA. But we have no need to expand the record. The State acknowledges that the state-court evidentiary hearing determined Mr. Murphy's status as an Indian as well as the precise location of the crime. The OCCA relied on these facts, and we do not question them. Our analysis requires us only to compare the OCCA's adjudication of Mr. Murphy's claim with the Supreme Court's clearly established law. That comparison reveals the OCCA's decision is contrary to *Solem*.

Mr. Murphy put the issue of whether the Creek Reservation had been disestablished squarely before the OCCA, but the court decided the claim by ignoring and contradicting *Solem*. Its decision was thus "contrary to . . . clearly established Federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). Consequently, we must review his jurisdictional claim without AEDPA deference. *See Milton*, 744 F.3d at 670-71 (explaining that "satisfaction of the § 2254(d)(1) standard" does not entitle the prisoner to habeas relief but it does "effectively remove[] AEDPA's prohibition on the issuance of a writ"). We now apply the *Solem* framework to analyze Mr. Murphy's jurisdictional claim.

C. ***Exclusive Federal Jurisdiction***

Mr. Murphy has overcome AEDPA's barrier to habeas relief, and we must now decide his jurisdictional claim de novo.[35] In this section, we begin by (1) addressing additional legal authority. Although our evaluation of the OCCA's decision under AEDPA was limited to clearly established Supreme Court law decided before December 2005, our de novo analysis of Mr. Murphy's claim must account for Supreme Court and Tenth Circuit authority post-dating the OCCA's decision. *See Lafler*, 566 U.S. at 173 (explaining that, when "AEDPA does not present a bar to granting" relief because the state court "failed to apply" the correct legal test, the federal habeas court "can determine the principles necessary to grant relief"); *Williams*, 529 U.S. at 406 (explaining that when a state-court decision falls within the "contrary to" clause, "a federal court will be unconstrained by § 2254(d)(1)"); *see also Brown v. Uphoff*, 381 F.3d 1219, 1225 (10th Cir. 2004).[36] After addressing this recent legal authority, we (2) recap relevant history of

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[35] "[T]he Supreme Court has applied, without comment, a de novo standard of review in determining congressional intent regarding reservation boundary diminishment." *Wyoming v. EPA*, 849 F.3d 861, 869 (10th Cir. 2017) (brackets and quotations omitted).

[36] Independent of AEDPA, the Supreme Court's *Teague* doctrine, *Teague v. Lane*, 489 U.S. 288 (1989), imposes another limitation on habeas relief in certain circumstances. *See Brown*, 381 F.3d at 1225-26; *see also Horn*, 536 U.S. at 272 ("[T]he AEDPA and *Teague* inquiries are distinct."). *Teague* does not pose a barrier to Mr. Murphy.

For one thing, the State does not argue that *Teague* should preclude relief. In such circumstances, "a federal court may . . . decline to apply *Teague*." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). Even if we were to raise *Teague* on the State's behalf, it would not affect our analysis.

Continued . . .

the Creek Nation, which provides important context for the critical period in this case—the years around the turn of the twentieth century. Finally, we (3) apply *Solem*'s three-

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Teague provides that "new constitutional rules of criminal procedure will not be applicable to those cases which have become final before the new rules are announced." 489 U.S. at 310 (plurality opinion); *see also Danforth v. Minnesota*, 552 U.S. 264, 266 n.1 (2008) (explaining that "[a]lthough *Teague* was a plurality opinion . . . the *Teague* rule was affirmed and applied by a majority of the Court shortly thereafter"). "Finality occurs when direct state appeals have been exhausted and a petition for writ of certiorari from [the Supreme] Court has become time barred or has been disposed of." *Greene*, 565 U.S. at 39.

Teague has two exceptions. "First, the bar does not apply to rules forbidding punishment of certain primary conduct or to rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Beard v. Banks*, 542 U.S. 406, 416 (2004) (brackets and quotations omitted). "The second exception is for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Id.* at 417 (quotations omitted).

Mr. Murphy's conviction became "final" on April 21, 2003—the date the Supreme Court denied his petition for certiorari following his direct appeal to the OCCA. *See* 538 U.S. 985. (This is before the OCCA adjudicated his jurisdictional claim on post-conviction review in 2005.) Mr. Murphy has no need for *Teague*'s exceptions because he does not seek the benefit of a rule that falls within *Teague*'s retroactivity bar. The post-2003 cases we discuss in our de novo analysis are applications of the *Solem* framework. We need not decide whether these cases qualify as "constitutional" and "procedural" under *Teague* because, even if they do, they are not "new." A case does not announce a new rule under *Teague* "when it is merely an application of the principle that governed a prior decision to a different set of facts." *Chaidez v. United States*, 133 S. Ct. 1103, 1107 (2013) (brackets and quotations omitted). "[A] rule of general application," that is, "a rule designed for the specific purpose of evaluating a myriad of factual contexts," will only "infrequent[ly] . . . yield[] a result so novel that it forges a new rule, one not dictated by precedent." *Id.* (quotations omitted). When a court "appl[ies] a general standard to the kind of factual circumstances it was meant to address, [the resulting decision] will rarely state a new rule for *Teague* purposes." *Id.*; *see also id.* at 1107-08 (explaining "garden-variety applications" of the *Strickland* framework "do not produce new rules"). The post-finality cases we discuss apply the *Solem* framework to factual scenarios for which the test was developed; none of the cases created a new rule. Moreover, even if *Teague* required us to limit our analysis to pre-finality law, we would still reach the same result.

part framework and conclude that Congress has not diminished or disestablished the Creek Reservation.

1. **Additional Legal Background**

We review the Supreme Court's and our court's most recent applications of *Solem*.

a. *Supreme Court authority*

In *Nebraska v. Parker*, the Supreme Court unanimously recommitted to the "well settled" *Solem* framework. 136 S. Ct. 1072, 1078 (2016). The Court held Congress did not diminish the Omaha Indian Reservation in Nebraska and that the land at issue remained part of the Reservation. *Id.* at 1082. The Court reiterated that only Congress can divest land of its reservation status "and its intent to do so must be clear." *Id.* at 1078-79. *Parker* shed light on how the *Solem* factors interact and further underscored the importance of discerning congressional intent from statutory text, which is "the first and most important step" of the *Solem* framework. *Id.* at 1080.

Before examining the 1882 statute at issue, the Court reviewed its precedent and identified "[c]ommon textual indications" of a congressional intent to alter reservation boundaries. *Id.* at 1079. "[H]allmarks of diminishment" include:

- explicit references to cession or surrender of tribal interests,
- unconditional congressional commitments to compensate the tribe with a fixed sum for the total surrender of tribal claims to opened lands, and
- provisions restoring reservation lands to "the public domain."

Id. The statute in *Parker* featured none of these hallmarks. *Id.* Rather, it provided for a government survey and appraisal of certain lands and for sales to non-Indians. *Id.* The

Court contrasted the statute with earlier nineteenth century treaties between the Omaha Tribe and United States that had addressed other lands and had "terminated the Tribe's jurisdiction over their land in unequivocal terms." *Id.* at 1080 (quotations omitted). The Court concluded the 1882 statute did not diminish the Reservation's boundaries. *Id.*

Turning to the second *Solem* step, the *Parker* Court determined the "mixed historical evidence" around the law's passage could not "overcome the lack of clear textual signal that Congress intended to diminish the reservation." *Id.* To find diminishment, step-two evidence must "'*unequivocally* reveal[] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Id.* (emphasis added by *Parker* Court) (quoting *Solem*, 465 U.S. at 471). Floor statements by members of Congress cutting both ways, the Court ruled, "are far from the clear and plain evidence of diminishment required." *Id.* (quotations omitted).

The Court then considered step three—the later treatment of the area and its demographic history. *Id.* at 1081. Step-three evidence, the Court explained, "might reinforce a finding as to diminishment or nondiminishment based on the text" of the statute, but "never" has the Court "relied solely on this third consideration to find diminishment." *Id.* (alteration and quotations omitted).

The step-three evidence in *Parker* strongly favoring diminishment helps illustrate the significance *Solem* places in step-one statutory text. In *Parker*, "the Tribe was almost entirely absent from the disputed territory for more than 120 years." *Id.* It did not enforce any regulations in the area, nor did it "maintain an office, provide social services,

or host tribal celebrations or ceremonies." *Id.* For more than a hundred years, the federal government treated the lands as belonging to Nebraska. *Id.* at 1082. Of the people living in the town on the disputed site, most were not associated with the Tribe, and, since the early twentieth century, less than two percent of the Tribe's members lived in the disputed area. *Id.* at 1078.

This history was nonetheless insufficient, the Supreme Court said, to "overcome the statutory text, which is devoid of any language indicative of Congress' intent to diminish." *Id.* at 1082 (quotations omitted). Despite the "compelling" justifiable expectations of non-Indian settlers stemming "from the Tribe's failure to assert jurisdiction" over a long period of time, the Court held such non-Indian expectations "cannot diminish reservation boundaries." *Id.* "Only Congress has the power to diminish a reservation." *Id.* And as *Parker* makes clear, the Supreme Court looks first and foremost to statutory text when attempting to discern Congress's intent.

b. *Tenth Circuit authority*

This court has addressed Indian reservation disestablishment and diminishment issues on numerous occasions. *See, e.g.*, *Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010); *Shawnee Tribe*, 423 F.3d 1204; *Yazzie*, 909 F.2d 1387; *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *overruled by Hagen*, 510 U.S. 399.

Most recently, in *Wyoming v. EPA*, 849 F.3d 861 (10th Cir. 2017), we applied *Solem*'s "well-settled approach" and concluded that Congress diminished the Wind River Reservation when it enacted a 1905 agreement the federal government negotiated with the Eastern Shoshone and Northern Arapaho Tribes. *Id.* at 865, 869.

Applying the "hierarchical, three-step framework" of *Solem*, we began with the statutory text. *Id.* at 869-74. We held the following language evinced Congress's intent to diminish the Reservation:

> The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within said reservation, except the lands within and bounded by the following lines . . . .

Id. at 870 (emphasis omitted) (quoting Act of March 3, 1905, ch. 1452, 33 Stat. 1016, 1016). We called this "express language of cession" notwithstanding the absence of the words "sell" or "convey." *Id.* at 871.[37] "There are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must establish an express congressional purpose to diminish." *Id.* at 869-70 (brackets and quotations omitted).

Turning to step two—the historical context surrounding the passage of the Act—we found it "further confirm[ed] Congress intended to diminish the Wind River Reservation." *Id.* at 874 (majority opinion). A history of failed congressional attempts to sever the area north of the Big Wind River from the Reservation informed our evaluation of the eventually enacted law that accomplished that diminishment. *Id.* at 874-79.

Our analysis at step three—concerning the later treatment and demographics of the area—was "brief and ultimately d[id] not impact our conclusion." *Id.* at 879. "Unsurprisingly," from the "volumes of material" unearthed by the parties, "each side . . .

[37] The Act elsewhere used the word "conveyed." *See id.* at 872.

managed to uncover treatment by a host of actors supporting its respective position," but because we could not "discern clear congressional intent" from the conflicting evidence, we found the later history held little value. *Id.*; *see also id.* at 887-88 (Lucero, J., dissenting) (agreeing with majority that step three "comes into play only at the margins" and that the post-act history was too "muddled" to provide clear evidence of congressional intent).

* * * *

This more recent case law, though unavailable to the OCCA in 2005, informs our de novo review of Mr. Murphy's claim. Indeed, we are bound by this precedent. Before turning to apply the *Solem* framework, we discuss relevant aspects of the Creek Nation's history, which provides important context for our *Solem* analysis.

2. **Additional Factual Background—Creek Nation History**

The following overview of the Tribe's history provides important context for the parties' arguments and our application of *Solem*.

a. *Original homeland and forced relocation*

The Creek Nation once exercised domain over much of present day Alabama and Georgia. *See Indian Country, U.S.A.*, 829 F.2d at 971. "In the 1820's, the federal government adopted a policy to forcibly remove the Five Civilized Tribes[38] from the southeastern United States and relocate them west of the Mississippi River, in what is

[38] "The Cherokees, Chickasaws, Choctaws, Creeks, and Seminoles historically have been referred to as the 'Five Civilized Tribes.'" *Indian Country, U.S.A.*, 829 F.2d at 970 n.2.

today Oklahoma." *Id.*; *see also Woodward v. De Graffenried*, 238 U.S. 284, 293 (1915) ("The history of the removal of the Muskogee or Creek Nation from their original homes to lands purchased and set apart for them by the government of the United States in the territory west of the Mississippi river does not differ greatly from that of the others of the Five Civilized Tribes . . . ."). *See generally* Cohen at 49-50 (discussing Creek Nation's forced removal).

The federal government and the Creek Nation entered into several treaties related to this forced relocation. In 1826, the Creek Nation "cede[d] to the United States" certain lands in Georgia. Treaty with the Creeks, art. 2, Jan. 24, 1826, 7 Stat. 286, 286, *available at* 1826 WL 2688. In an 1832 treaty, "the Creeks ceded their eastern homelands to the United States, in exchange for lands west of the Mississippi River" in present-day Oklahoma. *Indian Country, U.S.A.*, 829 F.2d at 971 (discussing Treaty with the Creeks, Mar. 24, 1832, 7 Stat. 366, *available at* 1832 WL 3599). "In a subsequent [1833] treaty regarding these lands, the United States agreed to grant 'a patent, in fee simple, to the Creek nation.'" *Id.*; *see* Treaty with the Creeks, art. 3, Feb. 14, 1833, 7 Stat. 417, 419, *available at* 1833 WL 4533. Thus, "[t]he Creek Tribe had a fee-simple title, not the usual Indian right of occupancy with the fee in the United States." *United States v. Creek Nation*, 295 U.S. 103, 109 (1935); *see also Woodward*, 238 U.S. at 293 ("Pursuant to treaty provisions, the Creeks held their lands under letters patent issued by the President of the United States, dated August 11, 1852, vesting title in them as a tribe, to continue so long as they should exist as a nation and continue to occupy the country thereby assigned

to them." (citations omitted)). In sum, by the mid-nineteenth century, treaties with the federal government had given the Creek Nation a vast tract of land in modern Oklahoma.

b. *Nineteenth century diminishment*

After the Creek Nation's relocation west, its land was diminished on multiple occasions in the mid-nineteenth century. "In 1856, the Creeks agreed to cede to the Seminole Tribe a portion of their lands." *Indian Country, U.S.A.*, 829 F.2d at 971. In the 1856 treaty, the federal government reaffirmed the Creek Nation's title and tenure to its remaining Reservation. It guaranteed "that 'no State or Territory shall ever pass laws for the government of the Creek or Seminole tribes of Indians,' and the United States pledged that 'no portion of either of the tracts of country defined in [the treaty] shall ever be embraced or included within, or annexed to, any Territory or State.'" *Id.* (quoting Treaty with the Creek and Seminole Tribes, art. 4, Aug. 7, 1856, 11 Stat. 699, 700, *available at* 1856 WL 11367).

Following the Civil War, an 1866 treaty required "the Tribe . . . to cede the western portion of its domain." *Id.* "The Creek Nation retained title to its 'reduced . . . reservation,'" which the United States promised would be "'forever set apart as a home for said Creek Nation.'" *Id.* (alteration in original) (quoting Treaty with the Creeks, arts. 3, 9, June 14, 1866, 14 Stat. 785, 786, 788, *available at* 1866 WL 18777).[39] The Creek Nation also agreed to new governance arrangements in the 1866 treaty by permitting "such legislation as Congress and the President of the United States may deem necessary

[39] As discussed below, the Creek Nation contends the 1866 borders remain the Reservation's boundaries today.

for the better administration of justice and the protection of the rights of person and property within the Indian [T]erritory,"[40] including the establishment of courts in the Indian Territory "with such jurisdiction and organized in such manner as Congress may by law provide." 1866 Treaty, art. 10, 14 Stat. at 789. The Treaty also guaranteed Congress would not "interfere with or annul . . . present tribal organization, rights, laws, privileges, [or] customs." *Id.*

c. *1867 Constitution and government*

"In 1867, the Creeks established a written constitutional form of government which included a separation of powers into executive, legislative and judicial branches." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 (D.C. Cir. 1988).

d. *Early congressional regulation of modern-day Oklahoma*

"In 1889, Congress created a special federal court of limited jurisdiction in the Indian Territory, which at that time encompassed most of present-day Oklahoma." *Indian Country, U.S.A.*, 829 F.2d at 977.

In 1890, "Congress carved the Territory of Oklahoma out of the western half of the Indian Territory." *Id.* "The lands in the east held by the Five Civilized Tribes remained Indian Territory, subject only to federal and tribal authority." *Id.* Also in 1890,

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[40] "Although most of what is today Oklahoma was once the 'Indian Territory,' after the creation of Oklahoma Territory in 1890, the phrase referred to the eastern portion of present-day Oklahoma encompassing the lands of the Five Civilized Tribes, plus lands of other tribes situated in the extreme northeastern corner of the state." *Indian Country, U.S.A.*, 829 F.2d at 969 n.2. "No territorial government was ever created in the reduced Indian Territory, and it remained subject directly to tribal and federal governance." *Id.* at 974.

"Congress expanded the civil and criminal jurisdiction of the special United States court in the diminished Indian Territory." *Id.* Congress provided that certain laws from neighboring Arkansas would apply in Indian Territory, provided they were "not locally inapplicable or in conflict . . . with any law of Congress." *Id.* (quotations omitted). "The tribes, however, retained exclusive jurisdiction over all civil and criminal disputes involving only tribal members, and the incorporated laws of Arkansas did not apply to such cases." *Id.*

e. *The push for allotment*

"During the 1880s and 1890s, the white population within the Indian Territory grew dramatically." *Id.* at 977. "[T]he white newcomers were frustrated by the communal tenure of the Indian lands, and pressured Congress to break up the tribal land base, attach freely alienable individual title to the land, and eventually create a new state." *Id.*

As already mentioned, the objectives, among others, of this allotment policy "were to end tribal land ownership and to substitute private ownership, on the view that private ownership by individual Indians would better advance their assimilation as self-supporting members of our society and relieve the Federal Government of the need to continue supervision of Indian affairs." *N. Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 650 & n.1 (1976) (discussing General Allotment Act). The General Allotment Act did not apply to the Five Civilized Tribes, *see Indian Country, U.S.A.*, 829 F.2d at 977, but by separate means Congress encouraged the Five Civilized Tribes to allot their lands.

"In 1893, reflecting federal policies to forcibly assimilate Indians into the non-Indian culture and to eventually create a new state in the Indian Territory, Congress created the Dawes Commission to negotiate with the Five Civilized Tribes . . . ." *Id.* "The Five Civilized Tribes, however, refused to negotiate with the Dawes Commission, and Congress—still unsure of the scope of its authority to forcibly dispose of tribal lands[41]—began to force the issue by placing restrictions on the Indian governments . . . ." *Id.*

In 1897, Congress imposed several measures to force the Creek Nation's agreement to the allotment policy. Congress (1) "provid[ed] that the body of federal law in Indian Territory, which included the incorporated Arkansas laws, was to apply irrespective of race"; (2) broadened federal court jurisdiction, thereby divesting Creek tribal courts of exclusive jurisdiction over cases involving only Creeks; and (3) subjected Creek legislation to presidential veto. *Id.* at 978 (quotations omitted).

An 1898 law, the Curtis Act, continued the campaign for allotment by "abolish[ing] the existing Creek court system and render[ing] then-existing tribal laws unenforceable in the federal courts." *Id.* It also "provided for forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment." *Muscogee (Creek) Nation*, 851 F.2d at 1441.

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[41] In 1903, the Supreme Court decided Congress can unilaterally abrogate treaties with Indian nations. *See Lone Wolf*, 187 U.S. at 566-68; *see also Parker*, 136 S. Ct. at 1081 n.1; *Woodward*, 238 U.S. at 294, 304-05; Cohen at 198 & n.121.

f. *Allotment and aftermath*

"In 1901, the Creek Nation finally agreed to the allotment of tribal lands." *Indian Country, U.S.A.*, 829 F.2d at 978. The 1901 Original Allotment Agreement ("Original Agreement" or "Agreement") provided: "All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe . . . so as to give each an equal share of the whole in value . . . ." Original Agreement, ch. 676, ¶ 3, 31 Stat. 861, 862 (Mar. 1, 1901). "Although the vast majority of Creek Nation lands were allotted or sold, some lands remained in tribal ownership under the original treaty-based fee patents." *Indian Country, U.S.A.*, 829 F.2d at 978. The Agreement exempted certain lands from allotment, such as railroad sites and lands for Creek schools and courthouses. ¶ 24, 31 Stat. at 868. It also allowed some non-Indians to purchase lands within town sites. *See* ¶¶ 10-11, 31 Stat. at 865-66. In 1902, a Supplemental Allotment Agreement ("Supplemental Agreement") made certain amendments. *See generally* Supplemental Agreement, ch. 1323, 32 Stat. 500 (June 30, 1902).[42]

The Original Agreement, in addition to providing for allotment, addressed governance. It made clear the Creek courts, already abolished in 1898, were not being re-established. ¶ 47, 31 Stat. at 873. The Agreement continued presidential review of Creek laws "affecting the lands of the tribe, of individuals after allotment." ¶ 42, 31 Stat. at 872. Further, it anticipated the total elimination of the Creek government: "The tribal government of the Creek Nation shall not continue longer than March fourth, nineteen

[42] We discuss these statutes in greater detail below as part of our step-one *Solem* analysis.

hundred and six, subject to such further legislation as Congress may deem proper." ¶ 46, 31 Stat. at 872.

As the termination date approached, however, "much remained to be done." *Harjo v. Kleppe*, 420 F. Supp. 1110, 1126 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). "[I]t was apparent that the affairs of the tribes could not be wound up by the date set," and "Congress in early 1906 debated and enacted the 'Five Tribes Act.'" *Id.* (citing ch. 1876, 34 Stat. 137 (Apr. 26, 1906)).

In the Five Tribes Act, "Congress expressly delayed any plans to terminate the tribes, and provided that the tribal governments 'are hereby continued in full force and effect.'" *Indian Country, U.S.A.*, 829 F.2d at 978 (quoting § 28, 34 Stat. at 148). Congress never dissolved the Creek government; it has enjoyed continuous and uninterrupted existence. Even while Congress contemplated the future dissolution of the tribal government, the Creek Nation continued to exercise taxing authority within its boundaries as confirmed by a decision of the Eighth Circuit, our predecessor court, which then had jurisdiction over the Indian Territory. *See Buster v. Wright*, 135 F. 947, 951-52 (8th Cir. 1905) (concluding the Creek Nation retained power "to fix the terms upon which noncitizens might conduct business within its territorial boundaries" and had not "los[t] the power to govern the people within its borders"), *appeal dismissed*, 203 U.S. 599 (1906).

g. *Creation of Oklahoma*

Months after preserving and extending the Creek tribal government in 1906, Congress passed the Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (June 16, 1906). It

allowed the Territory of Oklahoma, together with the Indian Territory, to apply for statehood. This law and its 1907 amendment "provided that federal Article III courts would succeed the special United States court in the Indian territory with respect to all cases arising under the Constitution, laws, or treaties of the United States." *Indian Country, U.S.A.*, 829 F.2d at 978. In addition, new state courts "were to succeed the Indian territory courts with respect to the remaining nonfederal cases." *Id.* "The enabling act also provided that 'the laws in force in the Territory of Oklahoma, as far as applicable, shall extend over and apply to said State.'" *Id.* (emphasis omitted) (quoting § 13, 34 Stat. at 275). "Finally, the enabling act preserved the authority of the federal government over Indians and their lands, and required the State to disclaim all right and title to such lands." *Id.* (quotations omitted). Oklahoma entered the Union in 1907. *See* Proclamation, 35 Stat. 2160-61 (Nov. 16, 1907).

h. *Away from allotment*

The 1930s saw another shift in federal policy as "Congress repudiated the practice of allotment" and passed the Indian Reorganization Act ("IRA"). *Atkinson Trading Co. v. Shirley*, 532 U.S. 645, 650 n.1 (2001). *See generally* Cohen at 79-84. The IRA, enacted in 1934, revitalized tribal "self-government pursuant to constitutions" and allowed "tribes to organize for economic purposes pursuant to corporate charters." *Muscogee (Creek) Nation*, 851 F.2d at 1442. The Creek Nation was excluded from the IRA, but, two years later in 1936, Congress passed the Oklahoma Indian Welfare Act ("OIWA"), which covered the Creek Nation and, "like the IRA, provided for

constitutional governments and corporate charters." *Id.*; *see* OIWA, ch. 831, 49 Stat. 1967 (June 26, 1936).

In a 1943 case concerning Oklahoma real estate taxes, the Supreme Court acknowledged the Creek Nation's continuing vitality: "Thus far Congress has not terminated [its guardianship] relation with respect to the Creek Nation and its members. That Nation still exists, and has recently been authorized to resume some of its former powers." *Bd. of Cty. Comm'rs v. Seber*, 318 U.S. 705, 718 (1943) (citations and footnote omitted) (citing OIWA). In sum, following allotment, Congress re-empowered the Creek Nation's government, which it had never dissolved.

i. *Public Law 280*

Policy shifted again in the post-World War II period, known as the "termination era," as Congress focused on assimilating Indians and ending the United States' trust relationship with many Indian tribes. *See* Cohen at 92-93.

One important law enacted in 1953, "Public Law 280," addressed state jurisdiction. It allowed some states "to assert limited civil and broad criminal jurisdiction in Indian country." *Indian Country, U.S.A.*, 829 F.2d at 980 (citing ch. 505, 67 Stat. 588 (Aug. 15, 1953) (codified as amended at 18 U.S.C. § 1162, 25 U.S.C. §§ 1321-26, 28 U.S.C. § 1360)). Public Law 280, "delegat[ed] to five, later six, states jurisdiction over most crimes . . . throughout most of the Indian country within their borders." Cohen at

537 (footnotes omitted).[43] It "offered any other state the option of accepting the same jurisdiction," until a 1968 amendment "made subsequent assumptions of jurisdiction subject to Indian consent." *Id.* at 537-38; *see* 25 U.S.C. §§ 1321(a), 1322(a), 1326.

Oklahoma chose not to use Public Law 280 to assert jurisdiction. State officials regarded the law as unnecessary because, in their view, Oklahoma already had full jurisdiction over Indians and their lands. *Indian Country, U.S.A.*, 829 F.2d at 980 n.6. But "[t]he State's 1953 position that Public Law 280 was unnecessary for Oklahoma . . . [has] been rejected by both federal and state courts." *Id.* (citing Tenth Circuit and Oklahoma cases). Oklahoma has not obtained tribal consent following the 1968 amendment and has thus never acquired jurisdiction over Indian country through Public Law 280. *See Cravatt*, 825 P.2d at 279 ("The State of Oklahoma has never acted pursuant to Public Law 83-280." (quoting *State v. Klindt*, 782 P.2d 401, 403 (Okla. Crim. App. 1989))); *see also* Cohen at 537-38 & n.47.

The termination era began to fade in the late 1950s as federal Indian policy shifted again toward tribal self-government and self-determination. *See* Cohen at 93.

j. *A new Creek Constitution*

In 1979, under OIWA, the Creek Nation adopted a new constitution "providing for three separate branches of government, including a judiciary." *Muscogee (Creek) Nation*, 851 F.2d at 1442. In 1982, when the tribe sought funding from the Bureau of Indian Affairs ("BIA") for its court system, the D.C. Circuit confronted the question whether the

[43] The six states are Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin. *See id.* at 537 nn.44-45.

Creek Nation could operate a court system at all in light of Congress's earlier abolition of the tribal courts. The D.C. Circuit held that OIWA had repealed the earlier elimination of Creek courts. *Id.* at 1444-46. "[T]he Muscogee (Creek) Nation has the power to establish Tribal Courts with civil and criminal jurisdiction, subject, of course, to the limitations imposed by statutes generally applicable to all tribes." *Id.* at 1446-47 (emphases omitted).

k. *Our decision in* Indian Country, U.S.A.

In 1987, we held in *Indian Country, U.S.A.*, that the Creek Reservation continues to exist, at least in some form. The case arose when Oklahoma tried to tax a bingo operation located on Creek Nation land that had never been allotted and was still held by the Tribe. 829 F.2d at 970. Oklahoma argued the site was not a reservation and therefore subject to the State's taxation. *Id.* at 973. We rejected that argument and explained the site at issue was "part of the original treaty lands still held by the Creek Nation, with title dating back to treaties concluded in the 1830s and patents issued in the 1850s. These lands historically were considered Indian country and still retain their reservation status within the meaning of 18 U.S.C. § 1151(a)." *Id.* at 976. Accordingly, we invalidated the Oklahoma tax. *Id.* at 987. Our holding, however, was limited. Because the case concerned land that had never been allotted and was still held by the Tribe, we had—as we twice made clear—no cause to decide whether Congress had disestablished the Reservation's 1866 exterior boundaries. *Id.* at 975 n.3, 980 n.5.

We now confront that question.

3. **Applying *Solem***

We must apply the *Solem* framework to determine whether Congress has disestablished the Creek Reservation. If the Reservation's boundaries are still intact, the crime occurred within them. *See* Aplt. Br. at 20; Aplee. Br. at 11-12. The State argues, however, that Congress disestablished the Creek Reservation in the early twentieth century. Mr. Murphy and the Creek Nation disagree.

We conclude Congress has not disestablished the Creek Reservation. The most important evidence—the statutory text—fails to reveal disestablishment at step one. Instead, the relevant statutes contain language affirmatively recognizing the Creek Nation's borders. The evidence of contemporaneous understanding and later history, which we consider at steps two and three, is mixed and falls far short of "*unequivocally* reveal[ing]" a congressional intent to disestablish. *Parker*, 136 S. Ct. at 1080 (emphasis in original) (quoting *Solem*, 465 U.S. at 471). Because our application of the *Solem* framework shows Congress has not disestablished the Creek Reservation, the crime in this case occurred within the Reservation's boundaries. The State of Oklahoma accordingly lacked jurisdiction to prosecute Mr. Murphy.

a. *Step One: Statutory Text*

The State argues the Creek Reservation did not survive a series of statutes that allotted Creek lands and created the State of Oklahoma. The State "acknowledges that no relevant act of Congress contains language which expressly disestablished the Creek Nation reservation through the use of such words as 'cede' or 'relinquish.'" Aplee. Br. at

57. It attempts to show disestablishment based on the collective weight of eight different laws enacted between 1893 and 1906.

At oral argument, we asked whether the State was relying on any particular statutory language in any of these laws for its step-one argument:

> THE COURT: Where do you find your strongest statutory language that the Creek Reservation was diminished or disestablished?
>
> THE STATE: You have to start before the 1901 Allotment Act. . . . In 1893, Congress passed the law which set up the Dawes Commission.
>
> THE COURT: I asked for statutory language, not a general overview of a statute. Where in any of these acts is there language that disestablished the Reservation?
>
> THE STATE: In that 1893 Act, Congress said that they were appointing the Dawes Commission to negotiate with the Tribes in whatever means necessary in order to create a State embracing the Indian Territory and to substitute for the tribal governments a State government.
>
> THE COURT: But that didn't happen.
>
> THE STATE: The—well, I think that's what we're arguing about here today.
>
> THE COURT: Well, let's go to 1901.
>
> . . . .
>
> THE COURT: Where's the disestablishment in the Act? You haven't given us in your brief or anything you said today any language from any act that shows disestablishment. And isn't that the first *Solem* factor?
>
> THE STATE: Well, yes, Your Honor, but [Congress does not] have to use the words . . . .
>
> THE COURT: Well, okay, even if they don't use the words. Can you give us some examples?
>
> THE STATE: Of course—

> THE COURT: Counsel, on the same point, I think . . . what we're looking for is what has been given in other Supreme Court cases where they have seized on language whether it's 'public domain' or whether it's the word 'cede' or whether it's a lump-sum payment. Those—there are words in a sentence in those acts, and what we're asking is can you show us words in a sentence in the acts that you're talking about that are equal or equivalent of those words rather than a general summary sort of an answer? We're looking for specific language.
>
> THE STATE: Other than the entire context of what happened, I cannot. . . . I still argue that the acts themselves are sufficient, but, if not, under *Osage Nation*, when you look at the step-two evidence here, it's overwhelming.
>
> THE COURT: Well, so your answer is that you don't have any language?
>
> THE STATE: I do not have a specific section that I can look at and say this is—
>
> THE COURT: And so the argument that I just heard is that it's context. Your word.
>
> THE STATE: Correct. If you look at all of the acts together, which the Supreme Court has said you can do—no I can't—when you look at the specific language which provides for the allotment, it doesn't use words [like] 'cession,' it doesn't provide for a fixed sum, those sorts of things that have happened in other cases. But when you go all the way back to when Congress started passing acts that led up to the 1901 Act, it's very clear that their purpose was to substitute for the tribal government a State government and put the area of the Five Tribes under State law.

Oral Arg. at 50:23-54:07. This exchange aligns with the position taken in the State's brief. *See* Aplee. Br. at 57. At step one, the State does not rely on any particular statutory text but rather on all eight acts in general because it does not "have a specific section" in any law that accomplished disestablishment. Oral Arg. at 53:18-21.

We question whether the State's argument based on the overall thrust of eight different laws deserves to be called a step-one argument. At step one, "we start with the

statutory text." *Parker*, 136 S. Ct. at 1079 (emphasis added); *see also Solem*, 465 U.S. at 470 ("The most probative evidence of congressional intent is the statutory *language* used to open the Indian lands." (emphasis added)); *Wyoming*, 849 F.3d at 869 ("*First*, we look to the text of the statute . . . ."). The State does not present us with any particular statutory language to analyze. Our independent review of the laws has not uncovered a provision on which the State might rely, either.

Assuming the State's cumulative-effect argument belongs in step one where we consider text, as opposed to step two where we consider context, we proceed to (i) review each of the eight statutes the State relies on, paying particular attention to the 1901 Original Allotment Agreement, and then (ii) conduct our step-one analysis based on those laws. The absence of statutory language in any of these acts disestablishing the Creek Reservation leads us to conclude the State "ha[s] failed at the first and most important step." *Parker*, 136 S. Ct. at 1080. In fact, the step-one evidence shows Congress recognized the existence of the Creek Nation's borders. And the State's attempts to shift the inquiry into questions of title and governance are unavailing.

i. The statutes

We discuss the State's eight statutes in chronological order.

1) Act of March 3, 1893, ch. 209, 27 Stat. 612 ("1893 Act")

The State first draws our attention to an appropriations law providing money for the federal government to fulfill treaty obligations with Indian tribes throughout the country. With respect to the Creek Nation, the 1893 Act provided funding for treaties

from 1790 to 1866 to pay for, among other things, annuities, blacksmithing, iron, steel, and interest on other funds. *See* 27 Stat. at 616-17.

In addition to providing funds, Congress gave "the consent of the United States" to the allotment of lands "within the limits of the country occupied by the Cherokees, Creeks, Choctaws, Chickasaws, and [S]eminoles." § 15, 27 Stat. at 645.[44] Congress instructed the President to appoint a commission, which became known as the Dawes Commission, to negotiate with the Creek Nation and the other tribes

> for the purpose of the extinguishment of the national or tribal title to any lands within that Territory now held by any and all of such nations or tribes, either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, respectively, as may be entitled to the same, or by such other method as may be agreed upon between the several nations and tribes aforesaid, or each of them, with the United States, with a view to such and adjustment, upon the basis of justice and equity, as may, with the consent of such nations or tribes of Indians, so far as may be necessary, be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory.

§ 16, 27 Stat. at 645. Congress provided the negotiators' priorities should be "first" to procure an allotment of lands "as may be agreed upon as just and proper to provide for each such Indian a sufficient quantity of land for his or her needs." § 16, 27 Stat. at 646. "[S]econdly," the negotiators were to "procure the cession, for such price and upon such

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[44] The law provided that tribal members who accepted an allotment would be deemed U.S. citizens. § 15, 27 Stat. at 645. The Supreme Court has explained that "the extension of citizenship status to Indians does not, in itself, end the powers given Congress to deal with them." *United States v. John*, 437 U.S. 634, 653-54 (1978). "Nor has [U.S.] citizenship prevented the Congress . . . from continuing to deal with the tribal lands of the Indians." *Tiger v. W. Inv. Co.*, 221 U.S. 286, 312 (1911). *See generally* Cohen at 922-24 (discussing citizenship).

terms as shall be agreed upon, of any lands not found necessary to be so allotted or divided, to the United States." *Id.* Although Congress wanted to pursue both allotment and the sale of surplus lands to the United States, it granted the commissioners

> power to negotiate any and all such agreements as . . . shall be found requisite and suitable to such an arrangement of the rights and interests and affairs of such nations, tribes, bands, or Indians, or any of them, to enable the ultimate creation of a Territory of the United States with a view to the admission of the same as a state in the Union.

Id. The 1893 Act established the Dawes Commission to commence negotiations; it did not disestablish the Creek Reservation.

2) Act of June 10, 1896, ch. 398, 29 Stat. 321 ("1896 Act")

The State next relies on an 1896 appropriations law in which Congress again provided money to fulfill treaty obligations with the Creek Nation. 29 Stat. 326-27. The 1896 Act declared it "the duty of the United States to establish a government in the Indian Territory" for the purpose of "rectify[ing] the many inequalities and discriminations" in the Territory and "afford[ing] needful protection to the lives and property of all citizens and residents thereof." 29 Stat. at 340. The Dawes Commission was directed "to continue the exercise of the authority already conferred upon them by law and endeavor to accomplish the objects heretofore prescribed to them." 29 Stat. at 339. Nothing in this law altered the Reservation's boundaries.

3) Act of June 7, 1897, ch. 3, 30 Stat. 62 ("1897 Act")

The State's third statute is an 1897 appropriations statute in which Congress again approved funds to satisfy obligations arising from treaties with the Creek Nation. *See* 30 Stat. at 68. Congress also provided that, beginning in 1898, the United States courts

would have "original and exclusive jurisdiction" over both civil and criminal cases in the Indian Territory. 30 Stat. at 83. The laws of the United States and of neighboring Arkansas, which were already in force in the Indian Territory, would apply "to all persons therein, irrespective of race." *Id.* In addition, Congress legislated that, beginning in 1898, "all acts, ordinances, and resolutions" of the legislative bodies of the Five Civilized Tribes would be subject to presidential veto. 30 Stat. at 84. This provision did not apply to tribal legislation related to negotiations with the Dawes Commission. *Id.* The law also provided that if any of the Tribes reached a negotiated agreement with the Dawes Commission, that new agreement, once ratified, would "suspend" any provisions of the 1897 Act inconsistent with the agreement. *Id.* In sum, this statute altered federal and tribal governance arrangements in the Indian Territory, but it did not erase the Creek Reservation's borders.

4) "Curtis Act," ch. 517, 30 Stat. 495 (June 28, 1898)

In 1898, Congress imposed new limitations on the powers of tribal governments in the Indian Territory. Under the Curtis Act, tribal courts would be abolished within the year. § 28, 30 Stat. at 504-05. All cases would be transferred to the United States court in the Indian Territory, and tribal laws would be unenforceable. §§ 26, 28, 30 Stat. at 504-05. Congress instructed the Secretary of the Interior ("Secretary") to stop directing federal payments to tribal governments and to begin paying individual tribal members directly. § 19, 30 Stat. at 502. The Curtis Act included a default allotment scheme that would take effect following completion of the tribal citizenship rolls and survey of tribal

lands. § 11, 30 Stat. at 497-98.[45] But, as discussed in the next section, Congress and the Creek Nation later agreed to a different allotment plan. The Curtis Act made the most significant governance changes to date, but it did not address the Creek Reservation's borders.

5) "Original Allotment Agreement," ch. 676, 31 Stat. 861 (March 1, 1901)

The Creek Nation reached a negotiated agreement with the federal government for the allotment of tribal lands, and Congress passed it into law in 1901. The Original Agreement, supplemented by another agreement we discuss below, specified that its terms would control over conflicting federal statutes and treaty provisions, but it "in no wise affect[ed]" treaty provisions consistent with the Agreement. ¶¶ 41, 44, 31 Stat. at 872. Our discussion of the Original Agreement covers (a) the allotment of Creek lands, (b) provisions concerning town sites, (c) lands reserved for tribal purposes, and (d) the Agreement's plan for future governance within the borders of the Creek Reservation.

a) Allotment

The Agreement's central purpose was to facilitate a transfer of title from the Creek Nation generally to its members individually. It provided that "[a]ll lands belonging to the Creek tribe," except for town sites and lands reserved for public purposes, should be

[45] The Curtis Act also contained a proposed agreement between the federal government and the Creek Nation providing for the allotment of tribal lands, *see* § 30, 30 Stat. at 514-19, but the Creek Nation did not ratify the agreement. A different allotment agreement was reached in 1901, and we discuss it in the next section.

appraised and allotted "among the citizens of the tribe." ¶¶ 2-3, 31 Stat. at 862-63.[46] Tribal citizenship rolls determined an individual's eligibility for an allotment. ¶¶ 3, 28, 31 Stat. at 862-63, 869-70.[47] The United States would bear the costs of "the survey, platting, and disposition" of lots, except where town authorities undertook those efforts. ¶ 34, 31 Stat. at 871.

Creek citizens would receive an allotment of 160 acres valued at $6.50 per acre. ¶ 3, 31 Stat. at 862. Recognizing that the tracts would not have the same value, the Act provided that "the residue of lands" not otherwise allotted or reserved—the surplus lands—would be used "for the purpose of equalizing allotments." ¶ 9, 31 Stat. at 864. Creek citizens with more valuable lots could have the excess value charged against their entitlement to other tribal funds. ¶ 3, 31 Stat. at 862-63. The Tribe's funds from earlier treaties were made available to equalize allotments. ¶ 27, 31 Stat. at 869.

The assignment of allotments was not random. Creek citizens who had built improvements or possessed particular lands could select those lands. *See* ¶¶ 3, 5-6, 31

[46] The Agreement defined "citizen" as "a member . . . of the Muskogee tribe or nation of Indians." ¶ 1, 31 Stat. at 862. The Act stipulated "the words 'Creek' and 'Muskogee'" were synonymous. *Id.*

[47] The Agreement provided citizens of the Seminole Nation who had settled in lands belonging to the Creeks were allowed to take allotments in Creek lands, and the same terms were extended to Creek citizens in Seminole lands. ¶ 36, 31 Stat. at 871.

Stat. at 862-63.[48] The Agreement provided for dispute resolution when Creek citizens contested their right to select certain tracts. ¶ 6, 31 Stat. at 863.

The Tribe's principal chief was assigned the task of transferring title from the Tribe to the individual allottees. ¶ 23, 31 Stat. at 867-68. Each deed conveyed to the allottee "all right, title, and interest of the Creek Nation and of all other citizens in and to the lands embraced in [the] allotment certificate." ¶ 23, 31 Stat. at 868. For the allottee, acceptance of the deed represented "assent to the allotment and conveyance of all the lands of the tribe" and a "relinquishment of all his right, title, and interest in" the rest of the allotted lands as provided in the Agreement. *Id.*

The Secretary of the Interior was supposed to approve the conveyances, and this approval would serve "as a relinquishment" to the Creek citizen "of all the right, title, and interest of the United States in and to the lands embraced in [the] deed." *Id.*[49] But the Agreement provided for various forms of continuing federal supervision. For example, it restricted the ability of allottees to encumber or alienate their lands without approval from the Secretary. ¶ 7, 31 Stat. at 863-64. A five-year restriction period applied to

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[48] For members of the Creek Nation unable to select lands for themselves—children, "prisoners, convicts, and aged and infirm persons"—the Agreement provided a mechanism for selection on their behalf and in "the best interests of such parties." ¶ 4, 31 Stat. at 863; *see also* ¶¶ 7, 23, 31 Stat. at 863-64, 867-68.

[49] The United States was understood to have a reversionary interest in the Tribe's lands. *See* 1833 Treaty, art. 3, 7 Stat. at 419 (providing the Creek Nation's fee simple interest would continue "so long as they shall exist as a nation, and continue to occupy the country hereby assigned them"); § 15, 27 Stat. at 645 (consenting that "upon the allotment of the lands held by [the Five Civilized Tribes] the reversionary interest of the United States therein shall be relinquished and shall cease").

allotted lands generally, but a 21-year restriction applied to a subset of an allottee's lands—the 40 acres selected as a homestead. *Id.* Creek citizens were allowed to rent their allotments, subject to restrictions. ¶ 37, 31 Stat. at 871.

b) Town sites

The Agreement excluded "town sites" from allotment. ¶¶ 2, 24(a), 31 Stat. at 862, 868. Towns "in the Creek Nation" with more than 200 people would be "surveyed, laid out, and appraised." ¶ 10, 31 Stat. at 864. Town commissions, which were to include Creek commissioners, would administer the sale of town lots "for the benefit of the tribe." ¶ 10, 31 Stat. at 865. "Any person," not just Creek citizens, "in rightful possession of any town lot having improvements thereon" was given the opportunity to purchase the lot. ¶ 11, 31 Stat. at 866; *see also* ¶¶ 12-13, 31 Stat. at 866 (providing similar purchase opportunities to people with residential or business holdings in towns). Town sites lacking improvements would be sold at public auction within 12 months of their appraisal. ¶ 14, 31 Stat. at 866. Once sold, town lots were subject to municipal taxation. ¶ 17, 31 Stat. at 867.[50]

Some town sites were not available for purchase. The Agreement instructed town surveyors to set aside lands for cemeteries, ¶ 18, 31 Stat. at 870, and lots where church houses had been erected were conveyed to the churches at no cost, ¶ 21, 31 Stat. at 867. Educational institutions in Muskogee and other towns "in the Creek Nation" were given

[50] The Agreement gave municipal corporations authority to issue bonds and borrow money for public projects such as for "the construction of sewers, lighting plants, waterworks, and schoolhouses." ¶ 25, 31 Stat. at 869.

the chance to purchase lands at a discount. ¶ 20, 31 Stat. at 867. The United States reserved a right to "purchase, in any town in the Creek Nation, suitable land for court-houses, jails, and other necessary public buildings for its use, by paying the appraised value thereof." ¶ 19, 31 Stat. at 867.

c) Lands reserved for tribal purposes

In addition to town sites, the Agreement provided certain other lands would be "reserved from the general allotment" scheme. ¶ 24, 31 Stat at 868. Most of the reserved lands were for tribal purposes: Creek schools and orphan homes, ¶ 24(c)-(*l*), 31 Stat. at 868; cemeteries, ¶ 24(m), 31 Stat. at 868; a university, ¶ 24(n), 31 Stat. at 868-69; Creek courthouses, ¶ 24(o), 31 Stat. at 869; and churches and schools outside of towns, ¶ 24(p), 31 Stat. at 869. If and when these lands were no longer "needed for the purposes for which they are at present used," the Agreement provided they should be sold at auction "to citizens only." ¶ 24, 31 Stat. at 869.

d) Future governance

The Agreement contemplated roles for both the Tribe and the federal government in the post-allotment governance of the Creek Nation. It recognized Creek jurisdiction as continuing but also limited and temporary. It also provided for ongoing federal regulation and defined federal responsibilities by reference to the Creek Nation's borders.

A continuing role for the tribal government was apparent in a provision recognizing Creek legislative authority over both unallotted tribal lands and allotted lands. ¶ 42, 31 Stat. at 872. "[A]ct[s], ordinance[s], [and] resolution[s]" of the Creek National Council remained subject to presidential approval, but the Agreement

recognized the Creek government's authority to regulate "the lands of the tribe" as well as lands belonging to "individuals after allotment." *Id.*; *see also id.* (providing for Creek regulation, with presidential oversight, of "the moneys or other property of the tribe, or of the citizens thereof"). The Agreement also provided that Creek law would determine issues of descent and distribution. ¶¶ 7, 28, 31 Stat. at 864, 870.[51]

Under the Agreement, the Tribe continued to exercise authority over its finances: "No funds belonging to said tribe shall hereinafter be used or paid out for any purposes by any officer of the United States without consent of the tribe, expressly given through its national council, except as herein provided." ¶ 33, 31 Stat. at 870; *see also* ¶ 31, 31 Stat. at 870 (requiring that the federal government provide monthly, itemized financial reports to the principal chief regarding the Tribe's funds in the U.S. Treasury). The Agreement assigned the Creek National Council responsibility for appropriating money to operate tribal schools. ¶ 40, 31 Stat. at 872. It also authorized lawsuits "in the name of the principal chief, for the benefit of the tribe" to enforce liens against the property of people who defaulted on their purchase of property in towns. ¶ 30, 31 Stat. at 870.

Despite these recognitions of continuing Creek governmental authority, the Agreement contemplated this authority would be temporary. It said the tribal government would not continue past March 4, 1906, "subject to such further legislation as Congress may deem proper." ¶ 46, 31 Stat. at 872. In other words, the Agreement set

[51] Creek courts, already abolished under the Curtis Act, were not reestablished. ¶ 47, 31 Stat. at 873.

a date for the dissolution of the tribal government while recognizing a later Congress could change course. Congress did change course, and dissolution never happened.

In addition to providing a limited role for tribal government, the Agreement assigned powers and responsibilities to the United States, many of which were expressly tied to the Creek Nation's territorial boundaries. For example, the Secretary was authorized to collect a grazing tax when cattle were brought "into the Creek Nation" and grazed on unallotted lands. ¶ 37, 31 Stat. at 871. Revenue from the tax was "for the benefit of the tribe." *Id.* Similarly, although Creek citizens could dispose of timber on their allotments, no timber could be taken from unallotted lands "without payment of [a] reasonable royalty" and under conditions prescribed by the Secretary. ¶ 38, 31 Stat. at 871. The mineral-leasing provisions from the Curtis Act were not to apply "in the Creek Nation." ¶ 41, 31 Stat. at 872. And the United States agreed to maintain strict laws against the introduction of liquor "in said nation." ¶ 43, 31 Stat. at 872.[52]

To summarize, the Original Agreement shifted communal Creek land into individual allotments and provided for dissolution of the tribal government in the future.

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[52] The task of removing "objectionable" persons from the lands of Creek citizens fell to the Secretary of the Interior and the United States Indian agent. ¶ 8, 31 Stat. at 864.

The Secretary was also to administer the Creek school fund, and Creek schools were to be governed under the Secretary's rules and regulations as well as "under Creek laws" subject to the Secretary's oversight. ¶ 40, 31 Stat. at 871-72. The Agreement included a hiring preference for Creek citizens in teaching positions. ¶ 40, 31 Stat. at 872.

It also reserved from allotment lands for tribal purposes and repeatedly recognized the continuing existence of the Creek Nation's borders.

6) "Supplemental Allotment Agreement," ch. 1323, 32 Stat. 500 (June 30, 1902)

The 1902 Supplemental Allotment Agreement clarified the Original Agreement and made several amendments. Allotment-eligible lands would be appraised at no more than $6.50 per acre, not including improvements. ¶ 2, 32 Stat. at 500. The Dawes Commission was assigned exclusive jurisdiction to resolve the disputes of Creek citizens over the selection of particular allotments. ¶ 4, 32 Stat. at 501.[53] The Supplemental Agreement made corrections to the Creek Nation's citizenship rolls and addressed the situation of citizens entitled to an allotment who died before receiving it. ¶¶ 7-9, 32 Stat. at 501-02.

The Supplemental Agreement provided that Arkansas law, not Creek law, would govern inheritance but said "only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation." ¶ 6, 32 Stat. at 501. Noncitizen heirs could inherit when there was no Creek descendent. *Id.*

Anti-encumbrance and alienation provisions were reaffirmed and set to run from the date of the Supplemental Agreement. ¶ 16, 32 Stat. at 503. Restrictions on leases were also clarified. *See* ¶ 17, 32 Stat. at 504 (addressing leases for mineral extraction (prohibited), grazing (limited to one year), and agricultural purposes (limited to five

[53] *See also* ¶ 5, 32 Stat. at 501 (providing for corrections when selected land did not include allottee's home).

years)). Other parts of the Supplemental Agreement addressed public resources. *See* ¶ 13, 32 Stat. at 503 (providing for the purchase of land for parks within towns); ¶ 15, 32 Stat. at 503 (subjecting Creek courthouse lands to allotment); ¶ 18, 32 Stat. at 504 (regulating introduction of cattle "into the Creek Nation").

The Supplemental Agreement left in place the planned dissolution of the tribal government. It required the Secretary, following dissolution of the tribal government, to pay the Tribe's remaining funds to the citizens of the Creek Nation. ¶ 14, 32 Stat. at 503; *see also* ¶ 19, 32 Stat. at 504 (requiring the Secretary "during the continuance of the tribal government" to defend allottees against claims on their land arising from illegal leases and conveyances).

Overall, the Supplemental Agreement continued the policies embodied in the Original Agreement. It did not address the Creek Reservation's borders except to recognize their existence.

7) "Five Tribes Act," ch. 1876, 34 Stat. 137, April 26, 1906[54]

The State relies on two more statutes, both from 1906.[55] The first is the Five Tribes Act, in which Congress recognized and extended the Creek government's existence while also imposing new limitations on its authority. It provided the Creek Nation's "tribal existence and present tribal government[]" would "continue[] in full

[54] The Five Tribes Act was passed after March 4, 1906, the date the Original Agreement had set for the dissolution of the Creek government, *see* ¶ 47, 31 Stat. at 872, but Congress extended the Creek government's existence before the deadline on March 2, 1906, *see* 34 Stat. 822. As this section discusses, the Five Tribes Act extended the Creek government again, this time indefinitely.

force and effect for all purposes authorized by law, until otherwise provided by law." § 28, 34 Stat. at 148. It continued presidential oversight of tribal legislation, and further restricted tribal legislative functions by limiting tribal governments to 30-day legislative sessions each year. *Id.*

The Five Tribes Act gave new authority to the President and Secretary of the Interior. The President received authority to appoint a tribal citizen as principal chief when the principal chief died, became disabled, or refused or neglected to perform his duties. § 6, 34 Stat. at 139. The Secretary received power to approve land conveyances if the principal chief failed to act. *Id.* The Act also authorized the Secretary to "assume control and direction" of the Tribes' schools in 1906 with the goal of retaining "tribal educational officers" and "the present system so far as practicable" until a "public school system" was established under a future territorial or state government. § 10, 34 Stat. at 140-41. The Secretary received authorization to bring suit in the United States courts in the Indian Territory for the recovery of money or lands claimed by the Creek Nation. § 18, 34 Stat. at 144.[56]

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[55] The State contends these laws "carry less weight" because they were passed after the allotment agreements. Aplee. Br. at 62. This suggests the State considers the 1901-02 allotment agreements to be the legislative enactments in which Congress disestablished the Creek Reservation, yet the State includes the 1906 statutes in its step-one argument. We consider the text of the 1906 laws as step-one evidence, as opposed to step-three, later-history evidence, because statutory text is the concern of step one. *See Parker*, 136 S. Ct. at 1079 ("[W]e start with the statutory text . . . .").

[56] Congress also assigned new powers at the town level. It provided for the operation of light and power companies within the Indian Territory and granted new

Continued . . .

The Five Tribes Act continued many of the restrictions on allotted lands and amended others. Congress continued the Original Agreement's provisions for the equalization of Creek allotments. § 2, 34 Stat. at 137-38. It also clarified that lands reserved for public purposes would "revert to the tribe and be disposed of as other surplus lands" when the land was no longer used for the public purpose for which it was reserved. § 14, 34 Stat. at 142. The Secretary was instructed to sell unallotted lands not otherwise provided for and deposit the proceeds into the Treasury for the Tribe's benefit. § 16, 34 Stat. at 143.[57] New 25-year restriction periods against alienation and encumbrance were imposed on allotted lands, but allotted lands were immune from taxation "as long as the title remain[ed] in the original allottee." § 19, 34 Stat. at 144. Allottees remained free to lease their lands, subject to restrictions. §§ 19-20, 34 Stat. at 144-45.[58]

The Five Tribes Act provided for the future distribution of tribal property to Creek citizens. It abolished tribal taxes and instructed the Secretary to wind up claims against

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taxing powers to towns with more than two thousand people. *See* §§ 25-26, 34 Stat. at 146-48.

[57] Purchasers of town lots who failed to make timely payments were liable to forfeit the purchase and have the Secretary re-sell the land at public auction. § 12, 34 Stat. at 141-42.

[58] Congress made several changes to the laws of descent and inheritance. For allottees who died intestate and without heirs, their lands would revert to the Tribe or escheat to the future state or territorial government. § 21, 34 Stat. at 145. Adult Indian heirs were permitted to sell the lands they inherited, subject to the Secretary's approval. § 22, 34 Stat. at 145. Adult Indians were permitted to make wills, subject to court oversight when the will disinherited certain closely related family members. § 23, 34 Stat. at 145.

the Tribe following the dissolution of the tribal government. § 11, 34 Stat. at 141. Tribal citizenship rolls would be finalized by March 4, 1907. §§ 1, 2, 34 Stat. at 137-38. The Secretary would eventually take possession of and sell tribal buildings, furniture, and lands. § 15, 34 Stat. at 143. Local governments—be they state, territorial, county, or municipal—received the first chance to buy; proceeds would be deposited in the Treasury for the benefit of the Tribe. *Id.*[59] As had been the case in earlier acts, the Secretary was required to distribute the proceeds from the sale of tribal property to the Tribe's members on a per capita basis. § 17, 34 Stat. at 143-44.

In a section labeled "Tribal lands to be held in trust," the Act provided that, upon dissolution of the Five Tribes, tribal lands "shall not become public lands nor property of the United States, but shall be held in trust by the United States for the use and benefit" of the Tribes' members and their heirs. § 27, 34 Stat. at 148. And, as mentioned above, the Act extended the tribal governments' existence without setting a date for dissolution, providing only that they would continue "until otherwise provided by law." § 28, 34 Stat. at 148. The Five Tribes Act thus recognized that the Creek Nation's government continued to exist in "full force and effect," and that, in the event of the future dissolution of the tribal government, "the land[] belonging to the . . . Creek [Nation]" would be held in trust by the United States for the Tribe. *Id.* It did not terminate the Reservation's borders.

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[59] Later in 1906, Congress delayed the implementation of § 15—providing for the sale of tribal property—and clarified it would "not take effect until the date of the dissolution of the tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes." Act of June 21, 1906, ch. 3504, 35 Stat. 325, 342.

8) "Oklahoma Enabling Act," ch. 3335, 34 Stat. 267 (June 16, 1906)

In the Oklahoma Enabling Act, the final statute the State relies on, Congress did not dissolve the Creek government, but it granted permission to the inhabitants of both the Territory of Oklahoma and the Indian Territory to adopt a constitution and seek admittance into the Union as the State of Oklahoma. § 1, 34 Stat. at 267-68. Congress imposed restrictions on the new state's ability to affect Indians and Indian property. "[N]othing" in the state constitution was

> to limit or impair the rights of person or property pertaining to the Indians of said Territories (so long as such rights shall remain unextinguished) or to limit or affect the authority of the Government of the United States to make any law or regulation respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise . . . .

Id. Further, Congress required the people of the territories to

> forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian, tribe, or nation; and that until the title to any such public land shall have been extinguished by the United States, the same shall be and remain subject to the jurisdiction, disposal, and control of the United States.

§ 3, 34 Stat. at 270. Congress also prohibited the new state from allowing the liquor trade for 21 years within the Indian Territory, the bordering Osage Reservation, and "any other part of said State which existed as Indian reservations" as of 1906. § 3, 34 Stat. at 269.

Oklahoma was awarded five seats in the House of Representatives. § 6, 34 Stat. at 271-72. Congress instructed that the third district must "comprise all the territory now constituting the Cherokee, Creek, and Seminole nations, and the Indian reservations lying northeast of the Cherokee Nation, within said State." *Id.*

The United States granted Oklahoma certain townships for the State's school system but withheld "any lands embraced in Indian, military, or other reservations of any character" and specified that "land owned by Indian tribes or individual members of any tribe" were excluded "until the reservation shall have been extinguished and such lands be restored to and become a part of the public domain." § 7, 34 Stat. at 272.

Upon Oklahoma's admission as a State, the territorial laws in force within the Territory of Oklahoma would take effect statewide, and all applicable federal laws would take effect as they applied elsewhere in the country. § 21, 34 Stat. at 277-78.

The Oklahoma Enabling Act, as this court has already said, does not "contain express termination language." *Osage Nation*, 597 F.3d at 1124.

* * * *

The foregoing statutes show the Creek Nation accepted an allotment scheme that retained "surplus" lands for tribal citizens, and Congress established the State of Oklahoma. We now consider further whether, as the State insists, these laws also disestablished the Creek Reservation.

ii. Analysis

None of these statutes disestablished the Creek Reservation. The State's case for termination of the Creek Reservation thus falters at "the first and most important step." *Parker*, 136 S. Ct. at 1080. The State argues the cumulative effect of the eight laws demonstrate that Congress disestablished the Creek Reservation. For three reasons, we disagree. First, the statutes lack any of the textual "hallmarks" demonstrating congressional intent to disestablish, and no other language shows Congress altered the

Creek Reservation's boundaries. *See id.* at 1079. Second, specific statutory language—"[t]he most probative evidence of congressional intent," *Solem*, 465 U.S. at 470—shows Congress continued to recognize the Reservation's borders. Third, the State's reliance on the statutes' reforms of title and governance arrangements within the Reservation is unavailing because these changes did not disestablish the Reservation.

1) No hallmarks of disestablishment or diminishment

Congress never expressly terminated the Creek Reservation in any of the statutes, nor did it use the kind of language recognized by the Supreme Court as evidencing disestablishment. It has long been clear "the Congresses that passed the surplus land acts" were hostile to the reservation system; indeed they "anticipated [its] imminent demise" and "passed the acts partially to facilitate the process," but *Solem* prevents courts from "extrapolat[ing]" this general congressional expectation into "a specific congressional purpose" with respect to a given reservation. 465 U.S. at 468-69; *see also Shawnee Tribe*, 423 F.3d at 1220 & n.18 (explaining that, notwithstanding the "Congressional desire to end the reservation system," the question of "[w]hether a particular treaty or Congressional act was intended to extinguish some or all of an existing reservation requires a case-by-case analysis"). "The effect of any given surplus land act depends on *the language* of the act and the circumstances underlying its passage." *Solem*, 465 U.S. at 469 (emphasis added). Here at step one, we consider the language and find no congressional purpose to disestablish the Creek Reservation's borders.

We have not identified termination language in any of the statutes the State cites. Indeed, the State concedes that not one of the eight statutes contains particular language that disestablished the Creek Reservation.

The absence of such language is notable because Congress is fully capable of stating its intention to disestablish or diminish a reservation, as the following examples illustrate:

- "[T]he Smith River reservation is hereby discontinued." Act of July 27, 1868, ch. 248, 15 Stat. 198, 221; *see Mattz*, 412 U.S. at 504 n.22 (citing statute as an example of "clear language of express termination").

- "That subject to . . . allotment . . . a [legislatively defined] portion of the Colville Indian Reservation . . . is hereby, vacated and restored to the public domain . . . ." Act of July 1, 1892, ch. 140, § 1, 27 Stat. 62, 62-63; *see Mattz*, 412 U.S. at 504 n.22 (citing as example of "clear language of express termination"); *Seymour*, 368 U.S. at 354 (discussing as example of diminishment language).

- "Subject to the allotment of land . . . and for the considerations hereinafter mentioned . . . [the] Comanche, Kiowa, and Apache Indians hereby cede, convey, transfer, relinquish, and surrender, forever and absolutely, without any reservation whatever, express or implied, all their claim, title, and interest, of every kind and character, in and to the lands embraced in the following-described tract of country in the Indian Territory . . . ." Act of June 6, 1900, ch. 813, art. 1, 31 Stat. 672, 676-77; *see Tooisgah v. United States*, 186 F.2d 93, 97 (10th Cir. 1950) (discussing statute as example of language "disestablish[ing] the organized reservation").

- "[A]ll the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 245, 263; *see Hagen*, 510 U.S. at 412 (discussing statute and explaining that "Congress considered Indian reservations as separate from the public domain").

- "[T]he reservation lines of the said Ponca and Otoe and Missouria Indian reservations be, and the same are hereby, abolished." Act of April 21, 1904, ch. 1409, 33 Stat. 189, 218; *see Mattz*, 412 U.S. at 504 n.22 (citing as example of "clear language of express termination").

- "The said Indians belonging on the Shoshone or Wind River Reservation, Wyoming, for the consideration hereinafter named, do hereby cede, grant, and relinquish to the United States, all right, title, and interest which they may have to all the lands embraced within the said reservation, except the lands within and bounded by the following lines . . . ." Act of March 3, 1905, ch. 1452, art. 1, 33 Stat. 1016, 1016; *see Wyoming*, 849 F.3d at 870 (calling this language "precisely suited to diminishment" (quotations omitted)).[60]

Indeed, Congress has had no difficulty addressing the boundaries of the Creek Reservation, and, as the following treaties show, Congress used clear language on these occasions:

- "The Creek Nation of Indians cede to the United States all the land belonging to the said Nation in the State of Georgia, and lying on the east side of the middle of the Chatahoochie river. And, also, another tract of land lying within the said State, and bounded as follows . . . ." 1826 Treaty, art. 2, 7 Stat. at 286-87.

- "The Creek tribe of Indians cede to the United States all their land, East of the Mississippi river." 1832 Treaty, art. 1, 7 Stat. at 366.

- "The United States hereby agree . . . that the Muskogee or Creek country west of the Mississippi, shall be embraced within the following boundaries . . . ." 1833 Treaty, art. 2, 7 Stat. at 418.

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[60] Additional examples can even be found within the statutes the State cites, but not with respect to the Creek Nation. In the 1893 appropriations law—the State's first statute—Congress provided money to satisfy sum-certain purchases of Indian lands under agreements previously negotiated with two Tribes. First, Congress approved $30,600 "to pay the Tonkawa tribe of Indians in the Territory of Oklahoma for all their right, title, claim, and interest of every kind and character in and to four townships of land . . . conveyed and relinquished to the United States." § 11, 27 Stat. at 643-44. Second, Congress appropriated $80,000 "to pay the Pawnee tribe of Indians in Oklahoma, formerly a part of the Indian Territory, for all their right, title, claim, and interest of every kind and character in and to all that tract of country between the Cimarron and Arkansas rivers embraced within the limits of seventeen specified Townships of land, ceded, conveyed, and relinquished to the United States." § 12, 27 Stat. at 644. Further, Congress declared these newly acquired lands to be "part of the public domain." § 13, 27 Stat. at 644.

- "The Creek Nation doth hereby grant, cede, and convey to the Seminole Indians, the tract of country included within the following boundaries . . . ." 1856 Treaty, art. 1, 11 Stat. at 699; *see also id.* at art. 2, 11 Stat. at 700 ("The following shall constitute and remain the boundaries of the Creek country . . . ."); *id.* at arts. 5-6, 11 Stat. at 700-02 (providing for release of Creek claims to specified lands in consideration of $1 million paid by United States).

- "[T]he Creeks hereby cede and convey to the United States . . . the west half of their entire domain, to be divided by a line running north and south; the eastern half of said Creek lands, being retained by them, shall, except as herein otherwise stipulated, be forever set apart as a home for said Creek Nation; and in consideration of said cession of the west half of their lands . . . the United States agree to pay the sum of . . . nine hundred and seventy-five thousand one hundred and sixty-eight dollars . . . ." 1866 Treaty, art. 3, 14 Stat. at 786; *see also id.* at art. 9, 14 Stat. at 788 (providing for the construction of buildings "in the reduced Creek reservation").

The Supreme Court has said that when earlier treaties contained unequivocal language of disestablishment or diminishment and a later enactment "speaks in much different terms," "[t]he change in language . . . undermines [the] claim that Congress intended to do the same with the reservation's boundaries in [the later statute] as it did in [the earlier treaties]." *Parker*, 136 S. Ct. at 1080; *see also Mattz*, 412 U.S. at 504 ("Congress was fully aware of the means by which termination could be effected. But clear termination language was not employed in the [relevant statute]. This being so, we are not inclined to infer an intent to terminate the reservation."); *Seymour*, 368 U.S. at 355 (comparing earlier statute "expressly vacating the South Half of the reservation and restoring that land to the public domain" with later statute and finding that later statute "repeatedly refer[red] to the Colville Reservation in a manner that makes it clear that the intention of Congress was that the reservation should continue to exist as such").

Although the State contends the cumulative force of the eight statutes disestablished the Creek Reservation, Congress again discussed Creek boundaries in direct terms immediately following passage of the State's final statute. The Oklahoma Enabling Act was passed on June 16, 1906. 34 Stat. at 267. Days later, on June 21, Congress recommitted to the boundary separating "the Creek Nation" and "the Territory of Oklahoma." Act of June 21, 1906, ch. 3504, 34 Stat. 325, 364. The line, surveyed in 1871 and reestablished by the U.S. Geological Survey in 1895 and 1896, was "declared to be the west boundary line of the Creek Nation." *Id.* In the same statute, Congress established a new recording district in the Indian Territory and did so by reference to "the north line of the Creek Nation." 34 Stat. at 343. These references to the lines and boundaries of the Creek Nation undercut the State's contention that its eight statutes cumulatively disestablished the Creek Reservation.

As we recently said in *Wyoming*, "[t]here are no magic words of cession required to find diminishment. Rather, the statutory language, whatever it may be, must 'establish an express congressional purpose to diminish.'" 849 F.3d at 869-70 (quoting *Hagan*, 510 U.S. at 411). There are no traditional textual signs of disestablishment in any of the statutes, and our review uncovers no other language to overcome the presumption that the Creek Reservation continues to exist. *See Solem*, 465 U.S. at 481. In fact, the Original Agreement recognized the Reservation's boundaries.

2) Signs Congress continued to recognize the Reservation

The eight statutes not only lack textual evidence that Congress disestablished the Creek Reservation, the Original Agreement contains language recognizing the existence

of the Creek Nation's borders. *See, e.g.*, ¶ 10, 31 Stat. at 864 (discussing towns "in the Creek Nation"); ¶ 25, 31 Stat. at 869 (municipal corporations "in the Creek Nation"); ¶ 37, 31 Stat. at 871 (introduction of cattle "into the Creek Nation"); ¶ 41, 31 Stat. at 872 (application of other laws and treaties "in the Creek Nation"); ¶ 42, 31 Stat. at 872 (notice through publication in newspapers "having a bona fide circulation in the Creek Nation"); ¶ 43, 31 Stat. at 872 (maintenance of liquor laws "in said nation"). And so did other statutes. *See, e.g.*, Supplemental Agreement, ¶¶ 11, 13, 17-18, 32 Stat. at 502-04; Five Tribes Act, §§ 12, 14, 16, 24, 27, 34 Stat. at 141-43, 146, 148; Oklahoma Enabling Act, § 6, 34 Stat. at 272.

The Original Agreement also reserved lands for tribal purposes. *See* ¶ 24, 31 Stat. at 868. *Solem* explained that retention of lands for tribal purposes "strongly suggests" continued reservation status. *See* 465 U.S. at 474 (explaining "[i]t is difficult to imagine why Congress would have reserved lands for such purposes" if the land was no longer a reservation). "Surplus" Creek lands were not made a part of the public domain or even opened to unrestricted non-Indian settlement. Congress and the Tribe instead agreed lands not initially claimed as allotments would be used for the Tribe's benefit by equalizing the allotments of Creek citizens. *See* ¶¶ 3, 9, 31 Stat. at 862, 864; *see also* § 7, 34 Stat. at 272.

And instead of making a sum-certain payment to the Creek Nation for all—or even a portion of—its land, the Agreement provided the Tribe would receive an uncertain amount of revenue based on future sales to non-Indian settlers of surveyed town lots. *See* ¶¶ 11-15, 31 Stat. at 866; *see also Parker*, 136 S. Ct. at 1079 (finding no intent to

diminish where Tribe did not "receiv[e] a fixed sum for all of the disputed lands" because "the Tribe's profits were entirely dependent upon how many nonmembers purchased the appraised tracts of land"); *id.* at 1080 ("Such schemes allow non-Indian settlers to own land on the reservation. But in doing so, they do not diminish the reservation's boundaries." (citation and quotations omitted)).

Thus, not only do the State's statutes lack any language showing disestablishment, they show Congress's continued recognition of the Reservation's boundaries.

3) The State's title and governance arguments

The State's arguments for disestablishment based on Congress's general goals of extinguishing tribal title and establishing a new state government fail. Relying on its first statute—the 1893 appropriations law in which Congress announced the commencement of negotiations—the State argues Congress intended to disestablish the Creek Reservation because Congress aimed for (1) the "extinguishment" of tribal title and (2) the "ultimate creation" of one or more state governments in the Indian Territory. Aplee. Br. at 58 (quoting § 16, 27 Stat. at 645). Congress largely achieved both goals,[61] but the State's arguments fail because they confuse questions of title and governance with the issue before us—the Reservation's boundaries.

[61] Tribal title was never fully extinguished because, as we explained in *Indian Country, U.S.A.*, the Creek Nation has retained title to some lands within the Reservation. 829 F.2d at 976.

a) Title

Whether a reservation has been disestablished or diminished depends on whether its boundaries were erased or constricted, not on who owns title to land inside the lines. "This distinction between a property's title and a reservation's territory is important." *Shawnee Tribe*, 423 F.3d at 1220 n.17. Congress has defined "Indian country" to include "all land within the limits of any Indian reservation." 18 U.S.C. § 1151(a). Based on this definition, the Supreme Court has accepted the "inescapable" conclusion that allotment alone does not terminate a reservation. *Mattz*, 412 U.S. at 504. "[A]djudicating reservation boundaries is conceptually quite distinct from adjudicating title to the same lands. One inquiry does not necessarily have anything in common with the other, as title and reservation status are not congruent concepts in Indian law." *Navajo Tribe*, 809 F.2d at 1475 (footnote and quotations omitted). In other words, who has title is not the same question as whether Congress has erased or altered a reservation's boundaries. *See Yazzie*, 909 F.2d at 1394 (observing "the distinction between title and boundary [is] an important one"); *see also Solem*, 465 U.S. at 470 ("[N]o matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise.").

The allotment of Creek lands—the transfer of title from the Tribe to its members—does not mean Congress disestablished the Creek Reservation. Allotment can be "completely consistent with continued reservation status." *Mattz*, 412 U.S. at 497; *see Navajo Tribe*, 809 F.2d at 1475 ("[A]llotment in severalty to individual Indians and subsequent entry by non-Indians is entirely consistent with continued reservation status."

(quotations omitted)); *see also Solem*, 465 U.S. at 469 ("[I]t is settled law that some surplus land acts diminished reservations, and other surplus land acts did not." (citations omitted)). *Solem* provides the framework for the required case-by-case evaluation, and here the State presents no language showing Congress altered the Creek Reservation's boundaries. Its focus on the extinguishment of tribal title and the shift to individual ownership misses the mark because "the Supreme Court has required that specific congressional intent to diminish *boundaries* and not just Indian land titles be clearly established." *Yazzie*, 909 F.2d at 1394-95. As the Creek Nation explains, the allotment of Creek lands "effectuate[d] an uncompensated change from communal title to title in severalty," but this "transfer of title sa[id] nothing about reservation boundaries." Creek Nation Br. at 15.

b) Governance

Neither do changes in governance over the Creek Reservation show that Congress disestablished the Reservation. The State argues the erosion of Creek governmental authority and the creation of Oklahoma demonstrate Congress disestablished the Creek Reservation. For three reasons, we disagree.

First, a tribal government's *powers* and its reservation's *boundaries* are not the same thing. At times, the State's brief recognizes this point. *See* Aplee. Br. at 89 (arguing Mr. Murphy has "confuse[d] the question of whether the Nation was dissolved as a political entity with the issue in this case, i.e., whether the reservation was disestablished"); *see also id.* at 84 n.33 (noting "the Creek Nation continued to exist as a political entity"). But the State's attempt to tie Congress's regulation of the Creek

government's authority to what Congress must have intended regarding the Reservation's borders fails to satisfy *Solem*'s step one. *See* 465 U.S. at 470 (explaining Congress must "clearly evince an intent to change boundaries" (quotations omitted)).[62]

Second, even if the State could show that dissolution of a tribal government is relevant to disestablishing a reservation, that would not mean the Creek Reservation has been disestablished. This is so because Congress never dissolved the Creek government. Even when Congress contemplated the *future* dissolution of the Creek government, it continued to recognize the Tribe's governmental authority within the Reservation's boundaries. *See, e.g.*, Original Agreement, ¶ 42, 31 Stat. at 872. Thirty years ago, this court explained:

> Although Congress at one time may have envisioned the termination of the Creek Nation and complete divestiture of its territorial sovereignty, the legislation enacted in 1906 reveals that Congress decided not to implement that goal, and instead explicitly perpetuated the Creek Nation and recognized its continuing legislative authority. Congress subsequently repudiated its earlier policies of termination and enacted legislation designed to restore governmental powers to the Oklahoma tribes.

Indian Country, U.S.A., 829 F.2d at 981 (citation omitted). And, as all parties agree, the Creek government continues to exist today.

Third, Oklahoma's admission into the Union is compatible with the Creek Reservation's continuation. States and reservations co-exist throughout the country. *See,*

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[62] The State's contention that regulation of the tribal government indirectly reveals what Congress thought about the Reservation's borders may more appropriately be a step-two argument about the contemporary understanding of the Acts, rather than a step-one textual argument. Either way, it fails to show Congress disestablished the Creek Reservation's boundaries.

e.g., *Parker*, 136 S. Ct. at 1076 (Omaha Indian Reservation within Nebraska); *Solem*, 465 U.S. at 465-66 (Cheyenne River Sioux Reservation within South Dakota); *Indian Country, U.S.A.*, 829 F.2d at 976 (Creek Reservation within Oklahoma); *see also Donnelly v. United States*, 228 U.S. 243, 270-72 (1913) (holding California's admission did not affect federal jurisdiction over murder on Indian reservation).

In sum, the eight statutes do not, individually or collectively, show that Congress disestablished the Creek Reservation. They lack any of the "hallmarks of diminishment," *Parker*, 136 S. Ct. at 1079, and what they do say supports the view of Mr. Murphy and the Creek Nation that the 1866 Reservation borders continue to exist. The State's arguments about tribal title and governance miss the mark. Its case for disestablishment has "fail[ed] at the first and most important step." *Id.* at 1080.

b. *Step Two: Contemporary Historical Evidence*

When the statutory text at step one does not reveal that Congress has disestablished or diminished a reservation, such a finding requires "unambiguous evidence" that "*unequivocally* reveals" congressional intent. *Parker*, 136 S. Ct. at 1080-81 (alterations and quotations omitted); *see also Solem*, 465 U.S. at 478 ("[I]n the absence of some clear statement of congressional intent to alter reservation boundaries, it is impossible to infer from a few isolated and ambiguous phrases a congressional purpose to diminish [a reservation].").

At step two of the *Solem* analysis, courts consider how pertinent legislation was understood to affect the reservation when it was enacted. Evidence of this contemporary understanding may include the negotiations between the tribe and the federal

government, congressional floor debates, and committee reports about the relevant statues. *See Solem*, 465 U.S. at 476-78; *see also Wyoming*, 849 F.3d at 874-75 (considering earlier, failed legislation as indicative of intent).

We have relied on step-two evidence to find disestablishment. In *Osage Nation*, we concluded Congress had disestablished the Osage Reservation, despite an absence of clear textual evidence, because we found "the legislative history and the negotiation process [made] clear that all the parties at the table understood that the Osage reservation would be disestablished by the Osage Allotment Act." 597 F.3d at 1125.[63]

The State argues the contemporary historical evidence shows Congress intended to disestablish the Creek Reservation. Mr. Murphy and the Creek Nation contend there is no unequivocal historical evidence of disestablishment. Instead, they argue the evidence supports continued recognition of the Creek Nation's borders during the relevant period. The mixed evidence we discuss below falls short of "*unequivocally* reveal[ing]" that Congress disestablished the Creek Reservation. *Parker*, 136 S. Ct. at 1080 (quotations omitted).[64]

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[63] In *Osage Nation,* we referred in passing to the Creek Reservation as disestablished, *see* 597 F.3d at 1124, but the disestablishment or diminishment of the Creek Reservation was not before us in that case; the Creek Nation was not a party and therefore was not heard; and the court performed no *Solem* analysis regarding the Creek Reservation. The State acknowledges *Osage Nation* does not bind us here. *See* Aplee. Br. at 93 ("[T]his Court's statement that the Creek reservation was disestablished was dicta . . . .").

[64] Had the State chosen to present its eight-statute, cumulative-effect argument as step-two contextual evidence—as opposed to step-one textual evidence—we would still conclude Congress did not disestablish the Creek Reservation. The eight

Continued . . .

i. The State's evidence

The State's step-two evidence comes from the years preceding the 1901 Original Allotment Agreement. On their own, pre-1901 understandings do little to advance the analysis because the State "does not dispute that the reservation was intact in 1900." Aplee. Br. at 75 n.25. But we understand the State to argue that Congress had a pre-1900 intention to disestablish the Creek Reservation and that this intention carried through later legislation. *See Wyoming*, 849 F.3d at 878-79 (finding a "continuity of purpose" and stating "Congress's consistent attempts . . . to purchase the disputed land compel the conclusion that this intent continued through the passage of the 1905 Act").

The State largely relies on court decisions discussing Creek history as opposed to primary sources from the relevant time period. *See* Aplee. Br. at 69-70 (citing *Woodward*, 238 U.S. at 293; *Sizemore v. Brady*, 235 U.S. 441, 447 (1914); *Stephens v. Cherokee Nation*, 174 U.S. 445, 483 (1899); *United States v. Hayes*, 20 F.2d 873, 888 (8th Cir. 1927); *Harjo*, 420 F. Supp. at 1110). Many of these cases were decided years after the allotment of Creek lands and after Oklahoma became a state, thus providing second-hand evidence of any contemporaneous historical understanding. To the extent the State's cases discuss legislative documents from the era, we look to the documents themselves.

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statutes reveal a congressional hostility to Creek independence consistent with the assimilationist impulse of the era. *See Solem*, 465 U.S. at 466-69. But they do not show, and certainly not unequivocally, "a specific congressional purpose" to disestablish the Reservation's borders. *Id.* at 469. As our step-two discussion demonstrates, the contemporary historical evidence that the Reservation was disestablished is mixed.

1) 1892 Senate debate

The State cites *Hayes* for its earliest historical evidence of Congress's intent to disestablish the Creek Reservation. *Hayes*, a 1927 decision by the Eighth Circuit, discussed an 1892 Senate floor debate in which Senators Jones and Platt opposed a joint resolution proposing to create a commission to negotiate with the Five Civilized Tribes to induce them to allot their lands. *See* 20 F.2d at 879-82 (summarizing debate). Senator Jones argued the government's goal should be to induce the Indians "to abandon their tribal organizations and their tribal governments and to become citizens of the United States." 24 Cong. Rec. 98 (Dec. 13, 1892). Allotment should be offered, he said, *in exchange for* the dissolution of tribal governments. *Id.* He argued the joint resolution would "give away the single advantage we have." *Id.*

Senator Platt thought the "real question" was whether the country could "endure five separate, independent, sovereign, and almost wholly foreign governments within the boundaries of the United States." *Id.* at 100. Although acknowledging "[t]he United States conveyed to each of the five civilized tribes their lands in fee simple, and agreed that they should never be included in any Territorial or State government, so long as the tribes continued to exist and occupy the lands," he contended things had changed. *Id.* The "original idea" had been "that white people were not to dwell in that country," but he thought the influx of white settlers into the Indian Territory showed the Tribes no longer wished to remain isolated. *Id.* The changing demographic situation required new governing structures. *Id.* at 101-02. Elimination of the tribal governments, he argued, would eventually have to happen with or without the Tribes' consent. *Id.* at 102. Senator

Platt also pointed out the Committee on Indian Affairs was drafting a bill to create a commission "much wider in scope than is contained in the joint resolution." *Id.*

The joint resolution "died upon the table without reference to committee," *Hayes*, 20 F.2d at 880 (quotations omitted), but, as discussed above, Congress created the Dawes Commission the next year though the 1893 Act, which instructed the Commission to pursue the purchase or allotment of tribal lands and to secure conditions "suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said India[n] Territory," § 16, 27 Stat. at 645.

This legislative history of a failed resolution falls far short of what would permit us to find disestablishment. "[I]solated statements" from a few legislators do not show that Congress disestablished a reservation, *Parker*, 136 S. Ct. at 1080, especially when, as here, the discussion concerns tribal title and governance rather than a reservation's boundaries.

2) 1894 Senate committee report

Next, the State looks to an 1894 report from a Senate select committee on the Five Civilized Tribes discussed in *Stephens*, an 1899 Supreme Court decision involving the constitutionality of laws regulating the Indian Territory. *See* 174 U.S. at 483. The report noted 1890 census figures showing the white population in the Indian Territory greatly outnumbering the Indian population. S. Rep. No. 53-377, at 6 (1894). Within the Indian Territory there were "[f]lourishing towns . . . composed wholly of white people." *Id.* To the committee, this state of affairs undercut the isolationist notion undergirding earlier treaties:

> It must be assumed . . . that the Indians themselves have determined to abandon the policy of exclusiveness, and to freely admit white people within the Indian Territory, for it cannot be possible that they can intend to demand the removal of the white people either by the Government of the United States or their own. They must have realized that when their policy of maintaining an Indian community isolated from the whites was abandoned for a time it was abandoned forever.

Id. at 7.

The committee report also commented on the state of land ownership and governance within the Indian Territory. Although the Tribes held title for the benefit of all their citizens, the report found that some tribal citizens, "frequently not Indians by blood but by intermarriage," had managed to take effective control over large swaths of the best agricultural land and earn private income by renting out sections of the land. *Id.* at 11-12. The report observed that this development disadvantaged many tribal citizens and the United States might have to intervene to ensure that tribal holdings were administered for the benefit of all a Tribe's members. *Id.* The report viewed the Tribes in the Indian Territory as incapable of reforming the situation, labelling "their system of government" as "not only non-American" but "radically wrong." *Id.* at 12. "There can be no modification of the system. It can not be reformed. It must be abandoned and a better one substituted." *Id.* Convinced change was needed, but "not car[ing] to . . . suggest what . . . will be the proper step for Congress to take," the committee simply noted that the Dawes Commission was hard at work, and said it would "wait and see." *Id.* at 12-13.

This report describing 1890s conditions does not address whether Congress understood its later reforms would disestablish the Creek Reservation. And again, the

State's contextual evidence concerns title and governance and does not speak to the reservation question.

3) Other sources

The State references an 1895 report from the Dawes Commission to Congress, which stated that the "so-called governments" in the Indian Territory were "wholly corrupt, irresponsible, and unworthy to be longer trusted" with the lives and property of Indian citizens. Dep't of the Interior, H.R. Doc. No. 54-5, at XCV (1st Sess. 1895). The Commission predicted the situation would not "remain peaceabl[e]" if the white population were excluded from the governance arrangement and stressed the United States was "bound by constitutional obligations to see to it that government everywhere within its jurisdiction rests on the consent of the governed." *Id.* at XC.

The State argues an 1897 report by the Secretary of the Interior similarly found that a uniform system of government would have to be provided for the Indian Territory. The State also observes that the Creek Nation and the Dawes Commission negotiated agreements that were rejected by either the Tribe or Congress before both sides agreed to the Original Allotment Agreement, but the State does not cite any particular provisions in these earlier, proposed deals to argue they reveal a contemporary understanding that Congress intended to disestablish or diminish the Creek Reservation.

These materials fail to show that Congress intended to disestablish the Creek Reservation by enacting any of the eight statutes.

ii. Mr. Murphy's and the Creek Nation's evidence

Mr. Murphy contends there is no unequivocal historical evidence supporting disestablishment. To the contrary, he and the Tribe cite sources from both before and after the 1901 Original Agreement to argue the Creek Nation's borders remain intact.

1) 1894 Dawes Commission records

The Creek Nation points to records from the Dawes Commission's early years. Its 1894 report to Congress discussed the Commission's negotiations and explained the Tribes had refused to discuss changes "in respect either to their form of government or the holdings of their domains." Dep't of the Interior, H.R. Doc. No. 53-1, at LIX-LX (3d Sess. 1894). The Commission explained to Congress it had proposed allotment after "abandon[ing] all idea of purchasing" tribal lands because "the Indians would not, under any circumstances, agree to cede any portion of their lands to the Government." *Id.* at LVX. The same report included a copy of the terms the Commission had submitted to the Creek Nation—the propositions "upon which [the Commission] proposed to negotiate." *Id.* at LX-LXI. The eighth proposition stated that, if an agreement was reached, Congress would be allowed to form a territorial government "over the territory of the Creek Nation." *Id.*

2) 1895 Dawes letter

Next, the Tribe points to an 1895 letter from Chairman Dawes to the Creek Nation's principal chief explaining:

> [T]he Commission have not come here to interfere at all with the administration of public affairs in these nations, or to undertake to deprive any of your people of their just rights. On the other hand, it is their purpose

> and desire, and the only authority they have, to confer with you upon lines that will result in promoting the highest good of your people and securing to each and all of them their just rights under the treaty obligations which exist between the United States and your nation.

H.R. Doc. No. 54-5, at LXXXI. These treaty obligations, the Creek Nation argues, included the 1866 treaty's recognition of the Tribe's territorial integrity.

3) 1900 Attorney General opinion

The Creek Nation also relies on a 1900 Attorney General opinion, which addressed the "conditions now existing in the Indian country occupied by the Five Civilized Tribes" to argue the 1898 Curtis Act did not affect the Reservation's boundaries. 23 U.S. Op. Att'y Gen. 214, 215 (1900), *available at* 1900 WL 1001. Responding to an inquiry from the Secretary of the Interior about the presence of non-Indians in the Indian Territory, the Attorney General explained that the Tribes, even after passage of the Curtis Act, still had the power to exclude intruders and to set the terms upon which non-members could enter the Tribes' lands. *See id.* at 215-18. The opinion said the Tribes could regulate activity within their borders because, although outsiders could purchase town lots, "the legal right to purchase land within an Indian nation gives to the purchaser no right of exemption from the laws of such nation." *Id.* at 217. Tribal laws "requiring a permit to reside or carry on business in the Indian country" were still in effect. *Id.* Non-members grazing cattle or otherwise occupying Indian lands were "simply intruders" who "should be removed, unless they obtain such permit and pay the required tax, or permit, or license fee." *Id.* at 219. The Attorney General concluded the Secretary of the Interior had

> the authority and duty . . . to remove all persons of the classes forbidden by treaty or law, who are there without Indian permit or license; to close all business which requires a permit or license and is being carried on there without one; and to remo[v]e all cattle being pastured on the public land without Indian permit or license, where such license or permit is required; and this is not intended as an enumeration or summary of all the powers or duties of your Department in this direction.

Id. at 220; *see also Maxey v. Wright*, 54 S.W. 807, 809-10, 812 (Indian Terr.) (upholding Creek occupancy tax imposed on non-member lawyers practicing law within the Creek Nation), *aff'd*, 105 F. 1003 (8th Cir. 1900).

4) Post-allotment evidence

Mr. Murphy and the Tribe argue contemporary historical evidence shows an understanding that the Creek Nation's borders continued after allotment. In its report to Congress in 1900, the Dawes Commission reflected on what its negotiations had—and had not—achieved:

> Had it been possible to secure from the Five Tribes a cession to the United States of the entire territory at a given price, the tribes to receive its equivalent in value, preferably a stipulated amount of the land thus ceded, equalizing values with cash, the duties of the commission would have been immeasurably simplified, and the Government would have been saved incalculable expense. . . . When an understanding is had, however, of the great difficulties which have been experienced in inducing the tribes to accept allotment . . . it will be seen how impossible it would have been to have adopted a more radical scheme of tribal extinguishment, no matter how simple its evolutions.

Dep't of the Interior, H.R. Doc. No. 56-5, at 9 (2d Sess. 1900).

Mr. Murphy points out that, in the years immediately following passage of the allotment agreements, the regional federal circuit court with jurisdiction over the Indian Territory continued to recognize the Creek Nation's borders. In *Buster*, federal agents

enforced the Creek Nation's licensing fee on trade "within its borders" by closing the businesses of non-Indians who had refused to pay. 135 F. at 949-50. The non-Indian business owners sought to enjoin federal enforcement of the tax and argued the Creek Nation's power had been withdrawn by the Original and Supplemental Allotment Agreements, which authorized the presence of individuals in lawful possession of town lots. *Id.* at 950. The Eighth Circuit held that, although allotment had altered title arrangements, the Creek Nation's power to govern the area was "not conditioned or limited by the title to the land." *Id.* at 951. "Neither the United States, nor a state, nor any other sovereignty loses the power to govern the people within its borders . . . by the ownership [or] occupancy of the land within its territorial jurisdiction by citizens or foreigners." *Id.* at 952. The Creek Nation retained "its power to fix the terms upon which noncitizens may conduct business *within its borders*." *Id.* (emphasis added). The Eight Circuit said in summation:

> The ultimate conclusion of the whole matter is that purchasers of lots in town sites in towns or cities within the original limits of the Creek Nation, who are in lawful possession of their lots, are still subject to the laws of that nation prescribing permit taxes for the exercise by noncitizens of the privilege of conducting business in those towns, and that the Secretary of the Interior and his subordinates may lawfully enforce those laws by closing the business of those who violate them, and thereby preventing the continuance of that violation.

Id. at 958.[65]

[65] The Supreme Court has questioned *Buster*'s approach to Indian taxing authority, but we consider the case only as a contemporary source revealing an understanding that Congress had not disestablished the Creek Reservation.

Continued . . .

iii. Analysis

The State's evidence at step two largely speaks to changes (or anticipated changes) in title and governance. It does not show that Congress understood it was disestablishing the Creek Reservation. Although Mr. Murphy and the Creek Nation present counter evidence showing a continuing understanding that the Creek Reservation's borders remained intact, we need not settle which side has the stronger argument about the contemporary historical evidence. Under *Solem*, our inquiry is simpler. Because no clear textual evidence shows Congress disestablished the Creek Reservation at step one, it is enough for us to say at step two that the "historical evidence in no way '*unequivocally* reveal[s] a widely held, contemporaneous understanding that the affected reservation would shrink as a result of the proposed legislation.'" *Parker*, 136 S. Ct. at 1080 (alteration and emphasis in original) (quoting *Solem*, 465 U.S. at 471).

None of the step-two evidence, whether viewed in isolation or in concert, shows unmistakable congressional intent to disestablish the Creek Reservation. The State's historical evidence supports the notion that Congress intended to institute a new government in the Indian Territory and to shift Indian land ownership from communal

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In *Atkinson Trading Co.*, the Supreme Court invalidated a hotel occupancy tax challenged by a non-Indian who owned a hotel within the borders of the Navajo Reservation. 532 U.S. at 647-48, 659. In doing so, the Court made clear that it has never endorsed *Buster*'s broad statement "that an Indian tribe's 'jurisdiction to govern the inhabitants of a country is not conditioned or limited by the title to the land which they occupy in it.'" *Id.* at 653 n.4 (quoting 135 F. at 951). For our purposes, the correctness of *Buster*'s pronouncements on Indian taxing authority is irrelevant. Mr. Murphy and the Creek Nation rely on *Buster* simply as contemporary historical evidence.

holdings to individual allotments. But this does not show, unequivocally or otherwise, that Congress had erased or even reduced the Creek Reservation's boundaries. Even if the State's evidence offers some suggestion of a contemporary understanding that the Creek Reservation was disestablished, Mr. Murphy and the Creek Nation have marshalled evidence showing an understanding that the Reservation's borders continued. The step-two evidence is at most debatable, and we need not parse it further because ambiguous evidence cannot overcome the missing statutory text at step one. *See Hagen*, 510 U.S. at 411 ("Throughout the inquiry, we resolve any ambiguities in favor of the Indians . . . .").

After the first two steps, the statutory-text analysis fails to show that Congress disestablished or diminished the Creek Reservation, and there is no unequivocal evidence of a contemporaneous understanding that the legislation terminated or redrew the Creek Nation's borders at step two. We turn to step three.

c. *Step Three: Later History*

We consider at step three "federal and local authorities' approaches to the lands in question and . . . the area's subsequent demographic history." *Shawnee Tribe*, 423 F.3d at 1222; *see Solem*, 465 U.S. at 471; *see also Parker*, 136 S. Ct. at 1081 (considering tribal presence in contested territory). "Congress's own treatment of the affected areas," especially in the years immediately following passage of legislation that opens a reservation to non-Indian settlement, "has some evidentiary value, as does the manner in which the Bureau of Indian Affairs and local judicial authorities" treated the disputed area. *Solem*, 465 U.S. at 471. Step three also concerns "who actually moved onto

opened reservation lands," *id.*, but later demographic facts are "the least compelling" evidence for disestablishment or diminishment because "[e]very surplus land Act necessarily resulted in a surge of non-Indian settlement and degraded the 'Indian character' of the reservation." *Yankton Sioux Tribe*, 522 U.S. at 356.

Solem provides that, as compared to steps one and two, step-three evidence is considered "[t]o a lesser extent." 465 U.S. at 471. In its most recent decision applying *Solem*, the Supreme Court observed that although it has "suggest[ed]" step-three evidence "might reinforce" a conclusion based on statutory text, it "has never relied solely on this third consideration to find diminishment." *Parker*, 136 S. Ct. at 1081 (alterations and quotations omitted); *see also Wyoming*, 849 F.3d at 879 ("[S]ubsequent events cannot undermine substantial and compelling evidence from an Act and events surrounding its passage." (quotations omitted)).

We proceed to discuss (i) the treatment of the area and (ii) its demographic history. The conflicting step-three evidence discussed below does not allow us to say that Congress disestablished the Creek Reservation.

i. Treatment of the area

1) Congress

Both sides cite evidence to show what later Congresses understood about the Creek Reservation's existence. We start with the earliest examples.

The Creek Nation cites the following statutes in arguing Congress continued to recognize the Reservation's boundaries following passage of the allotment agreements: Act of April 21, 1904, ch. 1402, 33 Stat. 189, 204 (granting Secretary of the Interior

authority to sell "the residue of lands in the Creek Nation"), *repealed by* Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1072 (revoking Secretary's authority); Act of March 3, 1909, ch. 263, 35 Stat. 781, 805 (providing for "equalization of allotments in the Creek Nation"); and Act of May 25, 1918, ch. 86, 40 Stat. 561, 581 (appropriating money for "the common schools in the Cherokee, Creek, Choctaw, Chickasaw, and Seminole Nations"). We find these laws carry some weight because, within step three, *Solem* emphasizes the years "immediately following" passage of the relevant laws. *See* 465 U.S. at 471; *see also Hagen*, 510 U.S. at 420 (repeating the Court's "longstanding observation that the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one" (brackets and quotations omitted)).

The Creek Nation cites other statutes showing that reservations continued to exist in Oklahoma, though they do not speak directly to the Creek Reservation. *See* Act of May 29, 1924, ch. 210, 43 Stat. 244, 244 (regulating oil and gas leases on "unallotted land on Indian reservations other than lands of the Five Civilized Tribes and the Osage Reservation"); Act of June 26, 1936, ch. 831, 49 Stat. 1967, 1967 (authorizing Secretary of the Interior to acquire land and water rights "within or without existing Indian reservations" in Oklahoma).

The State points to more recent statutes in which Congress defined "reservation" to include, among other things, "former Indian reservations in Oklahoma." Aplee. Br. at

85.[66] These laws also include existing reservations within their definitions, however, and none of them reference the Creek Reservation as being disestablished in particular. Congress's choice to include former reservation lands in Oklahoma within various regulatory programs does not show that Congress has disestablished the Creek Reservation.

The State also cites two congressional committee reports. First, a 1935 report by a Senate committee said that in Oklahoma, as the result of allotment, "Indian reservations as such have ceased to exist." S. Rep. No. 74-1232, at 6 (1935). But as the Creek Nation argues, the legislation associated with the report, the Oklahoma Indian Welfare Act, referenced "existing Indian reservations." *See* § 1, 49 Stat. at 1967. Second, the State argues "[a] survey in 1952 referred to the lands of the Five Civilized Tribes as areas, rather than reservations." Aplee. Br. at 85 (citing H.R. Rep. No. 82-2503, at 745, 753, 777, 793, 952 (1952)). Mr. Murphy and the Creek Nation do not address this report, but the State does not explain why "areas" and "reservations" cannot refer to the same land.

Altogether, these conflicting signals from later Congresses do not overcome the lack of evidence at steps one and two. Given "the textual and contemporaneous evidence" in this case, "confusion in the subsequent legislative record does nothing to alter our conclusion" that the Creek Reservation's borders still exist. *Hagen*, 510 U.S. at

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[66] The State cites the following examples: 12 U.S.C § 4702(11); 16 U.S.C. § 1722(6)(C); 25 U.S.C. §§ 1452(d), 2020(d)(1)-(2), 3103(12), 3202(9); 29 U.S.C. § 741(c); 33 U.S.C. § 1377(c); 42 U.S.C. §§ 2992c(2), 5318(n)(2). Within 29 U.S.C. § 741, "reservation" is actually defined in subsection (d), and within 42 U.S.C. § 2992c, "Indian reservation" is defined in subsection (3).

420; *see also id.* ("The subsequent history is less illuminating than the contemporaneous evidence.").

2) Executive

The parties' evidence from the executive branch also is mixed. The Creek Nation contends that the Bureau of Indian Affairs continued to regard the Reservation as intact in the early years of the twentieth century. The BIA's annual reports following Creek allotment and Oklahoma statehood consistently included the Creek Nation in tables summarizing reservation statistics. *See* Creek Nation Br., App'x B. Similarly, the Department continued to include the Creek Nation on its "Maps Showing Indian Reservations within the Limits of the United States." *See id.* App'x C (maps from 1900-14).

But the State argues a later BIA regulation concerning land acquisition policies shows that the BIA concluded the Creek Reservation was disestablished because the regulation defined "Indian reservation" to mean:

> that area of land over which the tribe is recognized by the United States as having governmental jurisdiction, except that, in the State of Oklahoma or where there has been a final judicial determination that a reservation has been disestablished or diminished, Indian reservation means that area of land constituting the former reservation of the tribe as defined by the Secretary.

25 C.F.R. § 151.2(f) (2016).[67] Even if this evidence supports the State, it merely creates a conflict with the other BIA evidence.

[67] The regulation dates to 1980. *See* Land Acquisitions, 45 Fed. Reg. 62034, 62036 (Sept. 18, 1980) (announcing regulation's finalization).

The Supreme Court has said that government officials' later treatment of the disputed area "has 'limited interpretive value.'" *Parker*, 136 S. Ct. at 1082 (quoting *Yankton Sioux Tribe*, 522 U.S. at 355); *see also Solem*, 465 U.S. at 469 ("The first and governing principle is that only *Congress* can divest a reservation of its land and diminish its boundaries." (emphasis added)). And, more generally, the "subsequent treatment of the disputed land cannot overcome the statutory text" when the relevant laws are "devoid of any language" indicating Congress intended to disestablish a reservation. *Parker*, 136 S. Ct. at 1082.

3) Federal courts

Both sides point to passing references in federal court decisions across the decades that reveal conflicting understandings of the Creek Reservation's status.

The State invokes a handful of twentieth-century cases "indicat[ing], in dicta, a widely held belief that the reservation was disestablished." Aplee. Br. at 78-79 (citing *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 171 (1973); *Okla. Tax Comm'n v. United States*, 319 U.S. 598, 602-03, 608 (1943); *Grayson v. Harris*, 267 U.S. 352, 353 (1925); *Woodward*, 238 U.S. at 285; *McDougal v. McKay*, 237 U.S. 372, 383 (1915); *Washington v. Miller*, 235 U.S. 422, 423 (1914); *Harjo*, 420 F. Supp. at 1143). But the State's characterization of these cases is overstated. *McClanahan*, for instance, does not discuss the Creek Nation at all. And in *Woodward*, the Supreme Court described the case as involving a 160-acre tract "formerly part of the domain of the Creek Nation," but, in the next sentence, the opinion explained "[t]he tract was allotted to Agnes Hawes, a Creek freedwoman." 235 U.S. at 285. The Court's description of the

land is consistent with the transfer of title from the Creek Nation, which formerly owned it, to Ms. Hawes. As previously explained, a change in title from tribal to individual ownership does not disestablish a reservation. Other cases the State cites suffer the same flawed understanding that allotment had terminated the reservation. *See Grayson*, 267 U.S. at 353, 357 (describing allotted lands "lying within the former Creek Nation"); *Washington*, 235 U.S. at 423 (referring to "lands within what until recently was the Creek Nation in the Indian Territory"). To the extent the State's cases reflect a later understanding that the Creek Reservation had been disestablished, these references, as the State acknowledges, are dicta.

The Creek Nation argues that "[f]ederal courts in the decades after allotment sometimes subscribed to [the] erroneous assumption" that the Creek Reservation had been disestablished based on a mistaken belief that the tribal government had been dissolved. Creek Nation Br. at 32. For example, in *Turner v. United States*, the Court of Claims remarked—incorrectly—that the "Creek Nation of Indians kept up their tribal organization . . . until the year 1906, at which date the tribal government was terminated by the general provisions of [the Original Allotment Agreement]." 51 Ct. Cl. 125, 127 (1916), *aff'd*, 248 U.S. 354 (1919). But, as discussed above, Congress extended the tribal government beyond 1906 and has never dissolved it. *See* § 28, 34 Stat. at 148. The Supreme Court affirmed the Court of Claims' decision and repeated its mistake that "[o]n March 4, 1906, the tribal organization was dissolved pursuant to" the Original Agreement. *Turner*, 248 U.S. at 356. But, as the Court later recognized, the Creek

Nation "still exists" and has "resume[d] some of its former powers." *Seber*, 318 U.S. at 718 & n.23.

As we have explained, the question of tribal governmental powers is distinct from reservation boundaries, but the Creek Nation persuasively argues these clear errors are an "indication of just how shaky such judicial assumptions were" in the decades after allotment. Creek Nation Br. at 32-33.

Scattered dicta in later court decisions do not justify a conclusion that Congress disestablished the Creek Reservation. We have undertaken the three-part *Solem* analysis *because* no Supreme Court or Tenth Circuit case has addressed the question. *See Indian Country, U.S.A.*, 829 F.2d at 975 (reserving issue of "whether the exterior boundaries of the 1866 Creek Nation have been disestablished").

4) Oklahoma

The Creek Nation acknowledges the State "asserts considerable governmental authority over the Creek reservation." Creek Nation Br. at 37. Oklahoma's general exercise of authority over the former Indian Territory has included criminal prosecutions of Indians, but we agree with Mr. Murphy and the Creek Nation that the exercise of State authority has not disestablished the Creek Reservation.

In *Ex parte Nowabbi*, Oklahoma convicted a member of the Choctaw Tribe in state court of murdering another tribal member on the victim's allotment. 61 P.2d 1139, 1141-42 (Okla. Crim. App. 1936), *overruled by Klindt*, 782 P.2d 401. The defendant argued the federal district court had exclusive jurisdiction. *Id.* at 1143. The OCCA

concluded state jurisdiction was proper and said Congress had failed to reserve federal jurisdiction for crimes committed within the former Indian Territory. *Id.* at 1154, 1156.[68]

Since then, however, the state courts have changed course. In 1989, the OCCA concluded *Nowabbi* had erred in holding Oklahoma had jurisdiction to prosecute an Indian defendant for a murder committed on an Indian allotment. *See Klindt*, 782 P.2d at 404 ("There is ample evidence to indicate that the *Nowabbi* Court misinterpreted the statutes and cases upon which it based its opinion. . . . *Nowabbi* is hereby overruled."); *see also Cravatt*, 825 P.2d at 280 (vacating Indian defendant's state-court conviction for murder committed on allotment). These cases addressed allotments, not the reservation question. Still, they show that Oklahoma has shifted away from its earlier position that there is no Indian country in the former Indian Territory.

The State has not provided us with other examples of Oklahoma prosecuting Indians for murders committed within the Creek Reservation,[69] but such cases would be

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[68] The Oklahoma Attorney General similarly concluded in 1979 that Oklahoma has jurisdiction over the former Indian Territory: "Due to the dissolution of the Indian tribes of former 'Indian Territory' as *governments of limited sovereignty*, there is no 'Indian country' in said former 'Indian Territory' over which tribal and thus federal jurisdiction exists." 11 Okla. Op. Att'y. Gen. 345 (1979), *available at* 1979 WL 37653, at *8-9.

[69] In the 1990s, we rejected an attempt by the federal government to allow Oklahoma to prosecute a Creek citizen for the murder of another Creek citizen. *Sands*, 968 F.2d at 1061. We did not address the reservation issue, however, because we determined the crime occurred on an allotment—and thus in Indian country under 18 U.S.C. § 1151(c). *Id.* at 1062. After prosecuting the defendant in federal court, the federal government "urge[d] us to adopt its frequently raised, but never accepted, argument that the State of Oklahoma retained jurisdiction over criminal offenses in

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of little value because the Supreme Court has explained that even when a state's exercise of jurisdiction goes unquestioned, lands retain their Indian country status until Congress decides otherwise. In *United States v. John*, 437 U.S. 634 (1978), the Supreme Court rejected an argument by the State of Mississippi that the federal government's failure to assert its jurisdiction had made the State's exercise of jurisdiction proper:

> [The State argues] that since 1830 the Choctaws residing in Mississippi have become fully assimilated into the political and social life of the State, and that the Federal Government long ago abandoned its supervisory authority over these Indians. Because of this abandonment, and the long lapse in the federal recognition of a tribal organization in Mississippi, the power given Congress "to regulate Commerce . . . with the Indian Tribes," Const. Art. I, § 8, cl. 3, cannot provide a basis for federal jurisdiction. To recognize the Choctaws in Mississippi as Indians over whom special federal power may be exercised would be anomalous and arbitrary.
>
> We assume for purposes of argument, as does the United States, that there have been times when Mississippi's jurisdiction over the Choctaws and their lands went unchallenged. But . . . we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

Id. at 652-53 (brackets and footnote omitted); *see also Indian Country, U.S.A.*, 829 F.2d at 974 ("[T]he past failure to challenge Oklahoma's jurisdiction over Creek Nation lands, or to treat them as reservation lands, does not divest the federal government of its exclusive authority over relations with the Creek Nation or negate Congress' intent to protect Creek tribal lands and Creek governance with respect to those lands.").

Indian country." *Id.* at 1061. We rejected the argument and affirmed the defendant's federal conviction. *Id.* at 1061-63, 1067.

Oklahoma's exercise of jurisdiction within the Creek Reservation is not a proper basis for us to conclude that Congress disestablished the Reservation.

5) Creek Nation

The Creek Nation has maintained a significant and continuous presence within the Reservation. The tribal government, which was never extinguished, saw many of its powers restored when Congress passed OIWA in 1936. *See Indian Country, U.S.A.*, 829 F.2d at 981. Later, "[i]n 1979, the Creeks reorganized their tribal government . . . and adopted a new Creek Constitution, which was approved by the United States Department of the Interior." *Id.* at 970. Today, the tribal government maintains a capital complex in Okmulgee and provides extensive services within the Creek Nation's borders. *See* Creek Nation Br., App'x D (maps reflecting Tribe's capital complex and locations of community centers, medical centers, and emergency response teams throughout the Reservation). The Creek Nation further contends it applies its traffic laws throughout the territory and supports traditional churches and ceremonial grounds on the Reservation. *Id.* at 37.[70] Mr. Murphy also observes the Creek Nation has entered into deputation agreements for law enforcement services "within the exterior boundaries of the Muscogee (Creek) Nation." Aplt. Br., Attach. F. The Creek Nation's continued presence and activity provides a much stronger case for reservation continuation than in *Parker*,

[70] *See also* The Muscogee (Creek) Nation, http://www.mcn-nsn.gov/services/# (providing overview of tribal services including, among others, language programs, environmental services, family violence prevention programs, historical and cultural preservation programs, senior services, and education and transportation programs) [https://perma.cc/Q82C-ZVZY].

where the Supreme Court held a reservation was intact notwithstanding the fact that "the Tribe was almost entirely absent from the disputed territory for more than 120 years." 136 S. Ct. at 1081. The value of this evidence may be slight, but it weighs in favor of Mr. Murphy and the Creek Nation.[71]

ii. Demographics

There is a large, non-Indian population within the Creek Reservation. The State argues that, even "[b]y 1906, four-fifths of the persons living in Indian Territory were non-Indian." Aplee. Br. at 86 (citing H.R. Rep. No. 59-496, at 10 (1906)). In 2000, the year Mr. Murphy was convicted in McIntosh County,[72] the census determined that—of a total county population of 19,456—14,123 people were white (73%) compared to 3,152 people who identified as American Indian or Alaska Native (16%).[73] And within the Reservation but beyond McIntosh County lies the city of Tulsa with a population, the State maintains, that is only 5.3% Indian. *Id.* at 86 (citing 2015 census figures).

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[71] Mr. Murphy has submitted other step-three materials in the form of reports and legislative history criticizing the Oklahoma probate courts for their handling of Indian estates in the years after allotment. *See* Aplt. Br., Attach. E. Similarly, he cites a lengthy 1928 report commissioned by the Department of the Interior, *see id.* at 42 n.19 (citing Institute for Government Research, "The Problem of Indian Administration" (1928)), on which the State also draws. We have considered these materials, but they do not affect our conclusion.

[72] The 1866 boundaries of the Creek Reservation, however, cover more than McIntosh County.

[73] *See* United States Census Bureau, "American FactFinder," Profile of General Demographic Characteristics: 2000 [https://perma.cc/LH7M-32WX].

Mr. Murphy argues this demographic evidence is unhelpful because "[t]he increase of non-Indian intruders into Indian Territory was occurring before the allotment acts and Enabling Act were passed," and even before allotment and Oklahoma statehood, "the [Creek] Nation's citizens were the minority within their own territory." Aplt. Br. at 65-66. Although many non-Indians have come to live in the area, the Tribe points out that approximately half of its members continue to live within the 1866 borders of the Reservation.

The demographic evidence does not overcome the absence of statutory text disestablishing the Creek Reservation. *See Parker*, 136 S. Ct. at 1082 (explaining it is not the "role" of courts to "rewrite" earlier statutes "in light of . . . subsequent demographic history" (quotations omitted)). *Solem* acknowledged that "[r]esort to subsequent demographic history is . . . an unorthodox and potentially unreliable method of statutory interpretation." 465 U.S. at 472 n.13; *see also Wyoming*, 849 F.3d at 887 n.6 (Lucero, J., dissenting) (applying step three but observing "[t]he demographic makeup of an area decades or more following passage of a statute cannot possibly tell us anything about the thinking of a prior Congress"). We take account of it as part of our step-three analysis but do not rest our decision upon it.

iii. Step-three concluding comment

When steps one and two "fail to provide substantial and compelling evidence of a congressional intention to diminish Indian lands," courts must accord "traditional solicitude" to Indian tribes and conclude "the old reservation boundaries" remain intact.

Solem, 465 U.S. at 472. Such is the case here. None of the step-three evidence allows us to conclude that Congress disestablished the Creek Reservation.

IV. **CONCLUSION**

Applying *Solem*, we conclude Congress has not disestablished the Creek Reservation. Consequently, the crime in this case occurred in Indian country as defined in 18 U.S.C. § 1151(a). Because Mr. Murphy is an Indian and because the crime occurred in Indian country, the federal court has exclusive jurisdiction. Oklahoma lacked jurisdiction. *See* 18 U.S.C. § 1153(a).

Mr. Murphy's state conviction and death sentence are thus invalid. The OCCA erred by concluding the state courts had jurisdiction, and the district court erred by concluding the OCCA's decision was not contrary to clearly established federal law. We therefore reverse the district court's judgment and remand with instructions to grant Mr. Murphy's application for a writ of habeas corpus under 28 U.S.C. § 2254. The decision whether to prosecute Mr. Murphy in federal court rests with the United States. Decisions about the borders of the Creek Reservation remain with Congress.

BUREAU: Office of the Solicitor
OFFICE: Division of Indian Affairs
ISSUE: *Murphy v. Royal*

Key Points:

- On August 8, 2017, the United States Court of Appeals for the Tenth Circuit held that Congress did not disestablish the Muscogee (Creek) Nation reservation in Oklahoma.
- This decision is contrary to longstanding positions of both the Department of the Interior and the United States Solicitor General.
- [redacted] *(b)(5)*

Background:
Patrick Murphy, an enrolled member of the Muscogee (Creek) Nation in Oklahoma, killed another tribal member in 1999. The crime occurred within the historical boundaries of the Creek reservation as defined by the Treaty of June 14, 1866 between the United States and the Nation.[1] Mr. Murphy was convicted of murder and sentenced to death in Oklahoma State court.

Mr. Murphy initiated a series of appeals in which he argued, among many other things, that the State lacked criminal jurisdiction over him because the crime occurred in "Indian country" within the meaning of 18 U.S.C. § 1151. In relevant part, that statute defines "Indian country" as including "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." Under criminal jurisdiction rules, an Indian accused of murdering another Indian in "Indian country" can be tried in Federal or Tribal court, not State court. However, if the crime took place outside of "Indian country," Oklahoma courts would retain jurisdiction.

In December 2006, the Supreme Court requested the views of the United States on Mr. Murphy's jurisdictional claims, and the Department of Justice sought the views of then-Solicitor David L. Bernhardt. Solicitor Bernhardt opined that the State properly had jurisdiction over Mr. Murphy because Congress had disestablished the Creek reservation through a series of late nineteenth and early twentieth century statutes.[2] In doing so, Solicitor Bernhardt applied the Supreme Court's well-established three prong test for reservation disestablishment and diminishment,[3] under which courts examine statutory language, historical context, and the subsequent treatment of the area at issue to evaluate whether Congress sought to disestablish or diminish an Indian reservation. Solicitor Bernhardt concluded that the crime had not taken place "in Indian country" and that the State of Oklahoma had properly asserted criminal jurisdiction over Mr. Murphy.

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[1] 14 Stat. 785. The historical Creek reservation is approximately three million acres and includes portions of eleven counties in eastern Oklahoma.
[2] In addition, the crime was committed on an allotment, the surface of which was held in fee and which had a subsurface mineral estate held in one-twelfth trust status. Solicitor Bernhardt rejected Mr. Murphy's claim that this alone rendered the parcel "Indian country" under the statute.
[3] *See, e.g.*, *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998); *Solem v. Bartlett*, 465 U.S. 463 (1984).

In May 2007, then-Solicitor General Paul D. Clement came to the same conclusion in a Supreme Court *amicus* brief opposing certiorari from Mr. Murphy's conviction in Oklahoma State court.[4] The Solicitor General applied the Supreme Court's three-part framework and found congressional disestablishment of the Creek reservation. The Solicitor General noted that no State or Federal court had ever held that the historic boundaries of the Creek Nation remained intact and encompassed an existing reservation, and argued that this position was consistent with the United States' briefing before the Supreme Court concerning criminal jurisdiction in Oklahoma in both 1989[5] and 1993.[6] The Solicitor General concluded that the series of statutes culminating in Oklahoma's 1907 grant of Statehood, as well as congressional action since that time, demonstrated that Congress had disestablished the reservation by "allotting [Creek] lands, displacing tribal jurisdiction, and establishing the supremacy of state law and state jurisdiction."

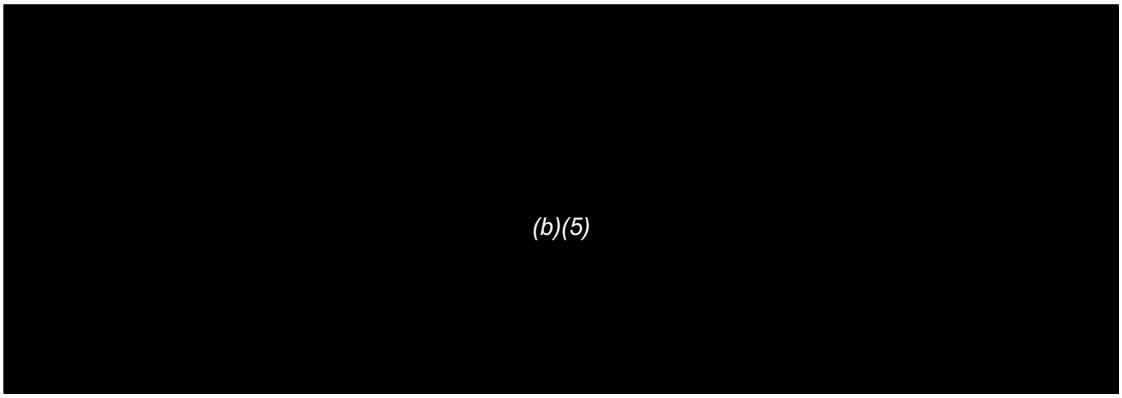
The Supreme Court denied certiorari in June 2007.[7]

Current Status:
Mr. Murphy continued to raise a variety of claims in Oklahoma State and Federal courts, eventually resulting in the instant case reaching the United States Court of Appeals for the Tenth Circuit.[8] On August 8, 2017, a unanimous Tenth Circuit panel held that under the applicable three prong test, most recently reaffirmed in the Supreme Court's 2016 *Nebraska v. Parker* decision,[9] the Creek reservation had not been disestablished.

The panel conducted an exhaustive review of the history of the Muscogee (Creek) Nation and Oklahoma generally, as well as the genesis and purpose of the various statutes that Solicitor Bernhardt and the Solicitor General previously found to have disestablished the reservation. With respect to step one, the panel held that the statutes lacked the textual "hallmarks" signifying congressional intent to disestablish, and that Congress had continued to recognize the reservation's borders even after passing the statutes at issue. At step two, the panel concluded no historical evidence unequivocally revealed any widely held, contemporaneous understanding pre- or post-allotment that the Creek reservation had been disestablished. The panel also rejected the State's argument, which the United States had previously advanced in its 2007 certiorari opposition, that changes in governance over the Creek reservation and the erosion of Creek governmental authority had any relevance to reservation status. Finally, at step three, the panel found that subsequent treatment of the area in question, as well as its demographic history, were ambiguous and could not overcome the lack of evidence otherwise demonstrating disestablishment. The panel dismissed various cases suggesting that the reservation had been disestablished as either dicta or having wrongly equated reservation allotment to disestablishment.

[redacted] *(b)(5)*

[4] Solicitor Bernhardt's name appeared on the Solicitor General's brief.
[5] *Oklahoma v. Brooks*, cert. denied, 490 U.S. 1031 (1989).
[6] *Sands v. United States*, cert. denied, 506 U.S. 1056 (1993).
[7] *Murphy v. Oklahoma*, 551 U.S. 1102 (2007).
[8] *Murphy v. Royal*, Nos. 07-7068 & 15-7041, 2017 U.S. App. LEXIS 14556 (10th Cir. Aug 8, 2017).
[9] 136 S. Ct. 1072 (2016).



Prepared by: Eric Shepard, Associate Solicitor, Division of Indian Affairs, 202-208-3233
Date: 8-15-2017

[10]The "Five Civilized Tribes" historically refers to the Cherokee, Chickasaw, Choctaw, Seminole and Creek Indians.

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APPELLATE-#355251-v1-Markle_-_Petition_for_cert__of_Markle_Interests (4).PDF

Preparatory to our meeting next Tuesday, attached are the pending Cert. Petitions and the Solicitor General's draft Opposition to them.

Rick
--
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No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
LIST OF ALL PARTIES ii
CORPORATE DISCLOSURE STATEMENT ii
PETITION FOR A WRIT OF CERTIORARI 1
OPINIONS BELOW 1
JURISDICTION 1
CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1
INTRODUCTION 4
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE PETITION 18

I This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act 18

II This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat 24

TABLE OF CONTENTS - Continued

Page

III This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear* 29

IV This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species 32

CONCLUSION..... 40

APPENDIX A – Panel Opinion of U.S. Court of Appeals, Fifth Circuit, and Dissent, 827 F.3d 452 (5th Cir. 2016) (June 30, 2016) A-1

APPENDIX B - Opinion of U.S. District Court, Eastern District of Louisiana, 40 F. Supp. 3d 744 (Aug. 22, 2014)..... B-1

APPENDIX C – Order of U.S. Court of Appeals, Fifth Circuit Denying En Banc Review, and Dissent from Denial, 848 F.3d 635 (5th Cir. 2016) (Feb. 13, 2017) C-1

TABLE OF CONTENTS - Continued

Page

APPENDIX D – Complaint for Declaratory and Injunctive Relief, filed in U.S. District Court, Eastern District of Louisiana (Feb. 7, 2013) D-1

APPENDIX E – Excerpts from Mar. 12, 2012, Public Comment on Behalf of P&F Lumber, Etc. E-1

APPENDIX F – Excerpts from Nov. 23, 2011, Public Comment on Behalf of P&F Lumber, Etc. F-1

TABLE OF AUTHORITIES

Page

CASES

Alabama-Tombigbee Rivers Coal. v. Kempthorne,
477 F.3d 1250 (11th Cir. 2007) 36

All. for Wild Rockies v. Lyder,
728 F. Supp. 2d 1126 (D. Mont. 2010) 27

Am. Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 27-28

Arizona Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 27

Bennett v. Spear, 540 U.S. 154 (1997)..... 5, 29-32, 40

Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 12, 28

Ctr. for Biological Diversity v. Kelly,
93 F. Supp. 3d 1193 (D. Idaho 2015) 27

Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 37

GDF Realty Invs. v. Norton,
326 F.3d 622 (5th Cir. 2003) 36

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 36

Home Builders Ass'n of N. California v. United States Fish and Wildlife Service,
616 F.3d 983 (9th Cir. 2010) 27

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 20

TABLE OF AUTHORITIES - Continued

Page

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 21, 22

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
40 F. Supp. 3d 744 (E.D. La. 2014)..... 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
827 F.3d 452 (5th Cir. 2016) 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
848 F.3d 635 (5th Cir. 2016) 1

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 22

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins., 463 U.S. 29 (1983) 32

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997) 36

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 38

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,
469 U.S. 189 (1985) 21

Pittston Coal Grp. v. Sebben,
488 U.S. 105 (1988) 22

Rancho Viejo, LLC v. Norton,
323 F.3d 1062 (D.C. Cir. 2003) 36

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

TABLE OF AUTHORITIES - Continued

Page

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) 36

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 37-40

United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) 20, 21

United States v. Bass, 404 U.S. 336 (1971)..... 39

United States v. Lopez, 514 U.S. 549 (1995) 38

United States v. Morrison, 529 U.S. 528 (2000) 37

FEDERAL STATUTES

16 U.S.C. § 1532(5)(A)(i)–(ii) 2, 19

§ 1532(5)(A)(ii) 22

§ 1533(a)(3)(A)(i)–(ii) 3, 20, 22

§ 1533(b)(2) 3, 11, 30

§ 1536(a)(2) 12

U.S. CONSTITUTION

U.S. Const., amend. X..... 2

U.S. Const., art. I, § 8, cl. 3..... 2

RULE OF COURT

Sup. Ct. Rule 13.3 1

TABLE OF AUTHORITIES - Continued

Page

FEDERAL REGULATIONS

50 C.F.R. § 402.01(a)..... 21
§ 424.12(b) 8
66 Fed. Reg. 62993 (Dec. 4, 2001) 5
75 Fed. Reg. 31389 (June 3, 2010) 6
75 Fed. Reg. 39396 (July 8, 2010) 13
76 Fed. Reg. 59774 (Sept. 27, 2011) 7
77 Fed. Reg. 35118 (June 12, 2012) 8
81 Fed. Reg. 7414 (Feb. 11, 2016) 35

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2014) 19
Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) 11, 12, 13
Index Map, Critical Habitat for the Dusky Gopher Frog 10
The Random House Dictionary of the English Language (1969) 18
Webster's Third New International Dictionary (1961)..... 18

PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

The term "critical habitat" for a threatened or endangered species means:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

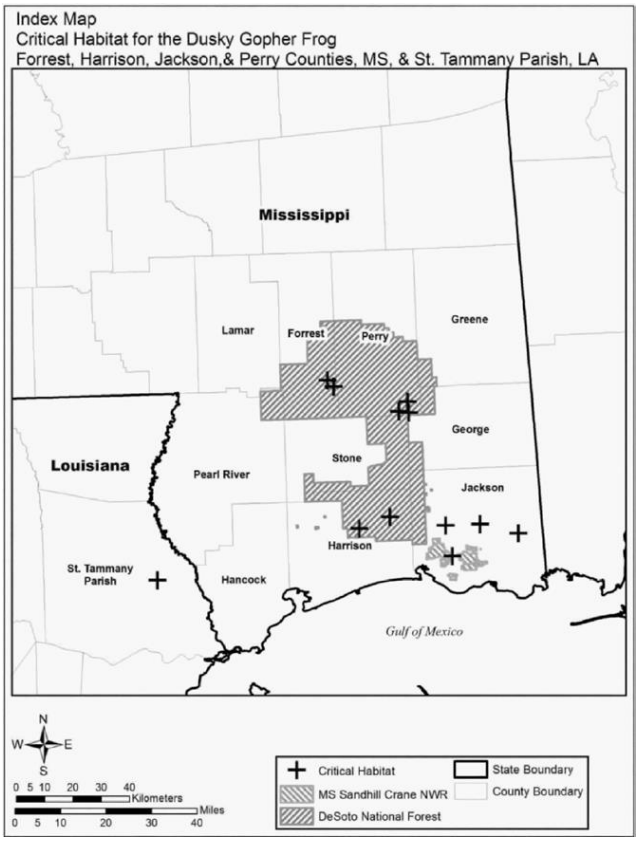
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

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

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

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

> present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.
>
> - In the second scenario, development requires a federal wetlands permit and therefore triggers a Section 7 consultation. The Service requires 60 percent of Unit 1 to be set aside and managed for the conservation of the dusky gopher frog, allowing the remaining 40% to be developed. This results in lost development value of $20.4 million over 20 years.
>
> - In the third scenario, a Section 7 consultation is triggered and "the Service . . . recommend[s] complete avoidance of development with [Unit 1] in order to avoid adverse modification of critical habitat." This results in lost development value of $33.9 million over 20 years.

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id*. at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id*. at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id*. at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id*. at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*. In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id*. Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id*.

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id*., Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id.* On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id*. § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id*. Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id*. (citing *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

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

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id*. at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id*. Unit 1 does not contain the upland features necessary for the frog's survival. *Id*.

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id*. at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id*. at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

> species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

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

16 U.S.C. § 1533(b)(2) (emphasis added).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

has not been for more than fifty years." *Id*. at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id*. at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id*. at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id*. at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id*. at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id*. at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id*. Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id*. Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id*. In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id*.

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id*. at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id*. at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id*. *See United States v. Morrison*, 529 U.S. 598, 613

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id*. at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

DATED: July 2017.

Respectfully submitted,

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Appendix A-1

United States of Appeals
Fifth Circuit
FILED
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Lyle W. Cayce, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix A-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private

property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open canopied pine forests.[2] They migrate to isolated,

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[1] *Se* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi go*e*pher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you

ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531– 1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review

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hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the

designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross- motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen- suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly defines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437

U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III

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[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing. [9]*See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development— is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that

"considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so

speculative fear" that the government would imminently target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen

immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court— that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of- interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone- of-interests test. We thus conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical-Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131

determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical- habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding

that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mississippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts

agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35,124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35,133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1

provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35,124.

Finally, in addition to ephemeral ponds, dusky gopher frogs alsorequire upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35,131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35,134. This value, which was based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

> Altogether, the Service concluded:
> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports

> metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's determination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that, when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that

the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument.

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra* note 20

There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F. Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not

demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habitat if these areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The statute defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation

goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii),

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

(b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in effect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider

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account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective

designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any more "necessary" to a

given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental- take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

conservation of the dusky gopher frog.[19]

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the

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[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field essential for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C.

situation here, and the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

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§ 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that in this case, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. See, e.g., Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them.

Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." See 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat designation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . . ." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We

thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical

> habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical- habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, at *7–8 (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which

is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05- 0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit 1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832)). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the

conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in Michigan, the ESA explicitly mandates "consideration" of "economic impact."16 U.S.C.§ 1533(b)(2); see Bennett, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. See Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number

of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. See Bldg. Indus. Ass'n of Bay Area, 2015 WL 4080761, at *5–6. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the

critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is intrastate (not interstate) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." Markle Interests, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." Id.

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third Lopez prong. See United States v. Morrison, 529 U.S. 598, 609– 12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." Id. at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to

instances that "have an explicit connection with or effect on interstate commerce." Id. at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. Id. at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. Id. The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in Morrison. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the "take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff–developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species)

in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. See GDF Realty, 326

F.3d at 639 ("ESA's protection of endangered species is economic in nature."); id. at 640 ("ESA is an economic regulatory scheme . . . ."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. See id. § 1538(a)(1)(E)–(F); GDF Realty, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical- habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic activity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress

has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 214 F.3d

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483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C.§ 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habitat—one that the Service has already found to be essential for the conservation of the species—to escape designation

would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted))

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the

regulation of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical- habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical- habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177– 78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect[ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will

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(1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in nature, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under

NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of- interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact- statement requirement

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district Court

PRISCILLA R. OWEN, Circuit Judge, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species" [1]because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3]to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] Id.

[3] Id.

play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one

feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A)

[6] 77 Fed. Reg. at 35,118

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the

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[10] *Id.* at 35,133

[11] *Id.* at 35,135

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . . . However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.")

[13] *Id.* (noting "we hope to work with the landowners").

habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then replaced with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

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[14] *Id*. at 35,129.

[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171-75 (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the endangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example,

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[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

[21] *Ante* at 19.

sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species. [22]The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" To the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24] In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C.§ 203(a) required long-distance communications common carriers to file tariffs with the Federal

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[22] *Bear Valley*, 790 F.3d at 994.

[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long- distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[31] The same can be said of the Service's, and the majority opinions, construction of the Endangered Species Act in the present case. It may be a good idea to

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[25] *Id*. at 220

[26] *Id*. at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id*. at 220.

[28] *Id*. at 228.

[29] *Id*. at 229-31.

[30] *Id*. at 231.

[31] *Id*. at 231-32.

permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation goes beyond the meaning that the statute can bear.[32] That court was fully cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges. This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI*

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[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[34] Sw. Bell Corp., 43 F.3d at 1521 (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)).

[35] Id.

[36] *Id.;* see also id. ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

Telecommunications Corp. is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of."[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the

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[37] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will

be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[s] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not *when the species will be conserved*, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation. The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species. [42]The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

[42]*See* ante at 22

to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species"

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[43] Id.

requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habitat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists

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[44] *See ante* at 22 n.17; 24 n.18.

[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24

and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that uninhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the

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[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant

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[51] *Ante* at 24-25.

[physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat,

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[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] See also ante at 20

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

[56] *See ante* at 25 n.19.

[57] *Id.*

the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[] that virtually *any* part of the United States could be designated as 'critical habitat' for any given

> endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging

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[58] *Id.* (citation omitted).
[59] *Id.*

that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that

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[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[61] *Id.*

are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

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[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id*. (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population)

[64] Ante at 13-14 (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)).

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation of the species" is therefore not supported by substantial evidence, and the

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[65] See 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . . .").

designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However, the Service found that Unit 1 has only one of the three

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[66] 77 Fed. Reg. at 35,131.

[67] Id.

[68] *Id.*

[69] *Id.*

primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed- canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The Service

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.; see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded:

> Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover;

found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact

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(3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] Id. at 35,140.

depended on the extent to which it might be developed,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The Service

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[77] *Id*.

[78] *Id*.

[79] *Id*.

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id*. at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no

reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results

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Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact

[84] *Id*. at 35,140-41:

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to

in development on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to

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section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

Appendix B-1

Filed
August 22, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	CIVIL ACTION
v.	NO. 13-234
UNITED STATES FISH AND WILDLIFE SERVICE, ET AL 13-413	c/w 13-362 and (Pertains to all cases)
	SECTION "F"

ORDER AND REASONS

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross- motion.

Additionally before the Court are two motions to strike extra- record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases -- landowners and a lessee of a tree farm in Louisiana -- challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately-owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

Appendix B-3

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species ... to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16

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[1]Technically, administration responsibilities are divided between the Department of Interior and the Department of Commerce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine...."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. §, 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A)("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable ... (i) shall concurrently with making a [listing] determination ... designate any habitat of such species...."). Like its listing duty, FWS's habitat designation duty is mandatory;[2]the designation must

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[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001)("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'"). It is incumbent on the Secretary -- "to the maximum extent prudent and determinable" -- to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later designation. *See* 16 U.S.C. § 1532(a)(3)(B)("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established...."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii)(if "critical habitat of [listed] species is not ... determinable [at the time of listing], the Secretary ... may extend the one-year

be based on "the best scientific data available ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines ... that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Id.

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means–
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary

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period specified in paragraph (A) by not more than one additional year....") and 50 C.F.R. § 424.17(b)(2).

> that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical occupied habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3]50 C.F.R. § 424.12(b). FWS may designate as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat...." 16 U.S.C. § 1536(a)(2).[4] If

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival andrecovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442-43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and*

FWS or the consulting federal agency determines that a contemplated action "may affect ... critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (Rana Sevosa) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129 - 35131. They travel to small, isolated

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survival of a species imposes a higher threshold than the statutory language permits.")(emphasis in original).

[5] Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking

[7] Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Id. at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. Id. at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

species. FWS determined that the frog was endangered due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

historical breeding sites for the frog. Based on the comments, FWS re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana.[11] FWS identified additional critical habitat in Mississippi and Louisiana[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetica scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9

[11] FWS was not able to identify critical habitat in Alabama.

million").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

land in Unit 1 is owned by Weyerhaeuser Company, which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaueuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531, et seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-record

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for Supplementing, or challenging, the administrative record; no party requested to supplement the record.

evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions,

to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed.R.Civ.P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA -- in particular, a final rule designating critical habitat -- the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174-75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)(Courts must be particularly deferential to agency determinations

made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent

Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001)(citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985))("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February

8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County*, 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record; (2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA, U.S,* 133 S.Ct. 1138, 1146 (2013). "One element of the case-

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545
(5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See S*ummers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); see also *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)(citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[19]

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but

The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. V. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C.Cir. 2006)(an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as

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in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C.Cir. 2005)(firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation ... has immediately devalued the land within Unit 1 for commercial purposes by bringing increased ... regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they

in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117-18 (D.D.C. 2004)(business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

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submit that the designation "limits the usability and saleability of the property" to their detriment.

[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser ... periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce... among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. See *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008)(vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-Lopez Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. V. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. V. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend Lopez, which dealt with a

challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United State*s, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" GDF, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally

valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640-41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n. 9 (1984)("[T]he

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining

that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which

> likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on recovery of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat because Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

occupied habitat must contain all of the relevant PCEs. See 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide. Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere

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[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010)(rejecting argument that FWS must first identify the point at which the endangered species is considered

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008)("While tempting in its logical simplicity...the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), aff'd, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), cert. denied, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly rebutted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument -- to the extent it is reviewable (see *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010)(Service's decision not to

exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map…[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." Id. FWS "chose the value of 621 m...by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog…and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use...." Id. FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." Id. With respect to Unit 1, FWS explained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. Id. at 35123-25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. See *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010("Where an agency's particular technical expertise is

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa*, will be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List...to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants

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involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

acceptance as its own species...and the scientific name for the species was changed to *Rana sevosa."* 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30]And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama Tombigee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position...on the question and is supported by...peer review[,] and by the opinion of the Service's own experts.")

Wyerhaeuser, a co- owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why -- (assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies -- FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the

landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat ... on the basis of the best scientific data available and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. See 16 U.S.C. § 1533(b)(2)(the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)(citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D.Ariz. 2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations' economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens imposed by simply listing the frog) are treated as part of the regulatory baseline and are not

factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation... to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results

million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion -- its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered -- is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

these economic impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013)(*quoting Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. Id. To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

environment."

U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003)(NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed.

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities

Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436-39 (10th Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. Id. Unlike the critical habitat designation in that case -- where the environmental impact of the critical habitat designation "will be immediate and disastrous" -- the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. Douglas County v. Babbitt, 48 F.3d 1495, 1501-08 (9th Cir. 1995)(considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. Id. Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain

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such as timber management lack a federal nexus and are therefore exempt.

terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009)(setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

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Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 202 F. Supp. 2d 594, 646-48 (W.D.Tex. 2002) (citations omitted).

[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

New Orleans, Louisiana, August 22, 2014.

s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse -- contrary to the express terms and scope of the statute -- a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

Appendix C-1

United States Courts of Appeals
Fifth Circuit
FILED
February 13, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix C-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

Opinion June 30, 2016, 827 F.3d 452)

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

ENTERED FOR THE COURT:

S/ STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." See 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied)

Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the

> species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

> Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012.

Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii)

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plantations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical- habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and

benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." [1]*Id.* at 472 n.20. Finally, the panel majority held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

> The ESA states that the Service
>
> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* … and ... may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical"

portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species ... and habitat of such species that has designated as critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant[.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the

species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical*.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This

predecessor provision, like the current consultation requirements, refers to the destruction or modification of "habitat of such species which is determined by the Secretary. . . to be critical."[3] From the very beginning, Congress rooted the concept of

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . . . I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . . . While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . . . In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

critical habitat in the relevant species' actual habitat.

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation. [4]As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be*

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

habitat. A diagram explains this statutory plan:

Figure 1: Under the ESA, a species critical habitat is necessarily a subset of the species habitat

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit decision. Neither of these objections should be persuasive. The first objection—that this textualist argument was waived—is easily disposed of. Throughout this

litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement exists,[5] but a reviewing court could not cite the same context and related regulations to say a

[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

habitability requirement does in fact exist. This objection is meritless

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. the Ninth Circuit appeared to assume that critical- habitat designation of those unoccupied, uninhabitable areas was the only means

of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally

live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)-(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by

chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features* . . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas*. . . [that] are essential for the

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose.[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conservation would be a more substantial

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions.[9] Mirroring the respective Houses' proposals, [10]Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied"

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat");

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional

purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of *unoccupied* critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to

the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious concern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species' occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally

limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical- habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472 n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity ofa Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to articulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances

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[12] *Markle Interests*, 827 F.3d at 471.

merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one

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[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no

would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C. § 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the

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support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent . . . .").

panel majority's one- feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

"unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non- Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical

> habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best

expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary." The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [] economic impact is not reviewable."*Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it— "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Cheney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the ESA's permissive language: "[t]he Secretary

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed,

and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard. The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

Appendix D-1

Filed
February 7, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO.

MARKLE INTERESTS, LLC,

Plaintiff,
v.

UNITED STATES FISH AND WILDLIFESERVICE, DANIEL M. ASHE, Director of United States Fish and Wildlife Service, in his official capacity; United States DEPARTMENT OF INTERIOR; and, KENNETH SALAZAR, Secretary of the Department of Interior, in his official capacity

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIE

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against Defendants for violating federal statutes and the U.S. Constitution. By final rule, dated June 12, 2012, 77 Fed. Reg. 35118, *et seq.*, Defendants, through the U.S. Fish and Wildlife

Service, designated critical habitat for the dusky gopher frog (previously Mississippi Gopher Frog) in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., in that the designation erroneously includes large areas of private land that do not contain the physical and biological features essential to the conservation of the species and the economic analysis is invalid for failing to properly consider the cumulative effects of the designation. Moreover, the designation was issued without the environmental review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*., and in excess of constitutional authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Defendants‟ actions are contrary to law and must be set aside.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (actions arising under the citizen suit provision of the Endangered Species Act); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

3. Plaintiff, Markle Interests, LLC (Markle), satisfied the notice requirement of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(2). More than 60 days ago, by letter dated September 27, 2012, Markle provided Defendants written notice of the violations that are the subject of this complaint in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as

Exhibit 1 and is incorporated herein by reference. Defendants have not responded to this notice or taken any action to withdraw the final rule at issue here, or to otherwise remedy their violations of law.

4. An actual, justiciable controversy now exists between Markle and Defendants. Relief is proper under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

5. The federal government has waived sovereign immunity in this action under 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

6. Markle has exhausted all administrative remedies.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in this district.

PARTIES

Plaintiff

8. Markle Interests, LLC, is a limited liability company that owns an undivided interest in forested property identified in the final rule as Unit 1 in St. Tammany Parish, Louisiana, and included as critical habitat for the dusky gopher frog. This designation imposes significant regulatory burdens on the property such that costly federal approval may be required for any activity deemed to affect the species, including adverse habitat modification. In addition to

these regulatory burdens, the destination of Unit 1 as critical habitat results in a drastic reduction in value and limits the usability and saleability of the property.

Defendants

9. Defendant United States Department of Interior (Department) is an agency of the United States. Congress has charged the Department with administering the Endangered Species Act for certain species, including the dusky gopher frog.

10. Defendant Kenneth Salazar is Secretary of the United States Department of Interior (Secretary). He oversees the Department‟s administration of the Endangered Species Act and is sued in his official capacity.

11. Defendant United States Fish and Wildlife Service (Service) is an agency of the United States Department of Interior. The Service has been delegated responsibility by the Secretary for day-to-day administration of the Endangered Species Act, including the designation of critical habitat.

12. Defendant Daniel M. Ashe is Director of the United States Fish and Wildlife Service. He oversees the Service‟s administration of the Endangered Species Act and is sued in his official capacity.

13. All of these Defendants are responsible for the violations alleged in this complaint.

LEGAL FRAMEWORK

Listing of Threatened or Endangered Species

14. Under Section 4 of the Endangered Species Act, Defendants must list a species as "threatened" or "endangered" based on certain factors relating to habitat, overutilization, disease or predation, existing regulatory mechanisms, or other factors. *See* 16 U.S.C. § 1532(20).

15. An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

16. Endangered species are specifically protected by Section 9 of the Endangered Species Act, which, among other things, makes it unlawful for any person to "take" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, hunt, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," and may include habitat modification. 16 U.S.C. § 1532(19)

Critical Habitat Designation

17. Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, Defendants must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

18. Critical habitat is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> ….
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

16 U.S.C. § 1532(5)(A)-(C).

19. "The statute thus differentiates between „occupied" and „unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Grower's Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

20. The term "conservation" means the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at

17-01174_018901;17-01174_018901;17-01174_018902;17-01174_018903;17-01174_018904;17-01174_018905;1...

which the protections of the Act are no longer required. 16 U.S.C. § 1532(3).

21. The Secretary must

> [d]esignate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

Consultation

22. Private property designated as critical habitat is subject to federal regulation.

23. In consultation with the Secretary, federal agencies are required to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

24. Section 7 of the Endangered Species Act also requires a federal agency to consult with the

Secretary at the request of a permit applicant, if the applicant "has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

25. Under Section 7, the Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If it is determined that the project is likely to jeopardize the species" "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.*

26. If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action will not" jeopardize the species" continued existence or result in the destruction or adverse modification of critical habitat of such species, a written "incidental take statement" must be issued that (1) specifies the impact of such incidental taking on the species; (2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3), sets forth the terms and conditions with which the agency or applicant must comply to implement the specified measures. 16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv).

National Environmental Policy Act

27. The National Environmental Policy Act requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency‟s decision making. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

28. An environmental impact statement must include:

> (i) The environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man‟s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

29. The NEPA implementing regulations provide federal agencies with the opportunity to prepare an "environmental assessment" that either determines that an environmental impact statement is required or concludes with a "finding of no

significant impact," which terminates the agency's NEPA obligations. 40 C.F.R. § 1508.9.

Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act, a court must set aside agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D).

31. Section 704 of the Administrative Procedure Act states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

U. S. Constitution

32. Commerce Clause enactments, like the Endangered Species Act, are subject to the limits of that power. "The Constitution grants Congress the power to „*regulate* commerce." Art. 1, § 8, cl. 3. (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012).

FACTUAL ALLEGATIONS

Listing and Critical Habitat Designation

33. On December 4, 2001, the U.S. Fish and Wildlife Service listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*.

34. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq*.

35. Although critical habitat may only include those areas "essential to the conservation of the species," the Service made no finding as to the quantity or location of habitat necessary to conserve the gopher frog or identify "the point" at which the protections of the ESA are no longer required.

36. The critical habitat designation covers 6,477 acres in two states, including 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1. *Id.* at 35118.

37. Unit 1 is private land in which the Plaintiff, Markle, owns an undivided interest. *Id.* at 35134-35135.

38. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35134-35135.

39. Unit 1 is not suitable for gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. *Id.* at 35135.

40. Unit 1 cannot be made suitable for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site. *Id.* at 35129-35130.

41. Unit 1 landowners submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123.

42. The Service acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35126.

43. The Service did not show how Unit 1—which is unoccupied and unsuitable as habitat for the gopher frog—is essential to the conservation of the species.

Economic Impacts Analysis

44. In conjunction with the critical habitat designation, the Service completed an economic impacts analysis mandated by Section 4 of the Endangered Species Act. *See id.* at 35140-35141.

45. That analysis showed that designating Unit 1 as critical habitat could have an adverse impact on the landowners as high as $33.9 million. *See id.* at 35141.

46. On the record, the Service did not conduct a balancing analysis that weighed the economic impact on the landowners of Unit 1 against the benefit of including Unit 1 in the critical habitat designation.

47. Notwithstanding the fact that Unit 1 is unsuitable for gopher frog habitat, the Service concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

48. The Service relied on the "baseline approach" and did not consider the *quantitative* economic impacts of the critical habitat designation coextensively (or cumulatively) with the listing of the gopher frog as an endangered species. *Id.* at 35140-35142.

NEPA Compliance

49. The government admitted that it did not subject the critical habitat designation for the dusky gopher frog to review under the National Environmental Policy Act. *See id.* at 35144.

APA Compliance

50. The rule designating critical habitat for the dusky gopher frog, 77 Fed. Reg. 35118, *et seq.*, is the culmination of the Service‟s decision making and constitutes final agency action.

Constitutional Compliance

51. The Service made no finding that the designation of Unit 1 as critical habitat constitutes the regulation of existing commercial activity as the Constitution and U.S. Supreme Court precedent require. *See United States v. Lopez*, 514 U.S. 549 (1995).

INJUNCTIVE RELIEF ALLEGATIONS

52. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 51 as though fully set forth herein.

53. If an injunction does not issue enjoining Defendants from enforcing the critical habitat designation for the dusky gopher frog, Markle will be irreparably harmed.

54. Markle has no plain, speedy, and adequate remedy at law.

55. If not enjoined by this Court, Defendants will continue to enforce or rely on the critical habitat designations in derogation of Markle‟s rights.

56. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

57. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 as though fully set forth herein.

58. An actual and substantial controversy exists between Markle and Defendants as to their legal rights and duties with respect to the ESA, NEPA, the APA, and the U.S. Constitution in the designation of critical habitat for the dusky gopher frog.

59. This case is presently justiciable because Defendants‟ failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Markle. Markle has a vital interest in knowing whether the critical habitat designation, to which Markle is subject, is statutorily and constitutionally valid.

60. Declaratory relief is therefore appropriate to resolve this controversy.

CLAIMS FOR RELIEF

First Claim for Relief

Failure to Make Threshold Determination for Designating Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(e); Alternatively, APA, 5 U.S.C. § 706)

61. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 60 as though fully set forth herein.

62. The Endangered Species Act defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5). In turn, the Act defines "conservation" to mean the use of all methods and procedures necessary to bring a "threatened" or "endangered" species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3). The Act does not define "essential" but it is axiomatic that to determine what is "essential to the conservation of the species," the Service must first identify "the point" when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. However, those threshold determinations are entirely missing from the final rule.

63. The effect of the Service‟s failure to determine a viable population and minimum habitat

size is that the Service is logically incapable of ascertaining which areas are "essential to the conservation of the species" and whether the designation of any particular unoccupied area is required. *See* 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). In this case, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area. Without the foundational underpinning of a viable population, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

64. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); federal regulation, 50 C.F.R. § 424.12(e); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Second Claim for Relief

Failure to Apply Correct Standard to Determine Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); Alternatively, APA, 5 U.S.C. § 706)

65. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. The Secretary does not have unfettered discretion to designate unoccupied areas as critical

habitat. Such areas must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(ii). Logically, this would include areas that at least contain those physical and biological features that are themselves "essential to the conservation of the species." The Service has identified such features as Primary Constituent Elements (or PCEs). For the dusky gopher frog, there are three: (1) ephemeral wetland habitat; (2) upland forested nonbreeding habitat; and (3) upland connectivity habitat. *See* 77 Fed. Reg. 35131. The Service maintains that all of these PCEs are essential to the conservation of the species. However, the Service admits that Unit 1 does not contain all these PCEs. *See id.* at. 35135. In fact, Unit 1 contains none of the PCEs essential to the conservation of the species. Therefore, Unit 1 is currently not suitable habitat for the dusky gopher frog at all, let alone critical habitat.

67. Nevertheless, the Secretary included this unoccupied area in the designation. In effect, the Secretary designated Unit 1 as critical habitat on the premise that the area would be essential for the conservation of the species, if it ever did contain the requisite PCEs. *See id.* But it doesn"t now and likely never will. The private owners have no intent to convert their property to conservation purposes and, according to the Service, they can"t be compelled to do so.

68. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Third Claim for Relief
Inadequate Economic Analysis
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

69. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 68 as though fully set forth herein.

70. The Economic Analysis (EA) adopts the "baseline" approach whereby the Service only considers the *qualitative* impacts that occur "without critical habitat," such as those impacts caused by listing of the species, whereas the incremental impacts occurring "with critical habitat" are given a *quantitative* analysis. *See* 77 Fed. Reg. at 35140-35141. The result of this approach is that neither the Service nor the public are ever provided a meaningful cumulative economic impacts analysis. This "baseline" approach was rejected by the Tenth Circuit in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). According to the Tenth Circuit, the "baseline" approach is meaningless and inconsistent with the language of the Act and the intent of Congress. Therefore, that Circuit held the Economic Analysis must consider all of the impacts of critical habitat designation, including those impacts co-extensive with the listing. In other words, the EA must consider the cumulative impacts of the listing and the critical habitat designation together, not just the incremental impacts of the designation. (For a contrary view see *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir 2010).) In *Home Builders Association of Northern California v. Norton*, 293 F.

Supp. 2d 1 (D.D.C. 2002), the Service appears to have represented to the court that it would follow the *New Mexico Cattle Growers'* co-extensive approach in all future critical habitat designations. But it has not done so here.

71. Moreover, the EA failed to quantify economic and other impacts of the designation on oil and gas exploration, forestry, and those impacts resulting from conservation activities such as controlled burns.

72. By these acts or omissions Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fourth Claim for Relief
Failure to Exclude
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

73. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The Service acknowledged, as it must, that Unit 1 will only become suitable habitat if the land is managed to develop the requisite PCEs. *See* 77 Fed. Reg. 35135. The Service also acknowledged that Unit 1 is comprised entirely of private land, *id.* at 35134-35135, and that private landowners cannot be compelled to manage the land for recovery purposes, *id.* at 35126. In fact, because Unit 1 is unoccupied and used for timber harvesting and has the potential for

development of oil and gas exploration, that the Service valued at approximately $34 million, the private owners have no intent to convert their property to conservation purposes. Not only do these facts compel a finding that Unit 1 is not "essential for the conservation of the species," but they also compel a finding that the benefits of exclusion outweigh the benefits of inclusion under Section 4(b)(2) of the Act. The Service‟s unsupported conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," 77 Fed. Reg. 35141, is arbitrary and irrational. *See Natural Resources Defense Council v. U.S. Department of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) ("Essentially, we must ask „whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.‟" (citation omitted)).

75. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fifth Claim for Relief
Failure to Conduct NEPA Review
(Violation of NEPA, 42 U.S.C. § 4321, *et seq.*;
Alternatively, APA, 5 U.S.C. § 706)

76. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. In its final rule designating critical habitat for the dusky gopher frog, the Service stated

categorically that the National Environmental Policy Act does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35121. But the better argument is to the contrary.

78. Neither the Endangered Species Act nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Preservation Alliance v. U. S. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), have held that critical habitat designations are subject to review under NEPA. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit parted ways with the Tenth Circuit and held that NEPA review was not required for critical habitat designations where there is no physical change to the environment. However, this case is different.

79. Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for human interference with the environment through management of the habitat by, among other things, regular controlled burns. Frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog"s aquatic and terrestrial habitat. *See* 77 Fed. Reg. 35129-35130. These burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and habitat for other species. But the critical habitat designation does not discuss these effects. That can only be done

through the NEPA review process. Therefore, notwithstanding the Ninth Circuit decision, and in accordance with the Tenth Circuit decision, NEPA review should have been undertaken here.

80. By these acts or omissions Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.*; and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Sixth Claim for Relief
U.S. Constitutional Violation
(Commerce Clause, Article 1, Section 8, Clause 3, and APA, 5 U.S.C. § 706)

81. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. The Service cites a long list of cases that have upheld the agency‟s authority to regulate intrastate, noncommercial species under the commerce power. *See* 77 Fed. Reg. at 35120. However, those cases do not address whether the agency has authority under the Commerce Clause to regulate private land that has no connection to the protected species other than through the critical habitat designation itself. The designation of Unit 1 as critical habitat for the dusky gopher frog is contrary to U.S. Supreme Court precedent not only because the frog is not a regulable entity but also because the critical habitat designation creates, rather than regulates, the putative economic activity. *See United States v. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); and, more recently, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573-74 (2012) ("This

Court‟s precedent reflects this understanding: As expansive as this Court‟s cases construing the scope of the commerce power have been, they uniformly describe the power as reaching „activity.‟ *E.g.*, *United States v. Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626. The [challenged provision], however, does not regulate existing commercial activity.”). Simply put, the uncontested facts show that the Service is not regulating existing commercial activity. The regulation of Unit 1 as critical habitat is unconstitutional because the land does not contain the listed species or any usable habitat and any activity on the land cannot affect the species or its habitat.

83. By these acts or omissions Defendants violated art. 1, § 8, cl. 3, of the U.S. Constitution and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

PRAYER FOR RELIEF

Wherefore, Markle prays:

As to the First Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to make the threshold determination as to the quality and location of habitat essential to the conservation of the species in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or alternatively, that the final rule is void under the APA, U.S.C. § 706.

As to the Second Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to apply the proper standard for designating critical habitat in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Third Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because the economic analysis was inadequate in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fourth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants‟ failure to exclude Unit 1 was arbitrary and irrational in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fifth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to comply with NEPA, 42 U.S.C. § 4321, *et seq.*, and the final rule is void under the APA, 5 U.S.C. § 706.

As to the Sixth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid under the Commerce Clause, U.S. Constitution, art. 1, § 8, cl. 3, and the final rule is void under the APA, 5 U.S.C. § 706.

As to all Claims for Relief:

That this Court:

(a) issue a judgment and order enjoining Defendants from enforcing or otherwise acting pursuant to the final rule, vacating the rule, and remanding the rule for redesignation of critical habitat in accordance with ESA, NEPA, the APA, and the U.S. Constitution;

(b) award Plaintiff attorneys‟ fees and costs to the extent permitted by law; and

(c) grant such other relief as the Court shall deem just and proper.

DATED: February 7, 2013.

Respectfully submitted,

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Appendix E-1

Excerpts from Mar. 12, 2012
Public Comment on Behalf of
P&F Lumber, Etc.

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16,
and Weyerhaeuser's comments of November 28, 2011 at page

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed bums would be necessary")

the only known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,201 I at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23,2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also sec proposed Rule at page 59777.

In *United States v. Lopez,* 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel,* 301 U.S. **1,** 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is

absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Commerce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist-- and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any

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Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?,* 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

Appendix F-1

Excerpts from Nov. 23, 2011 Public Comment on Behalf of P&F Lumber, Etc.

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands-- and, indeed, the FWS in the

Proposed Rule concludes that (by its own investigation on the Lands) the MGF does not now actually occupy the Lands-- it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both

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[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

the St. Tammany Parish Planning and Zoning Commission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish..

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million' dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

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[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

Appendix F-5

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.

Nos. 17-71, 17-74

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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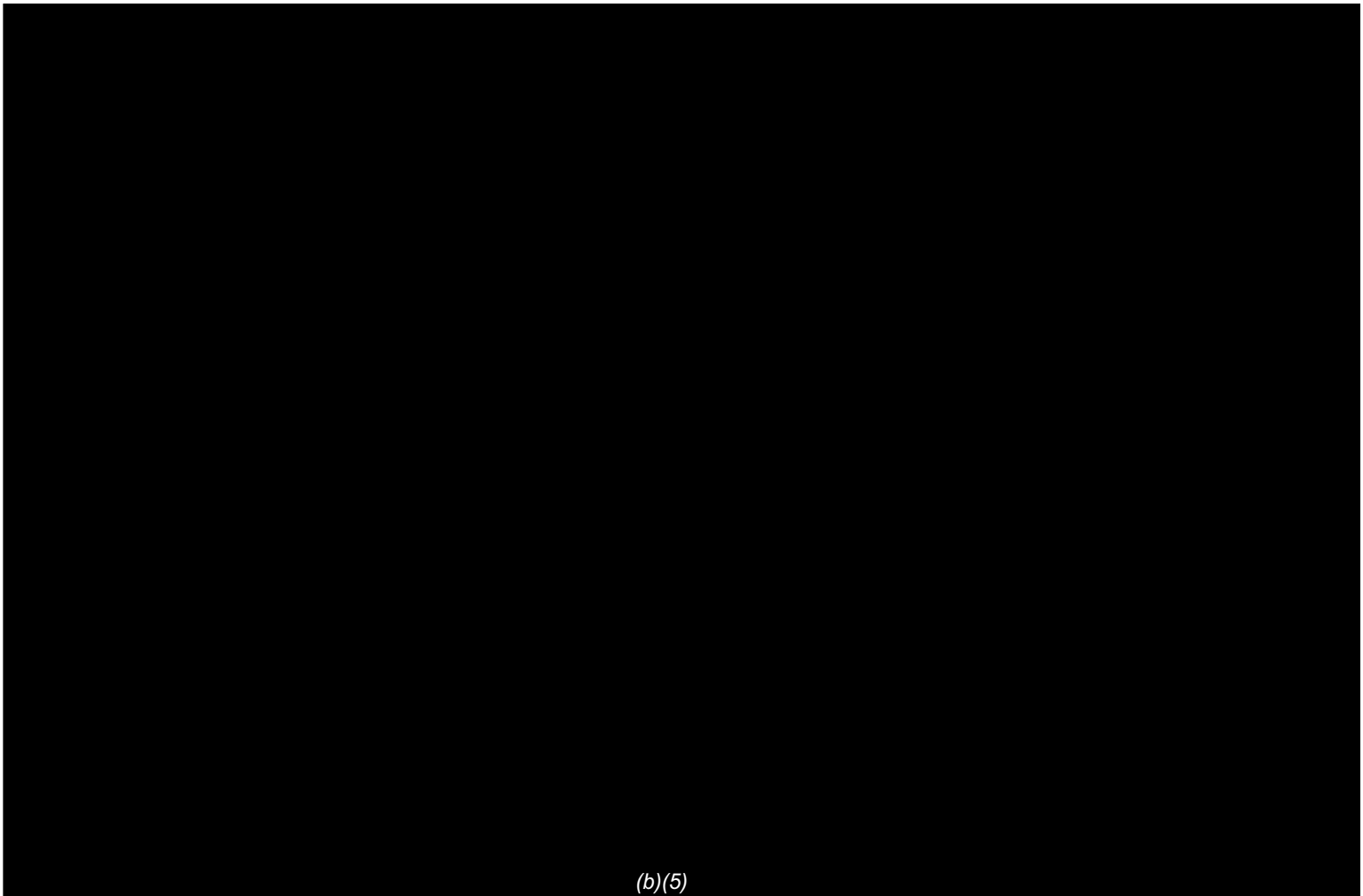
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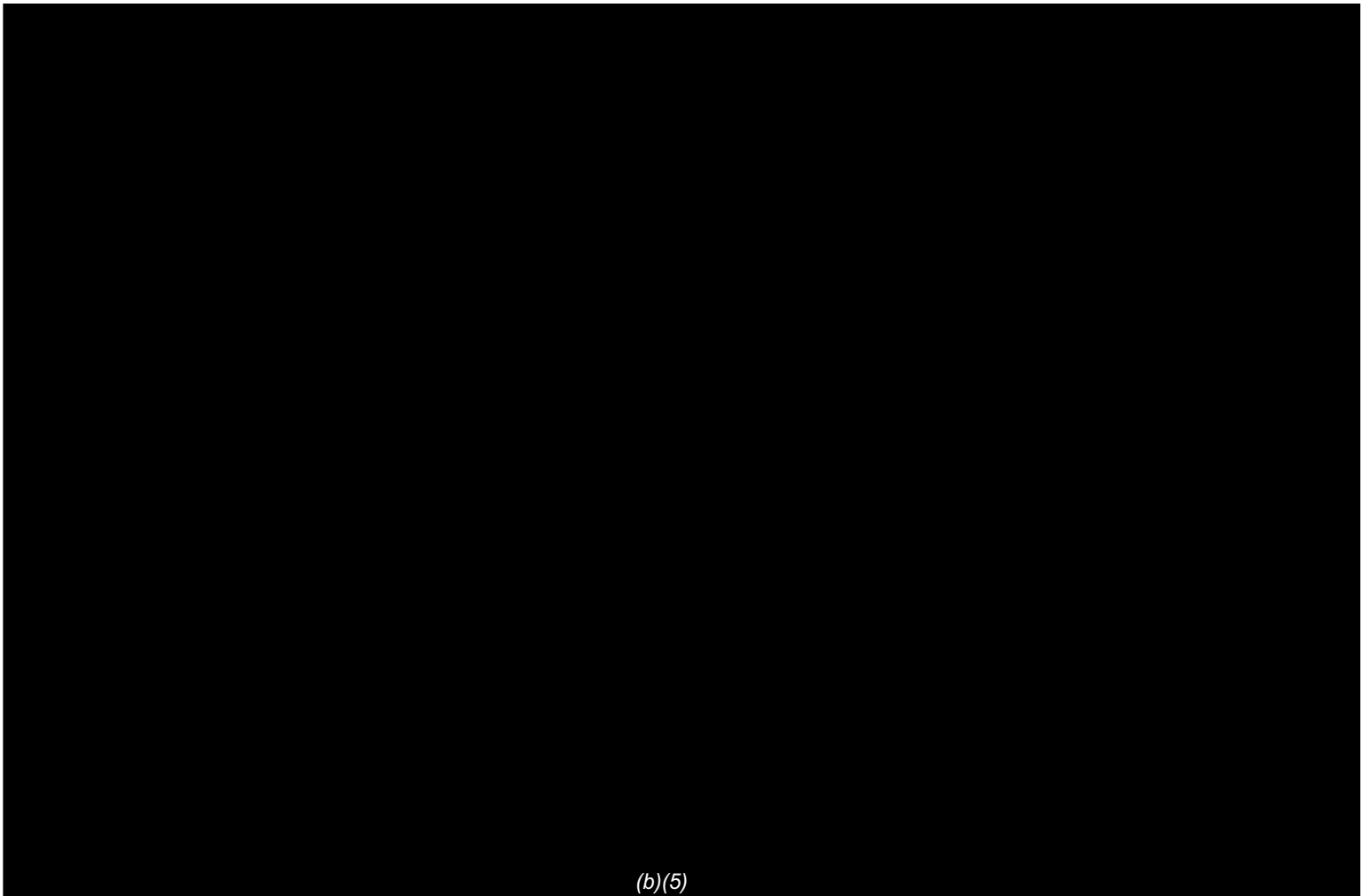
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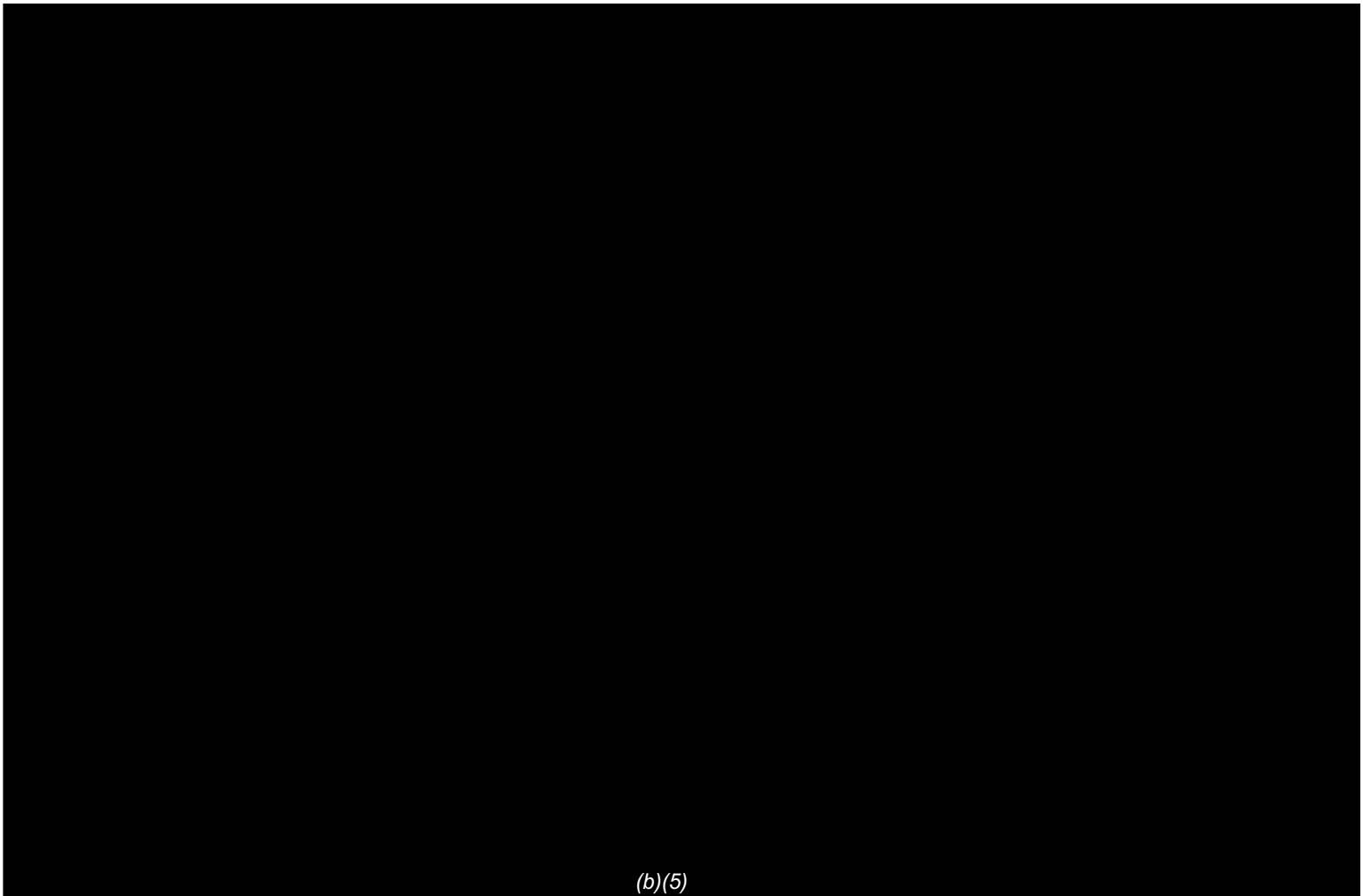
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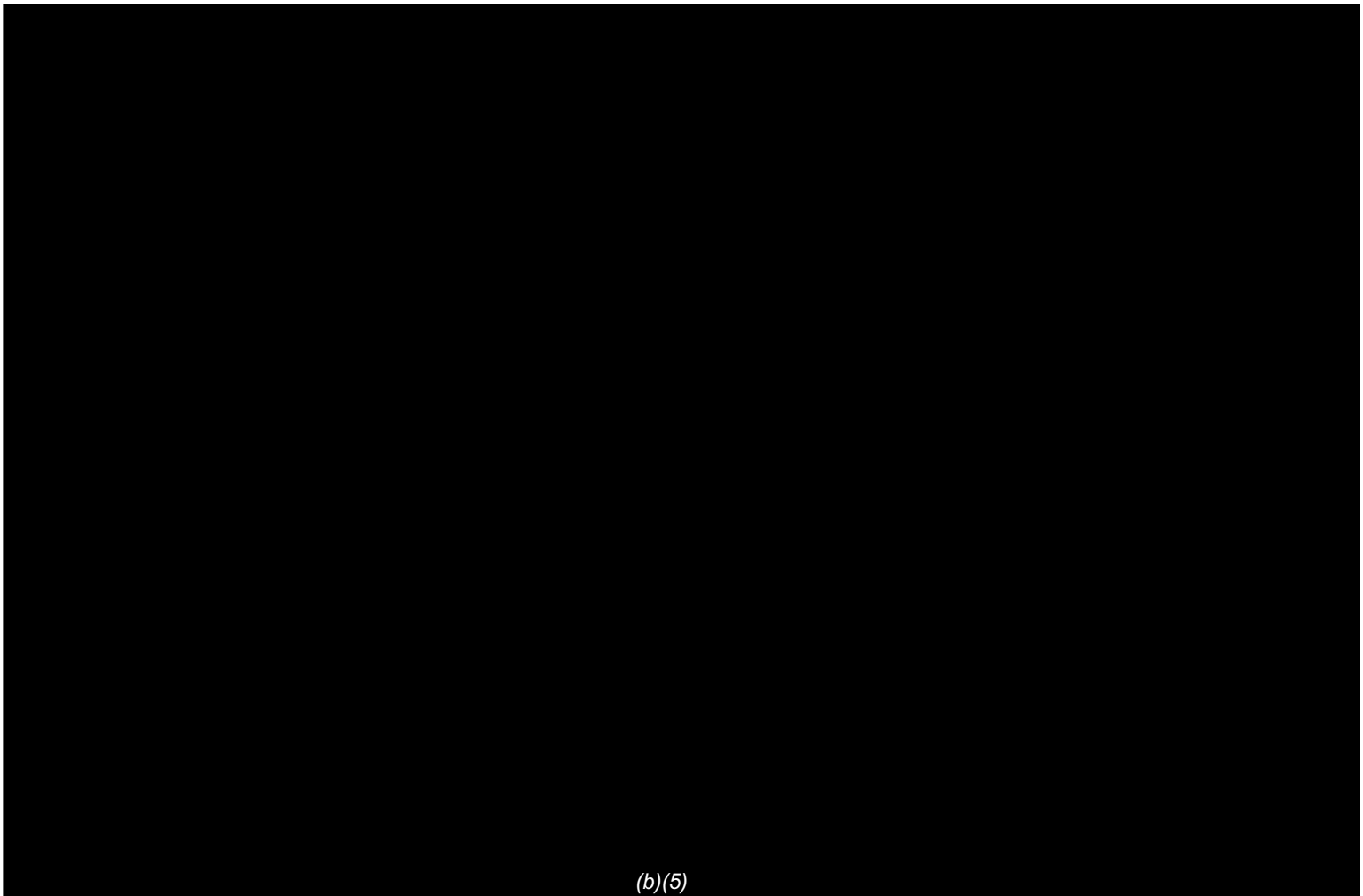
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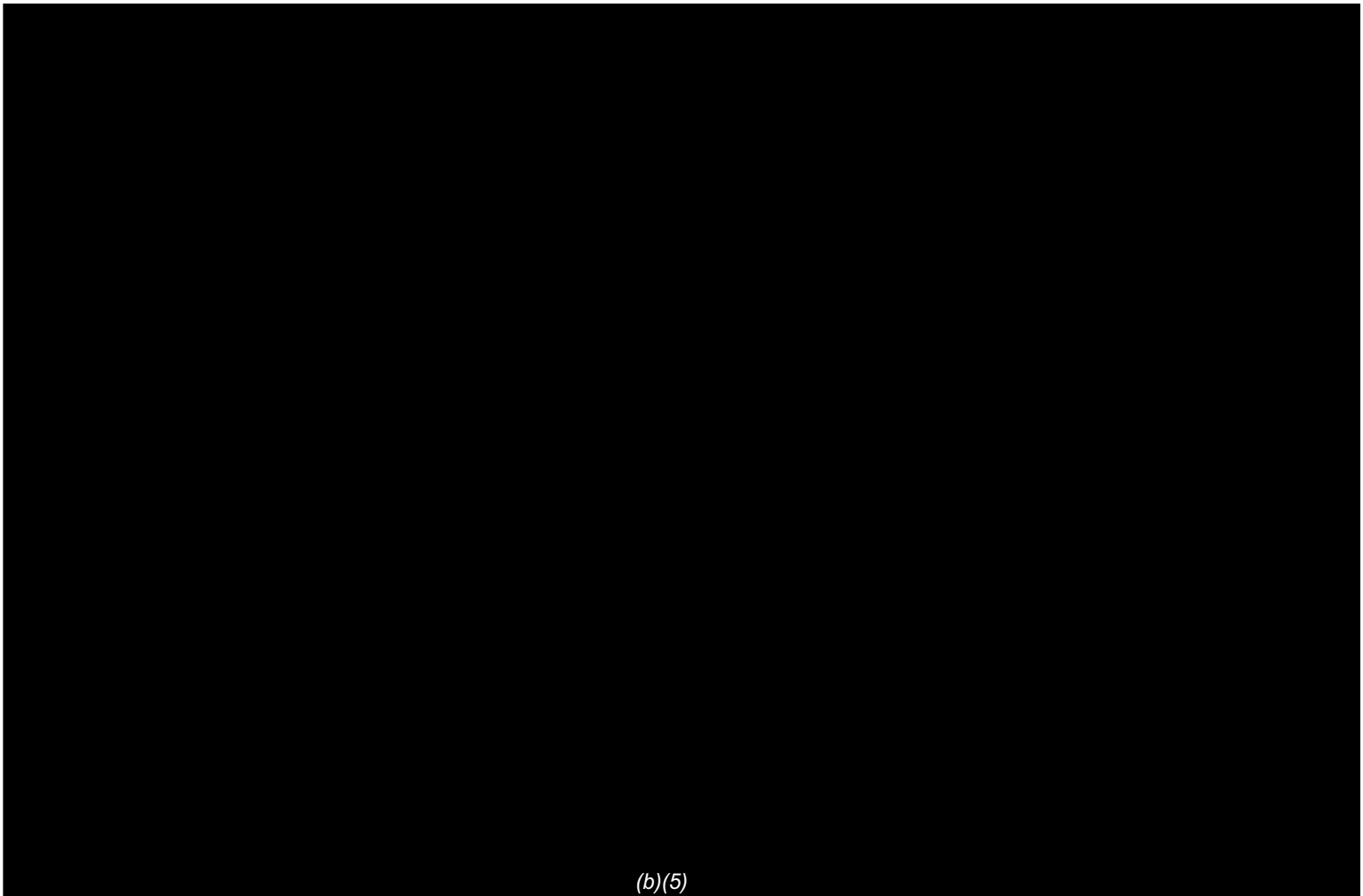
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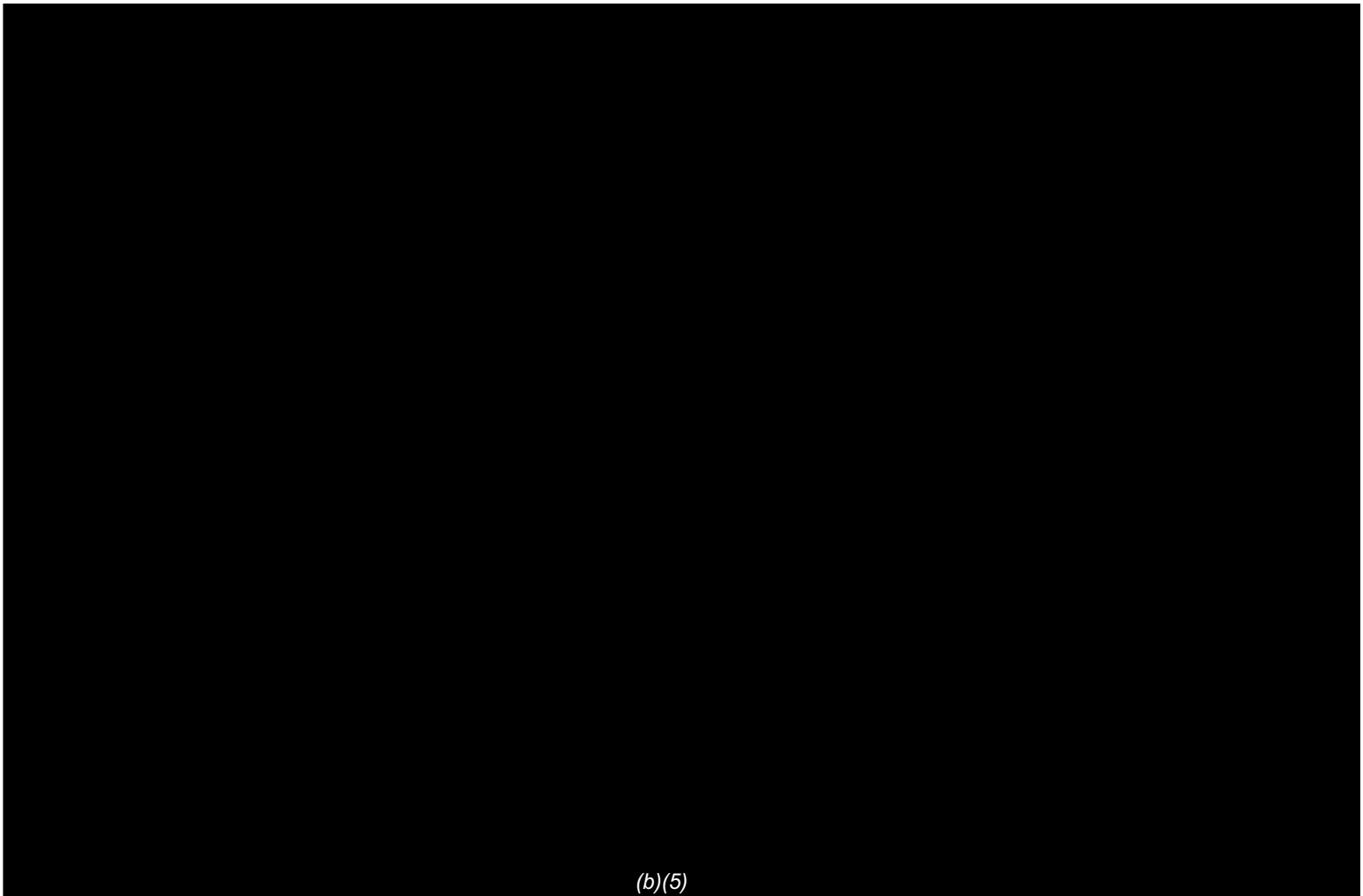
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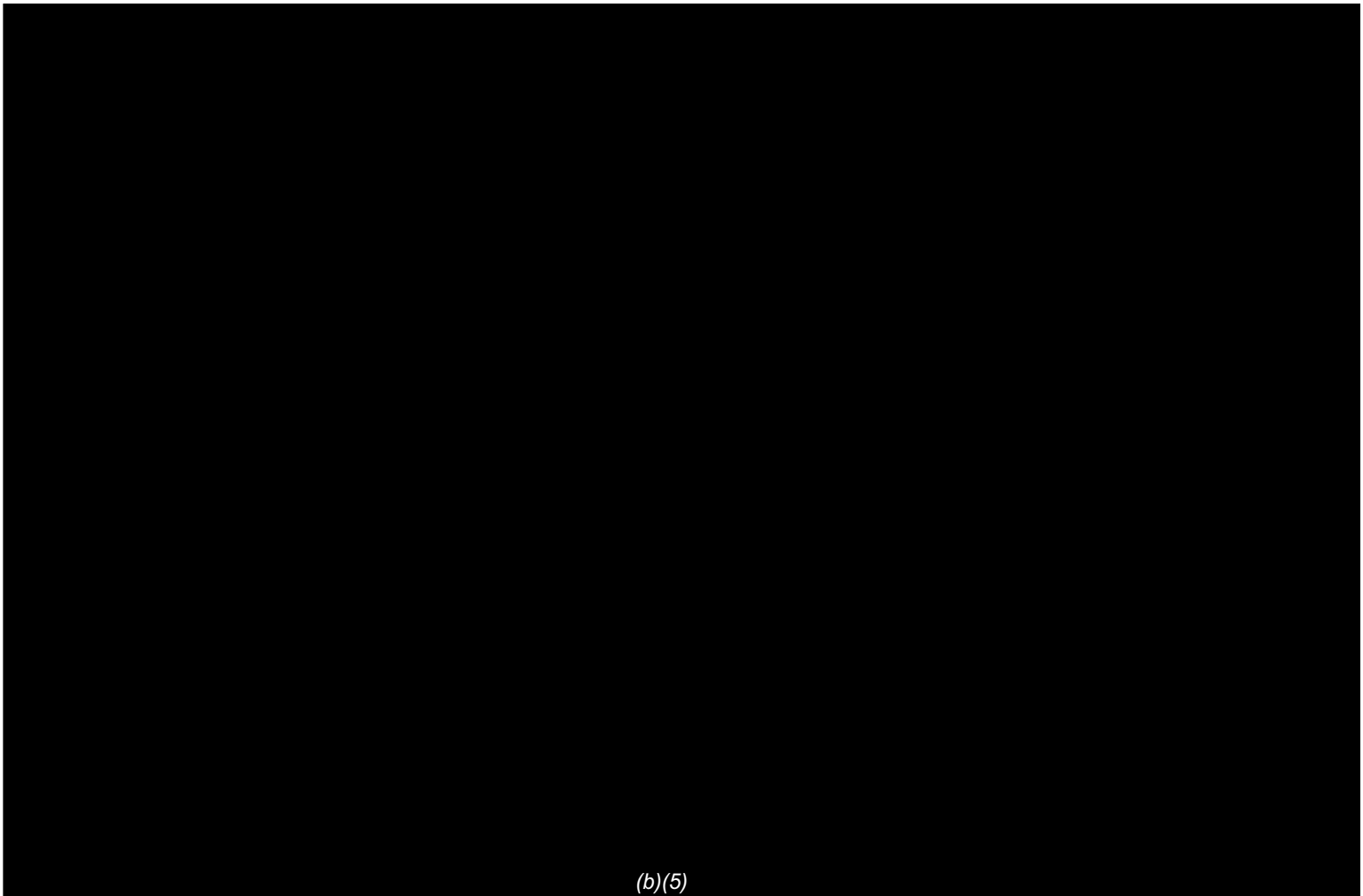
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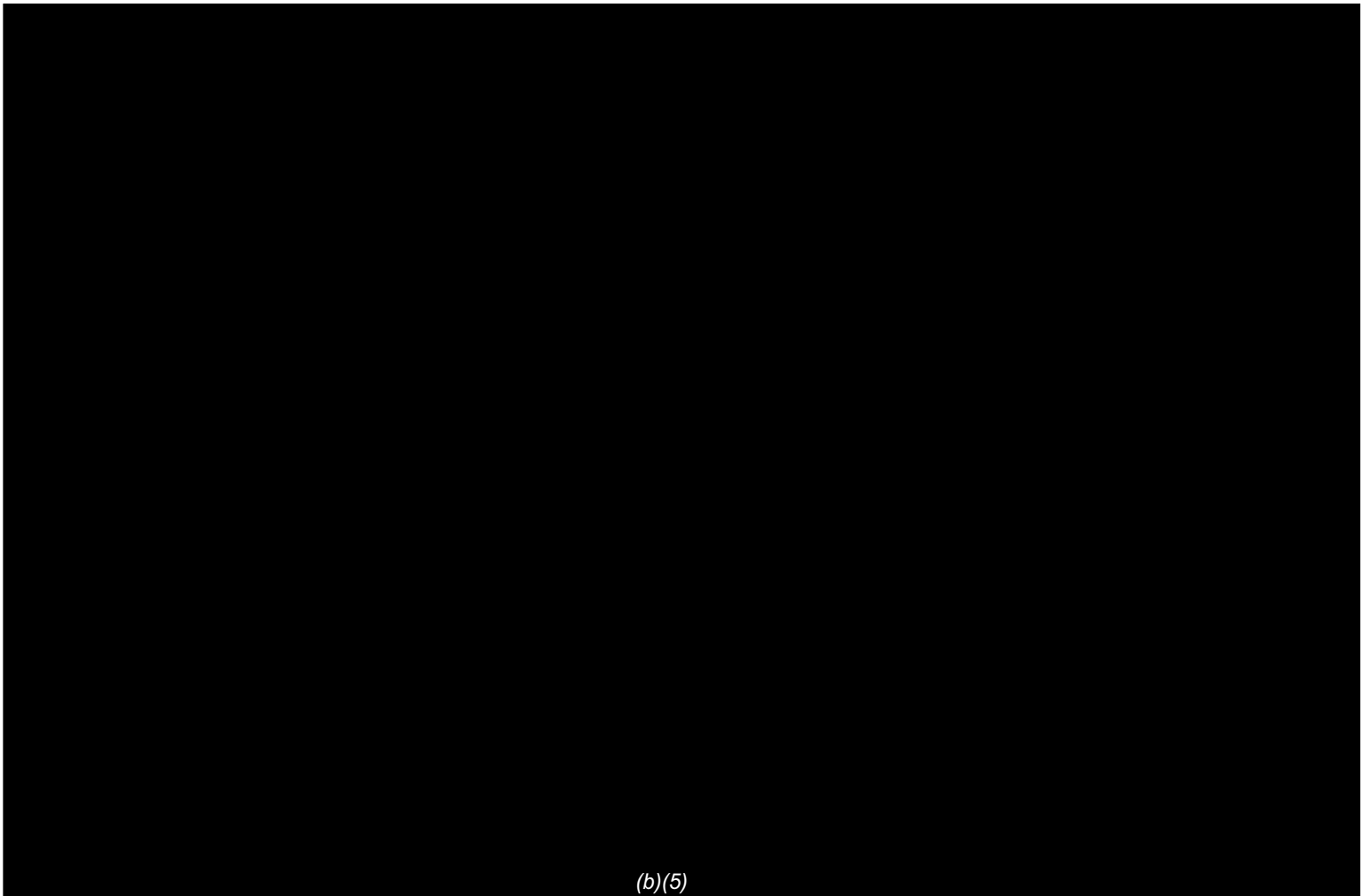
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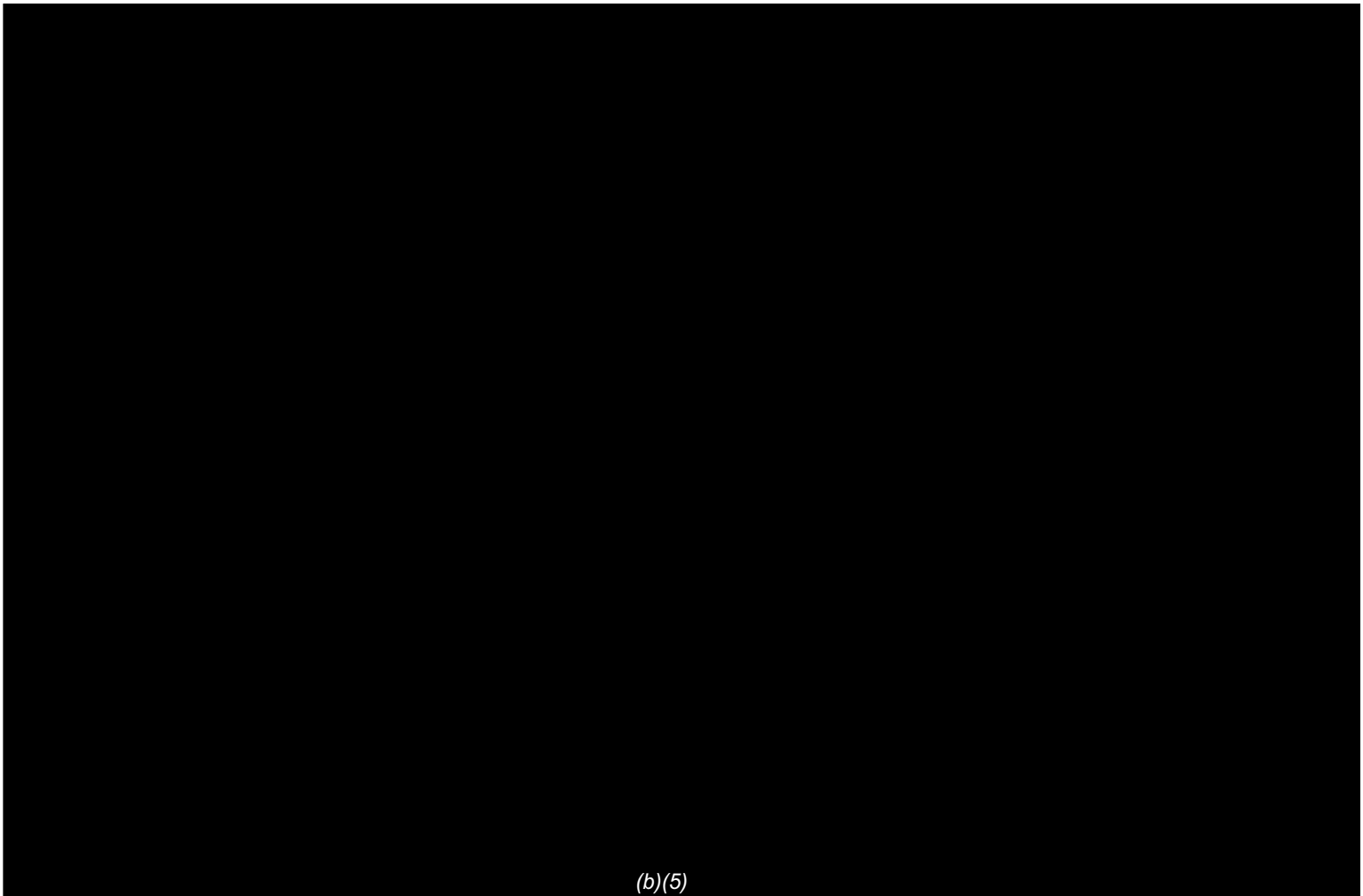
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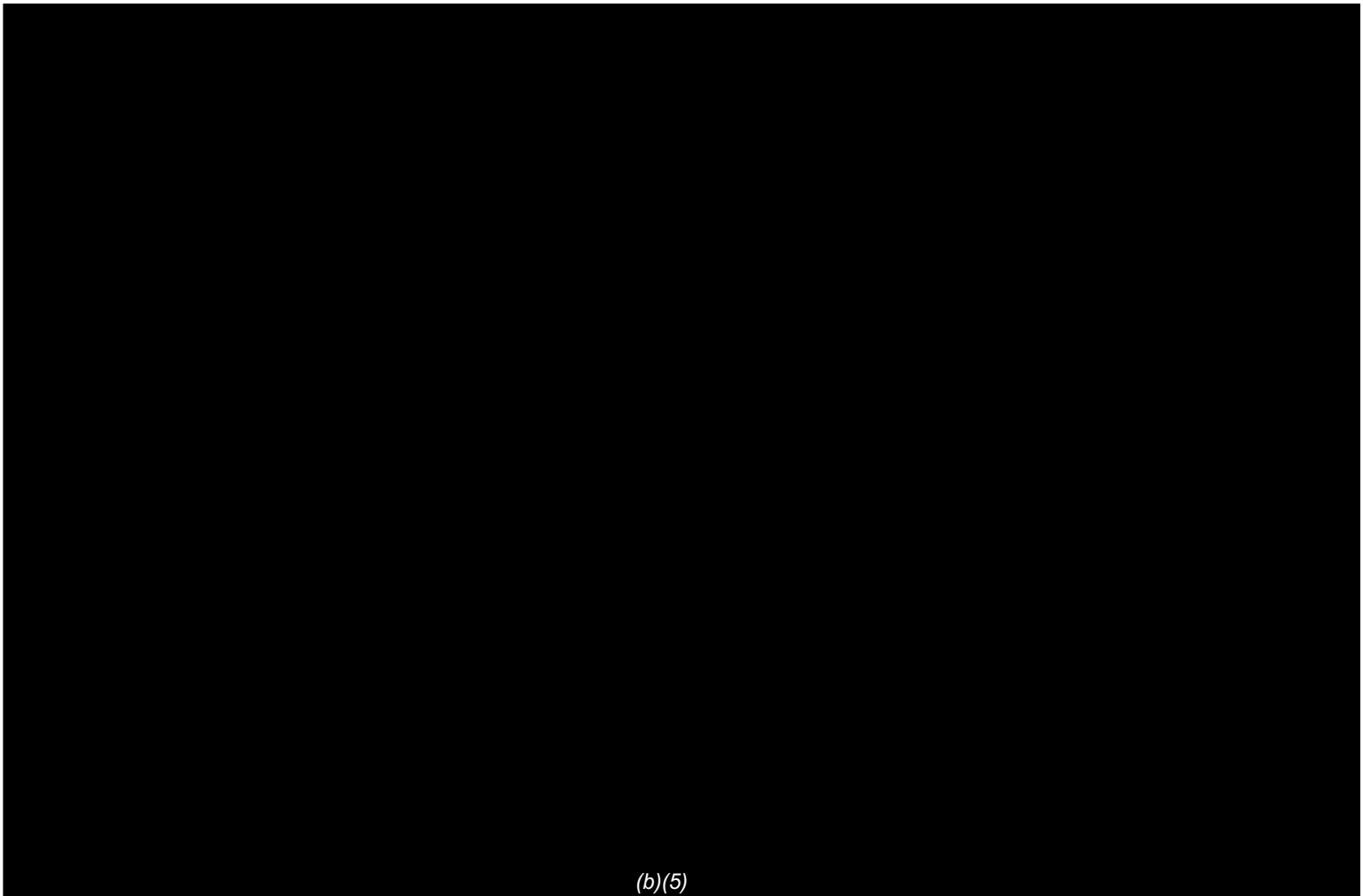
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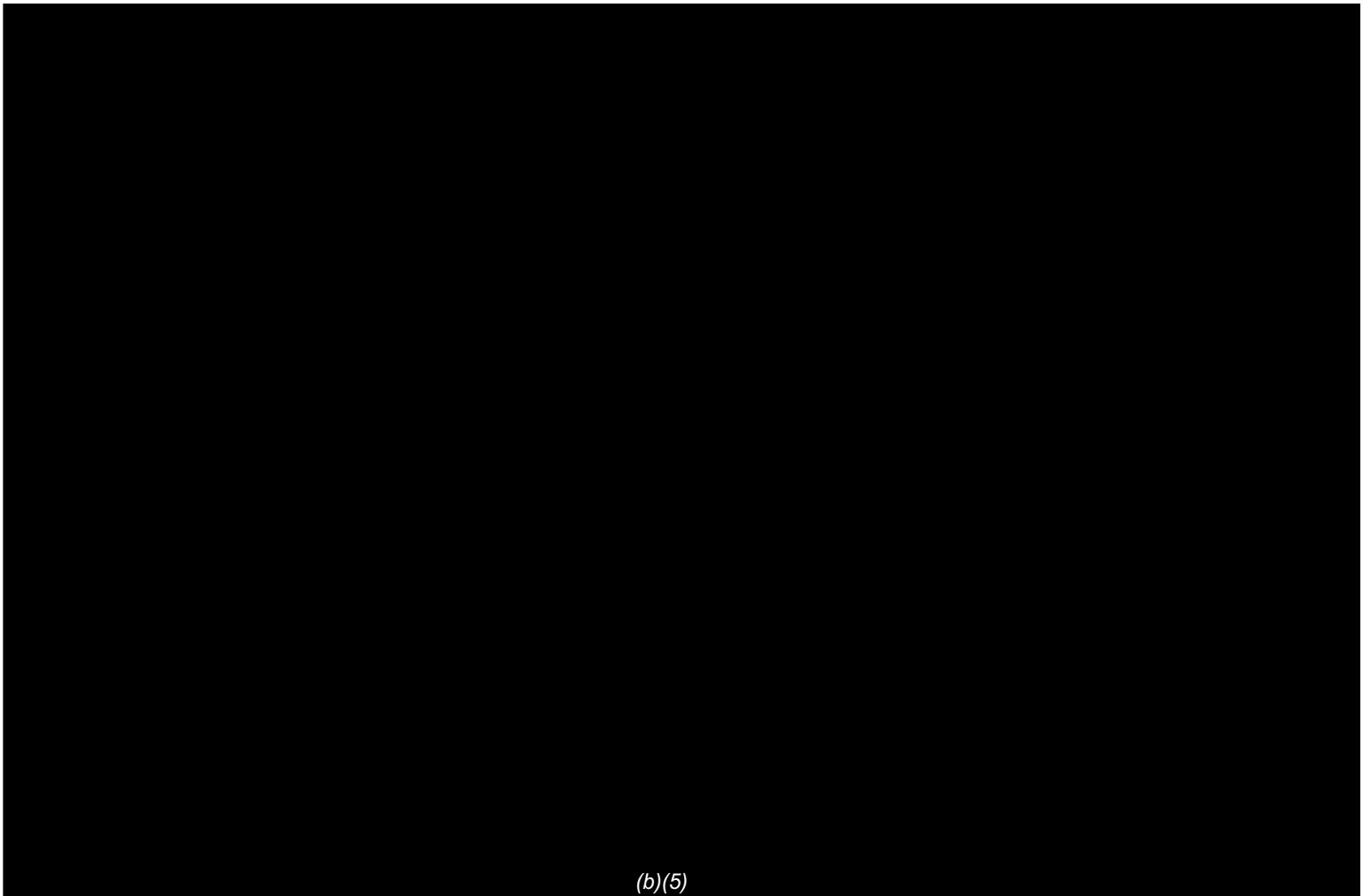
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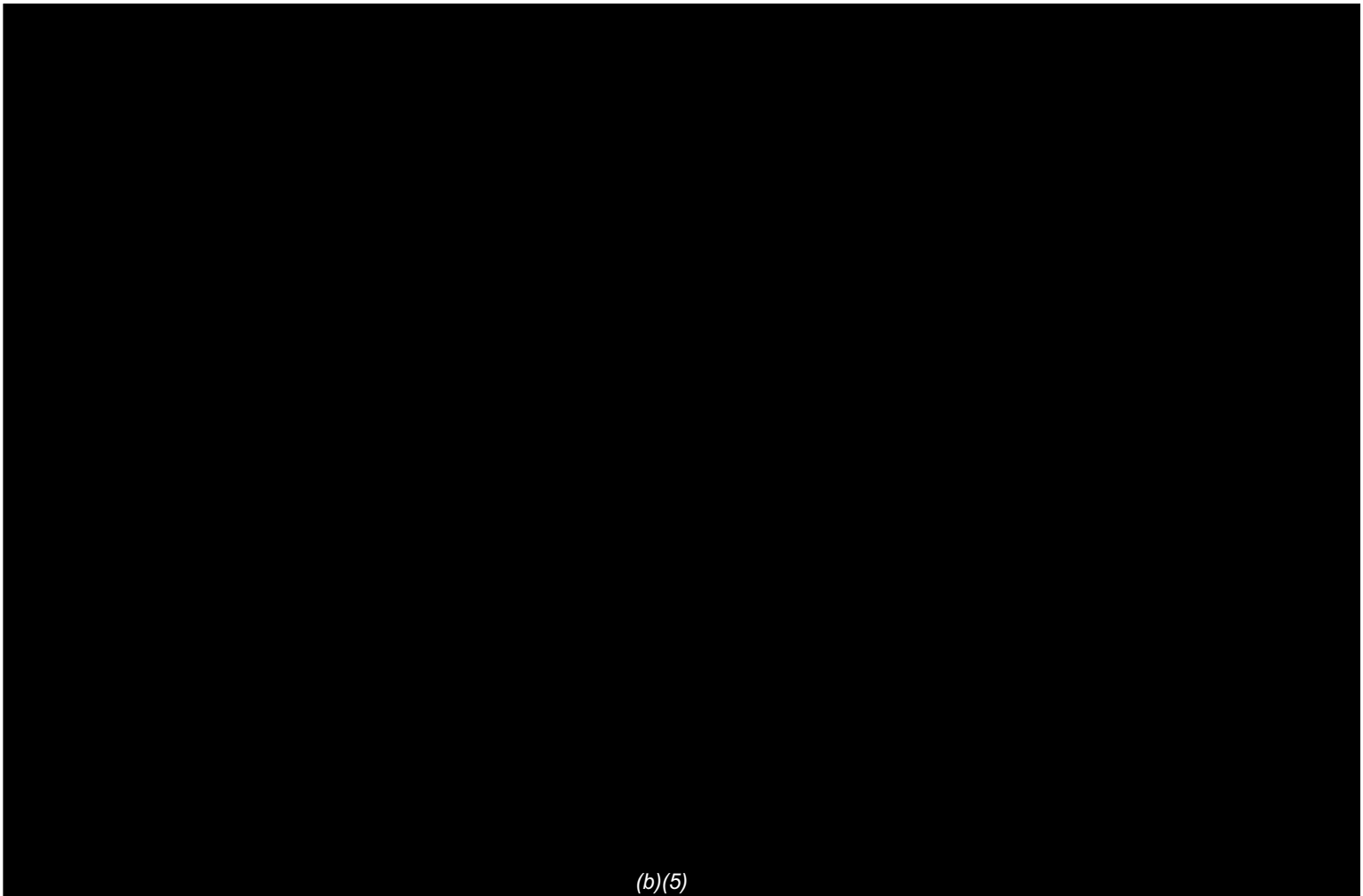
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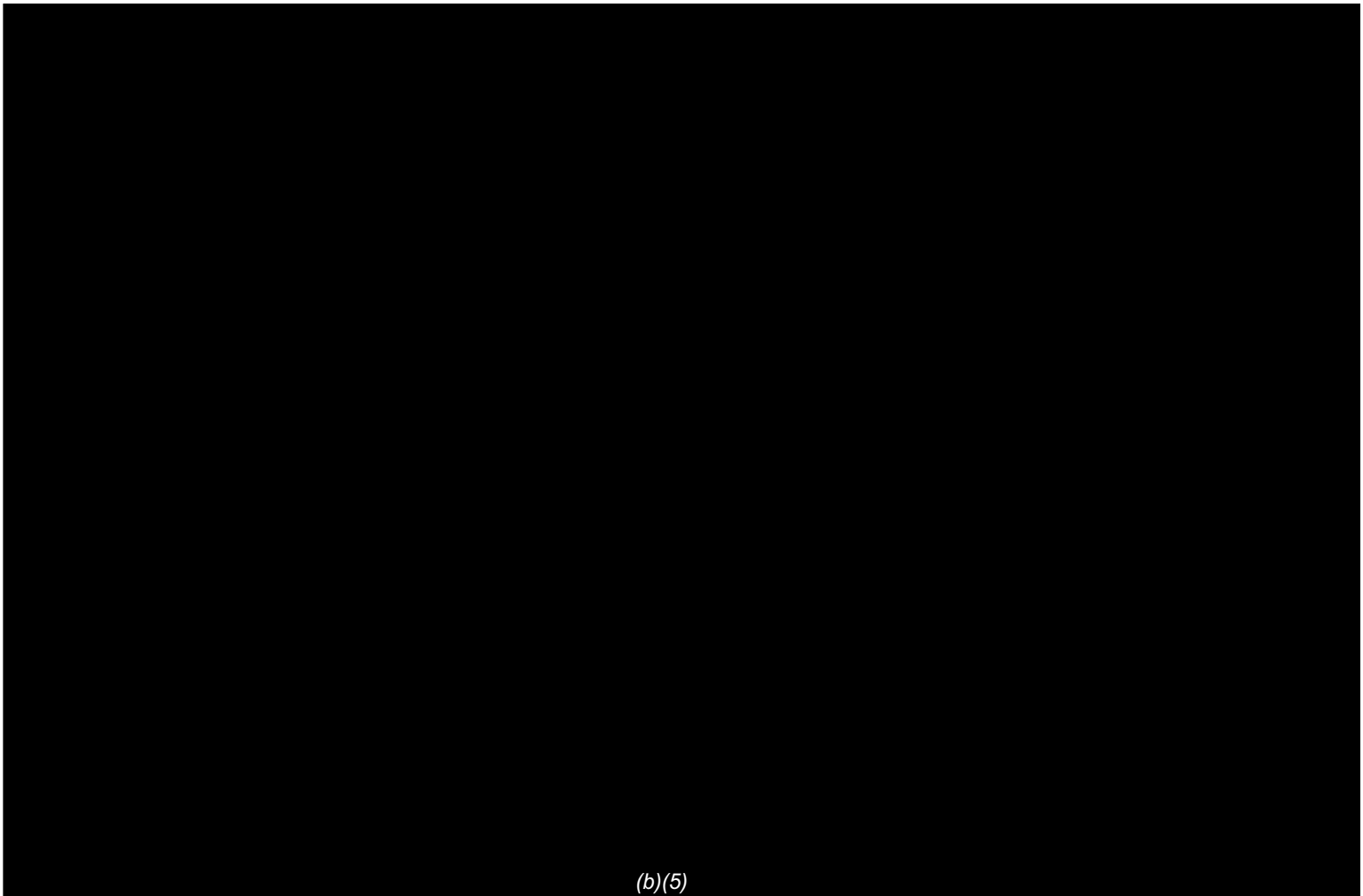
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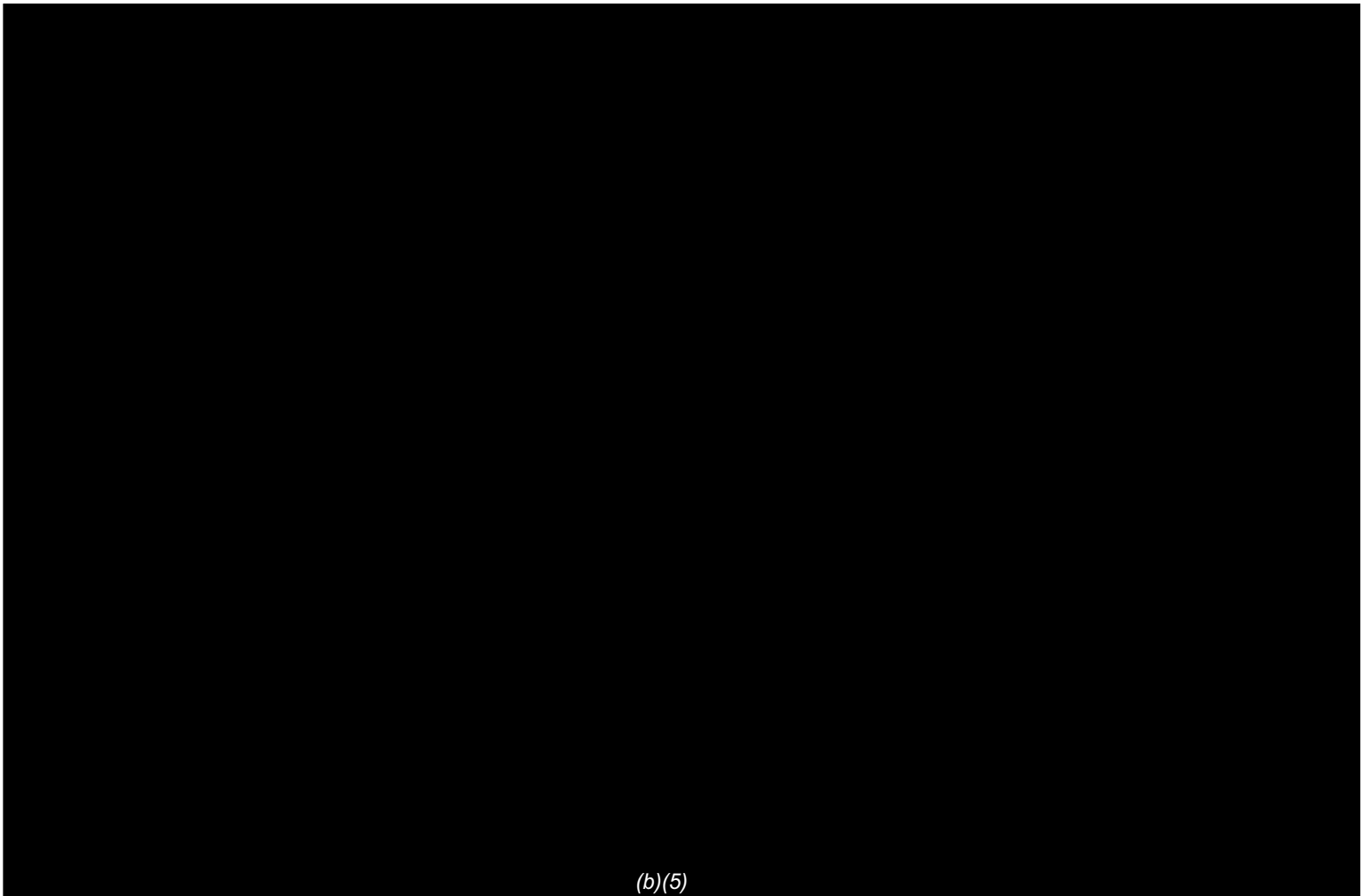
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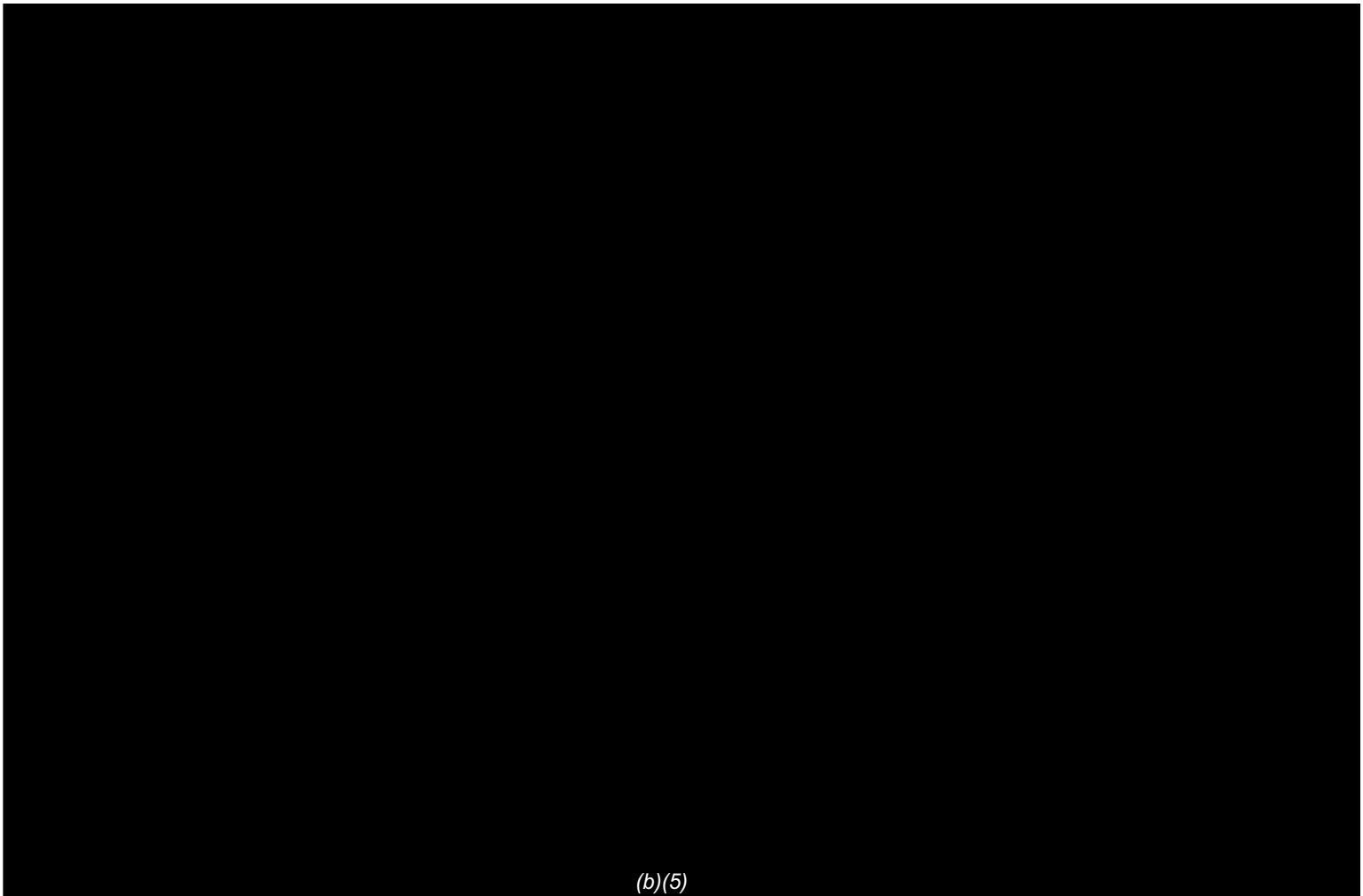
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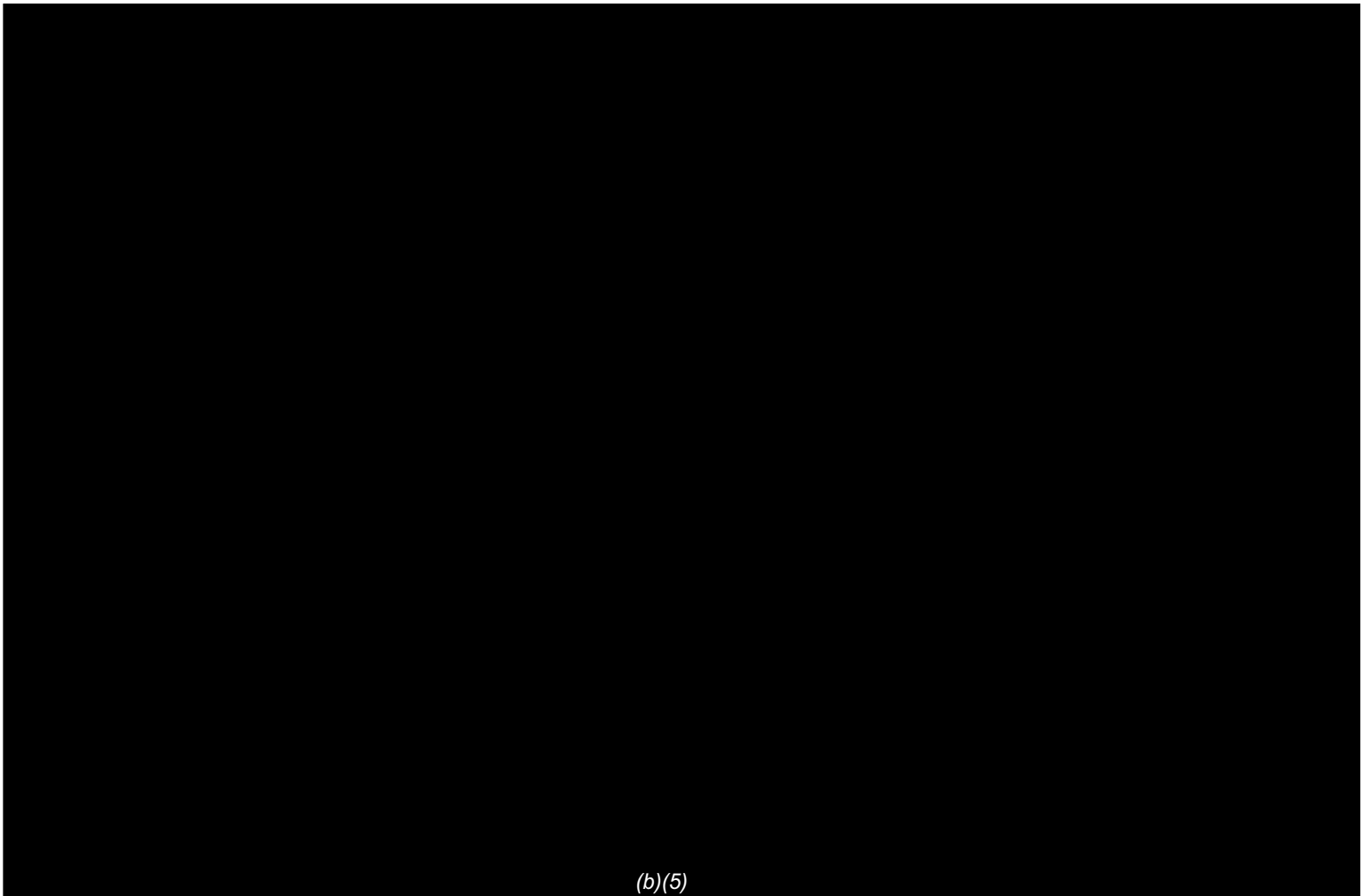
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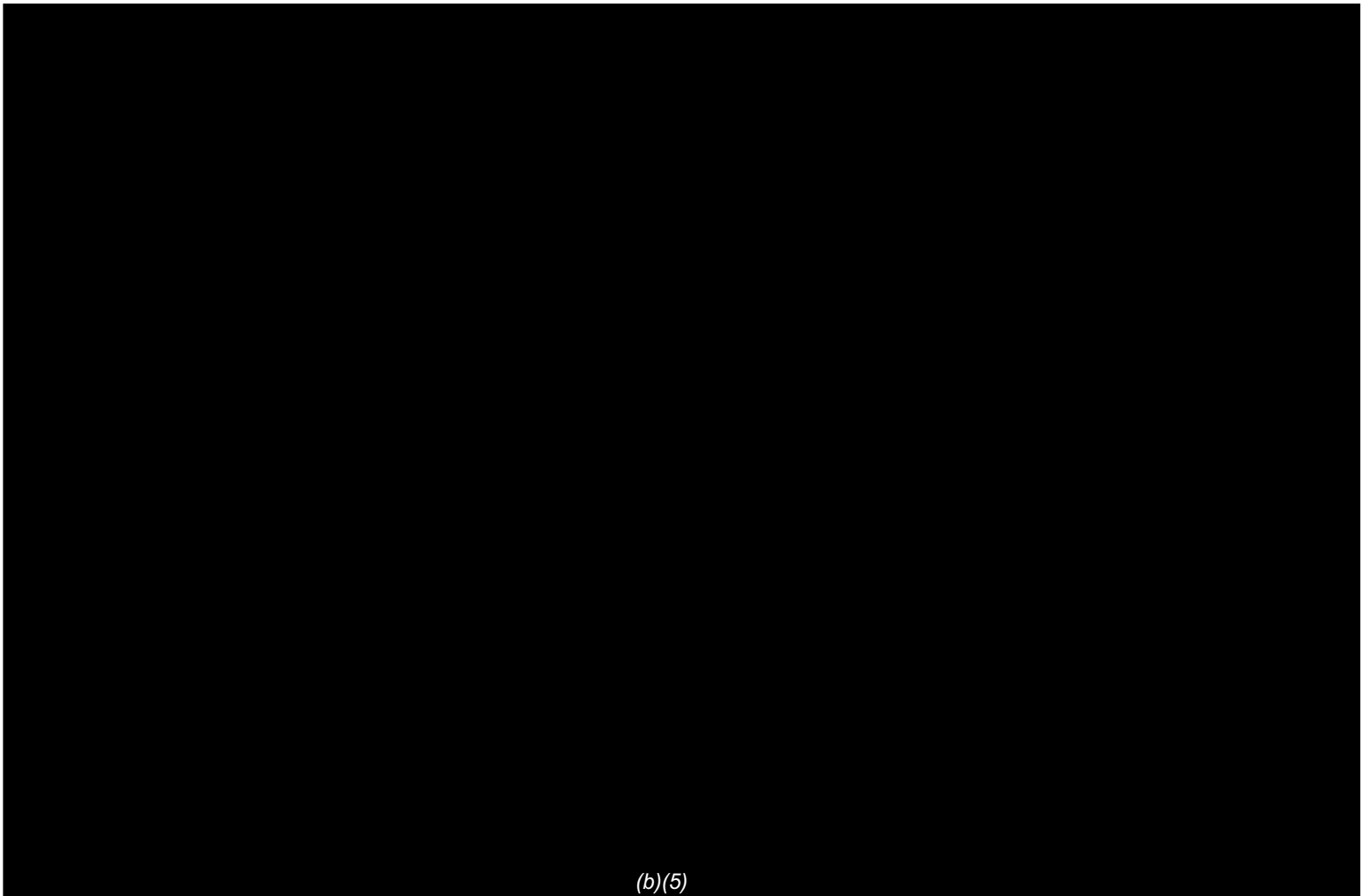
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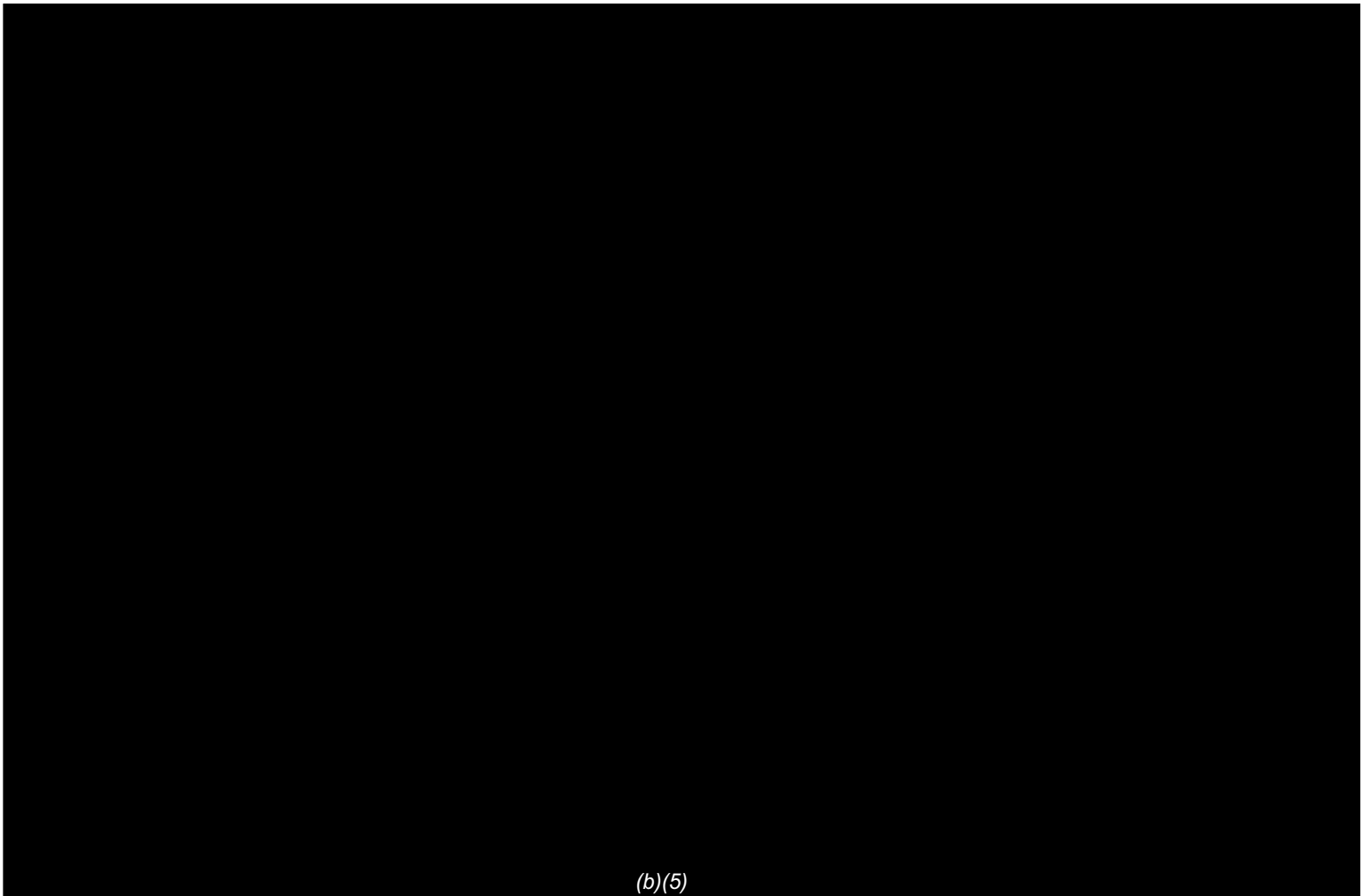
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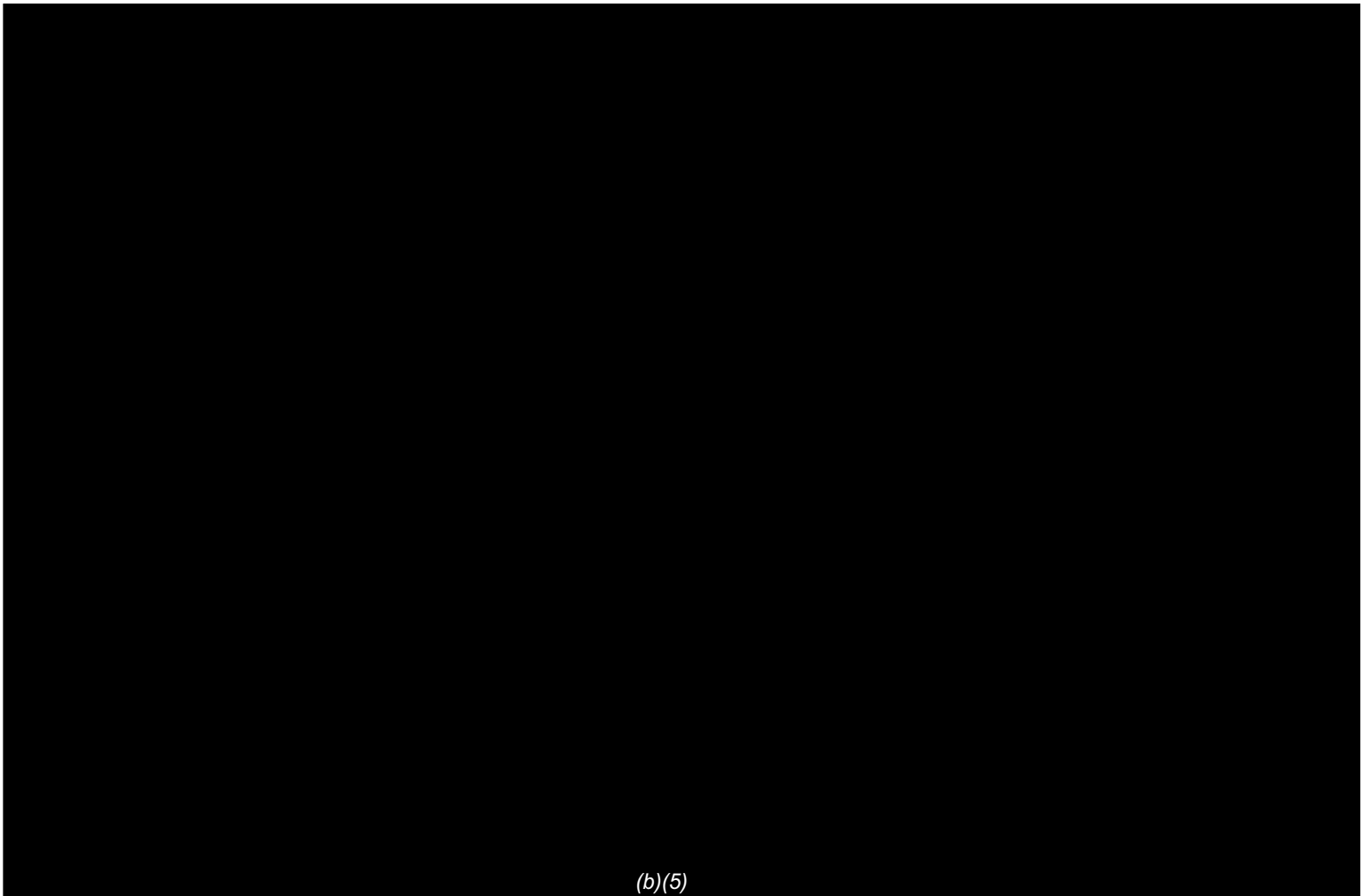
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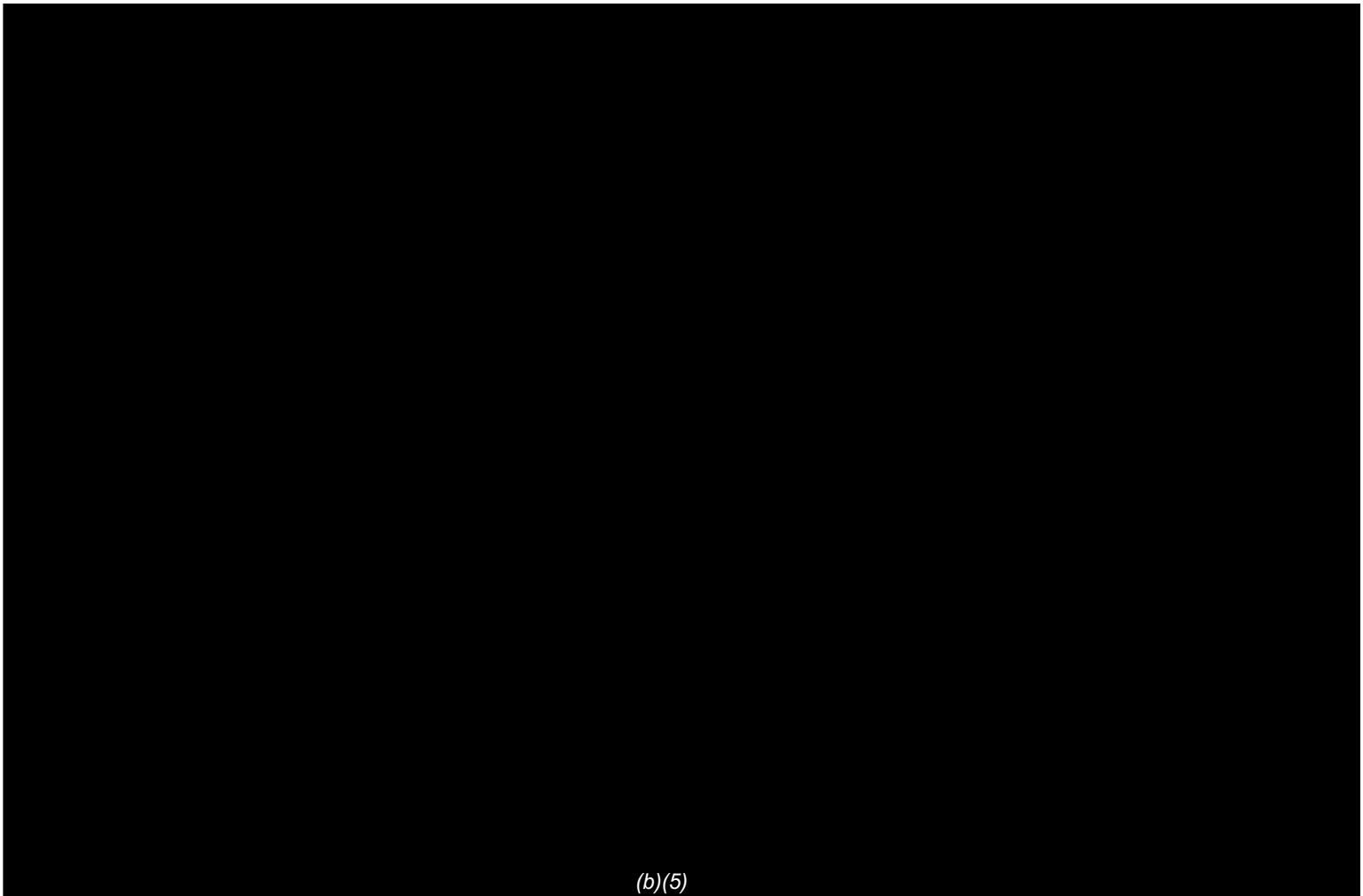
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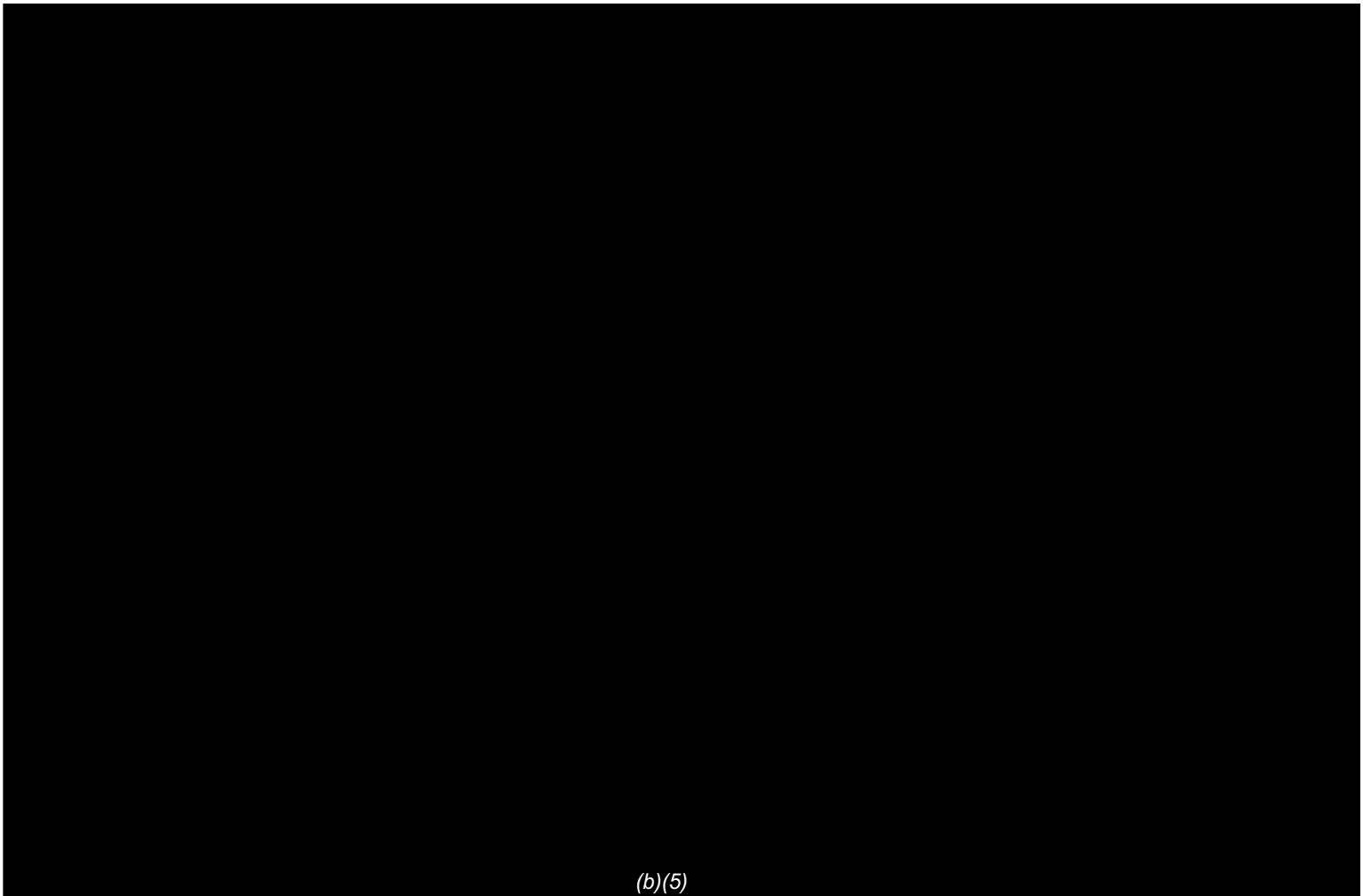
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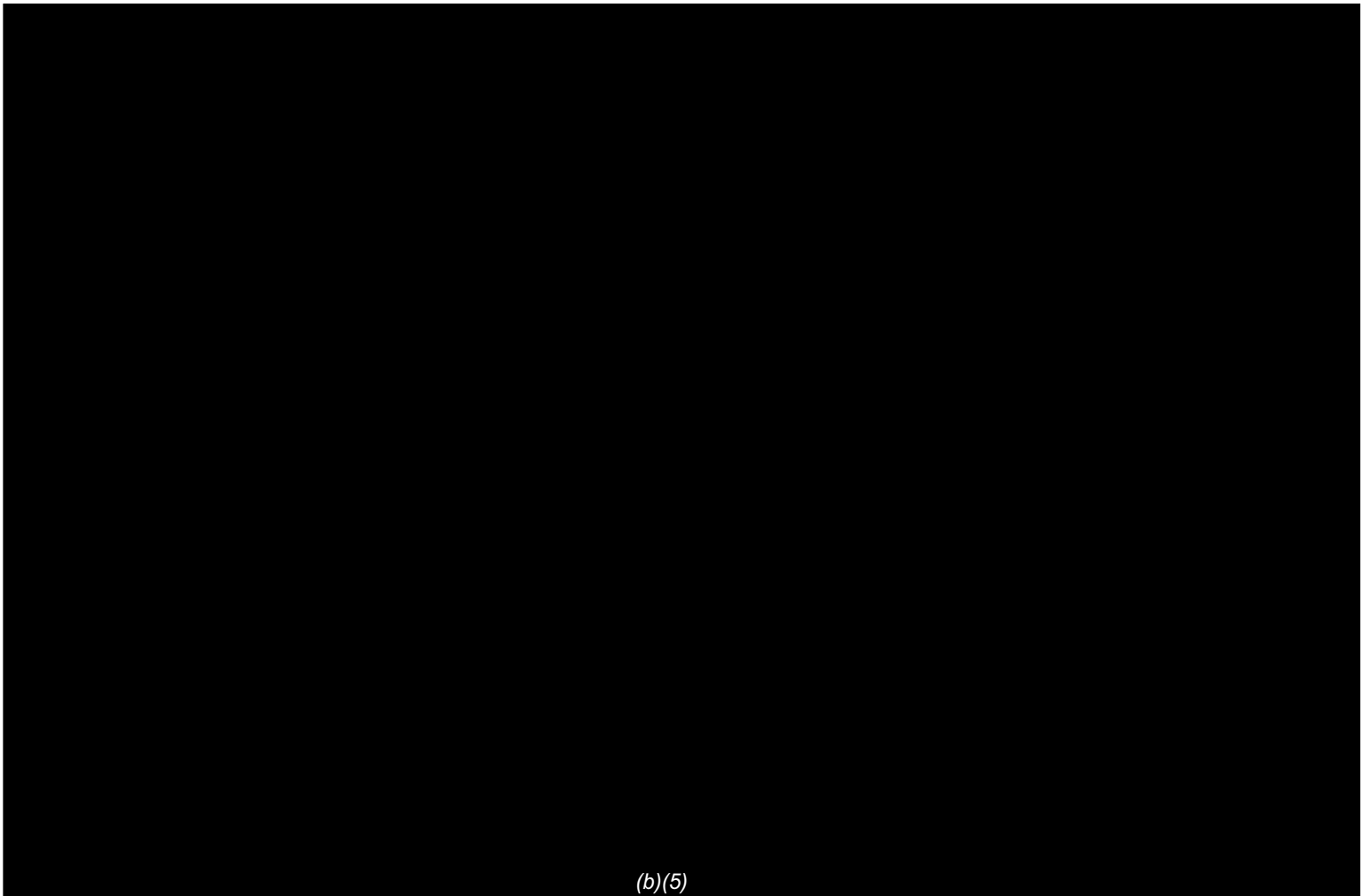
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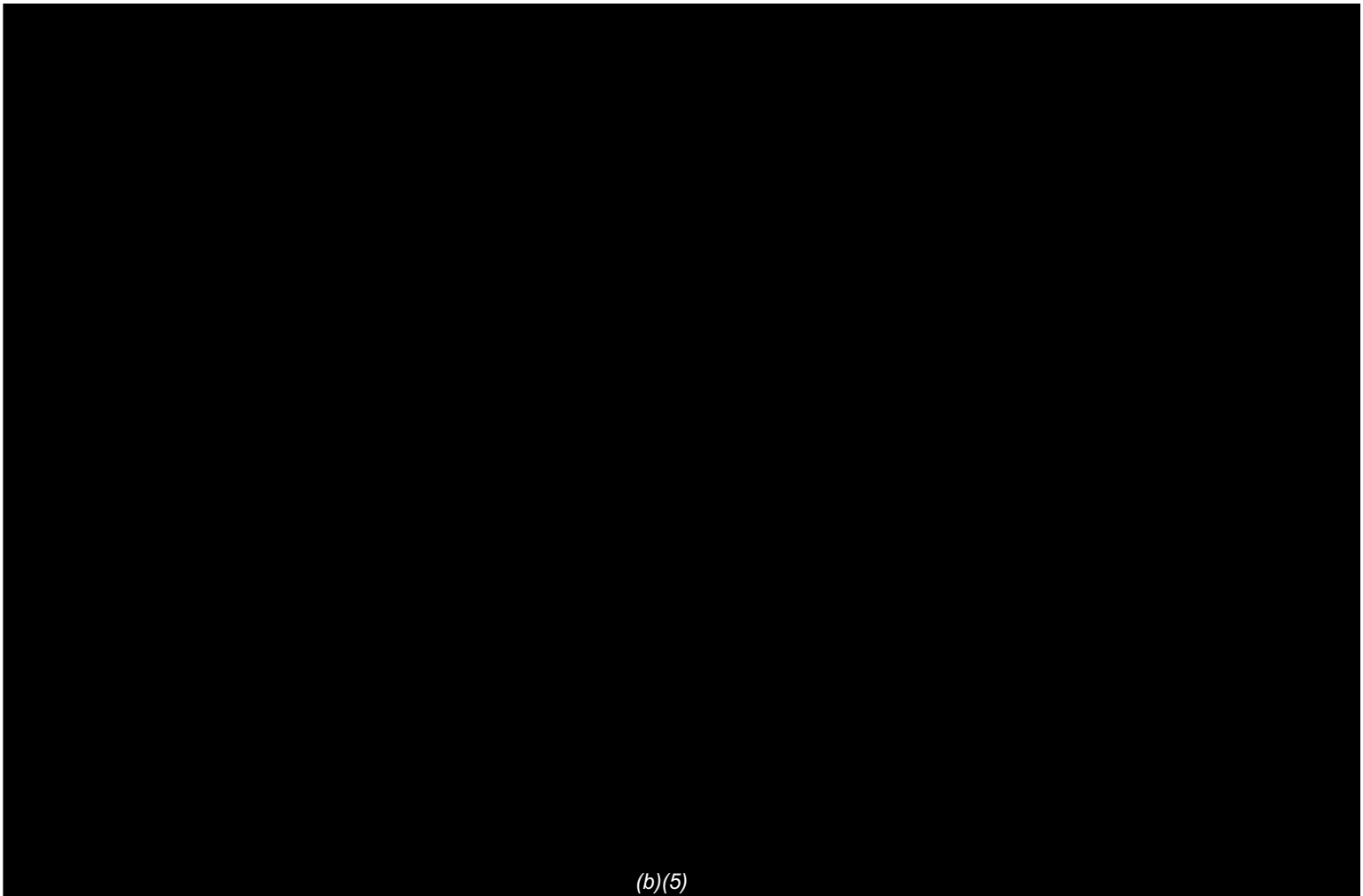
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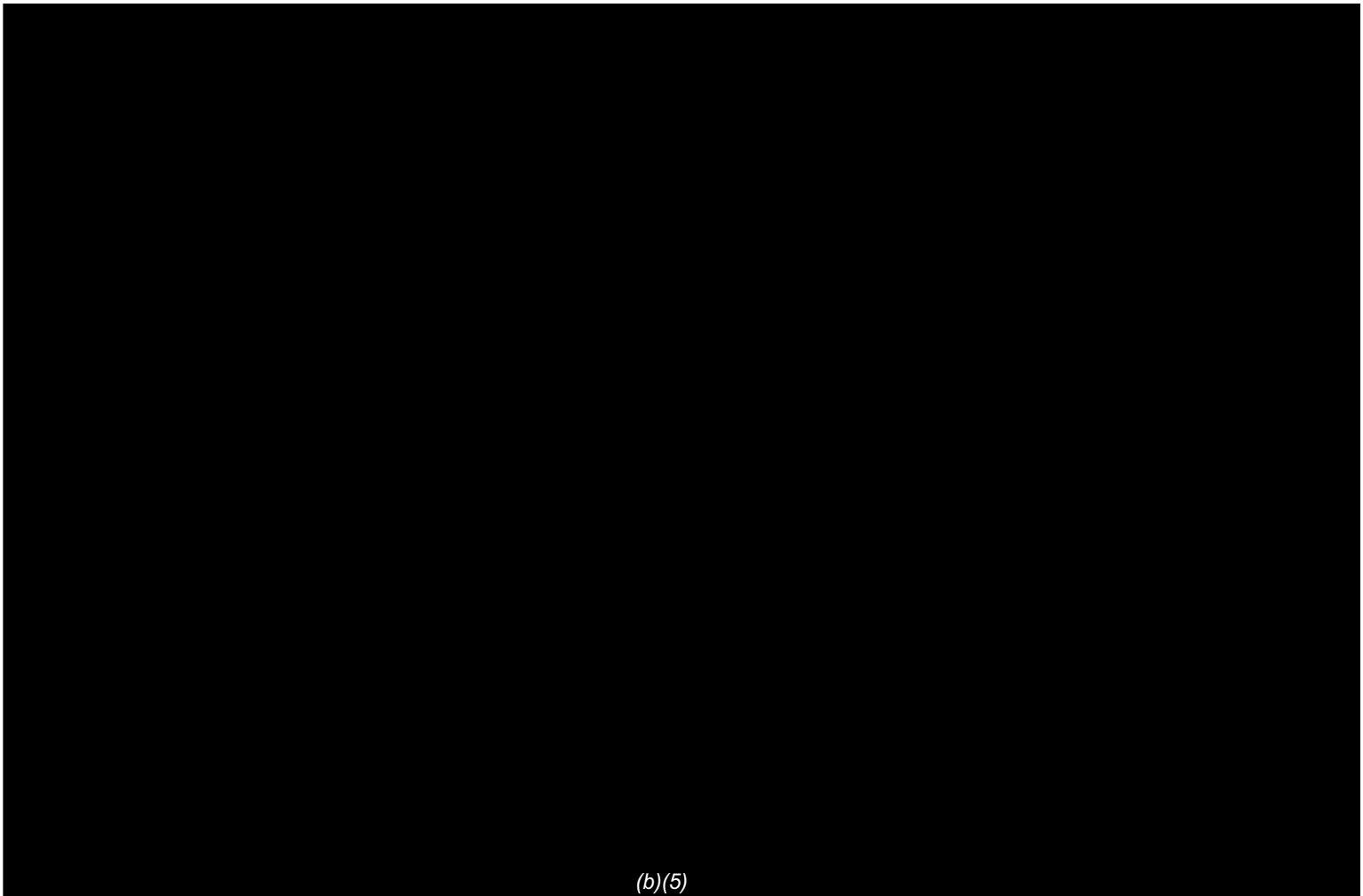
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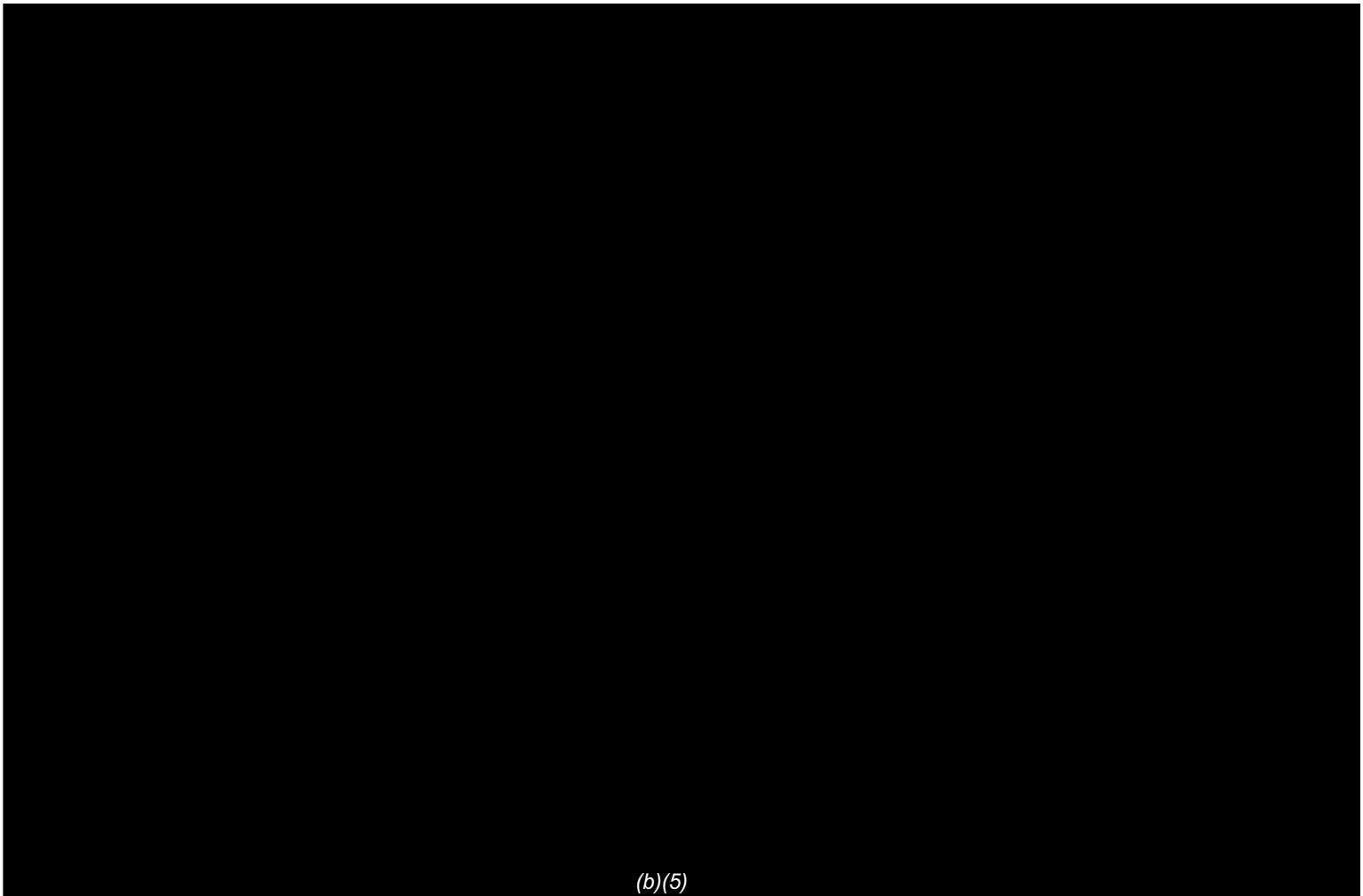
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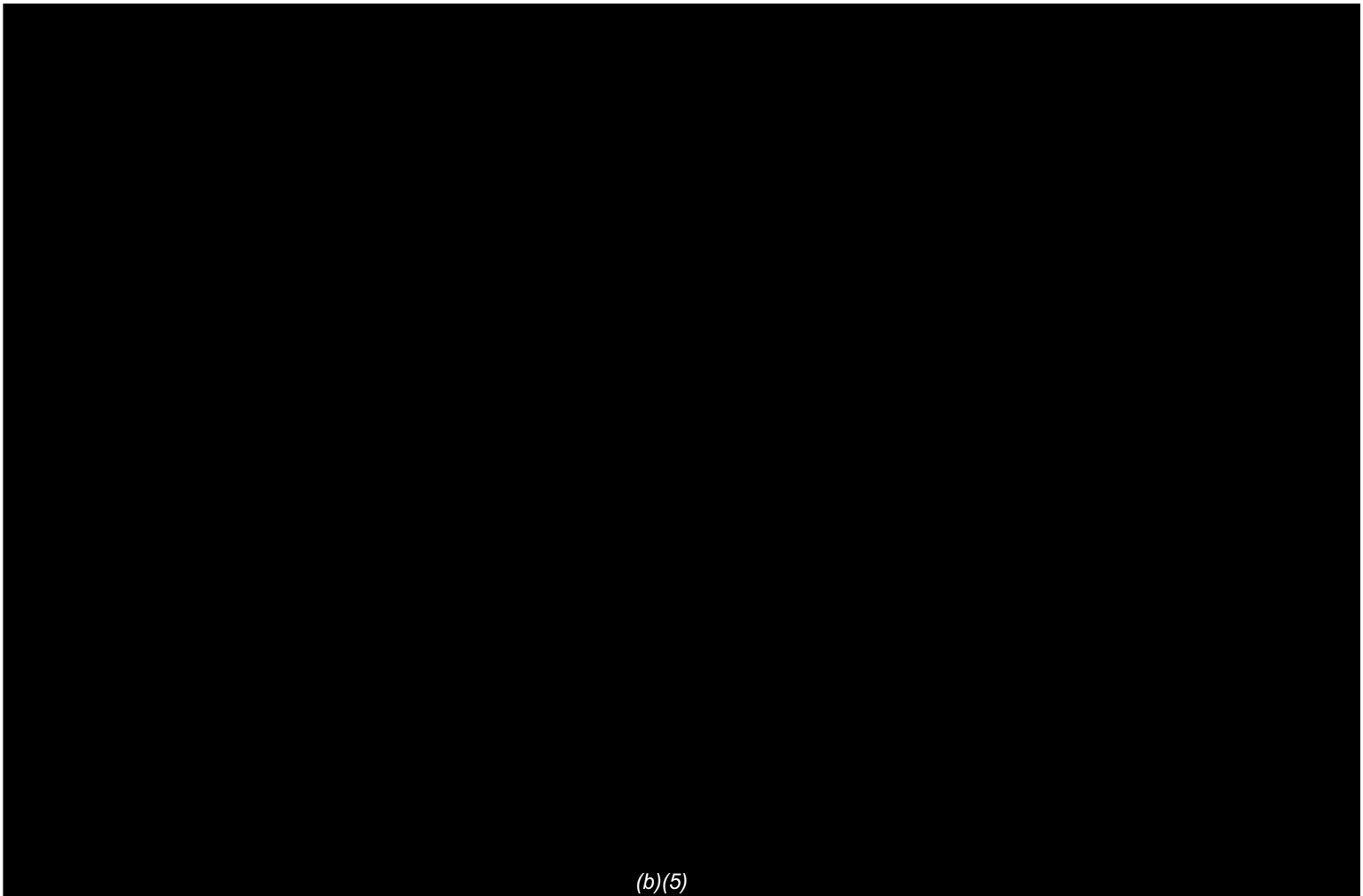
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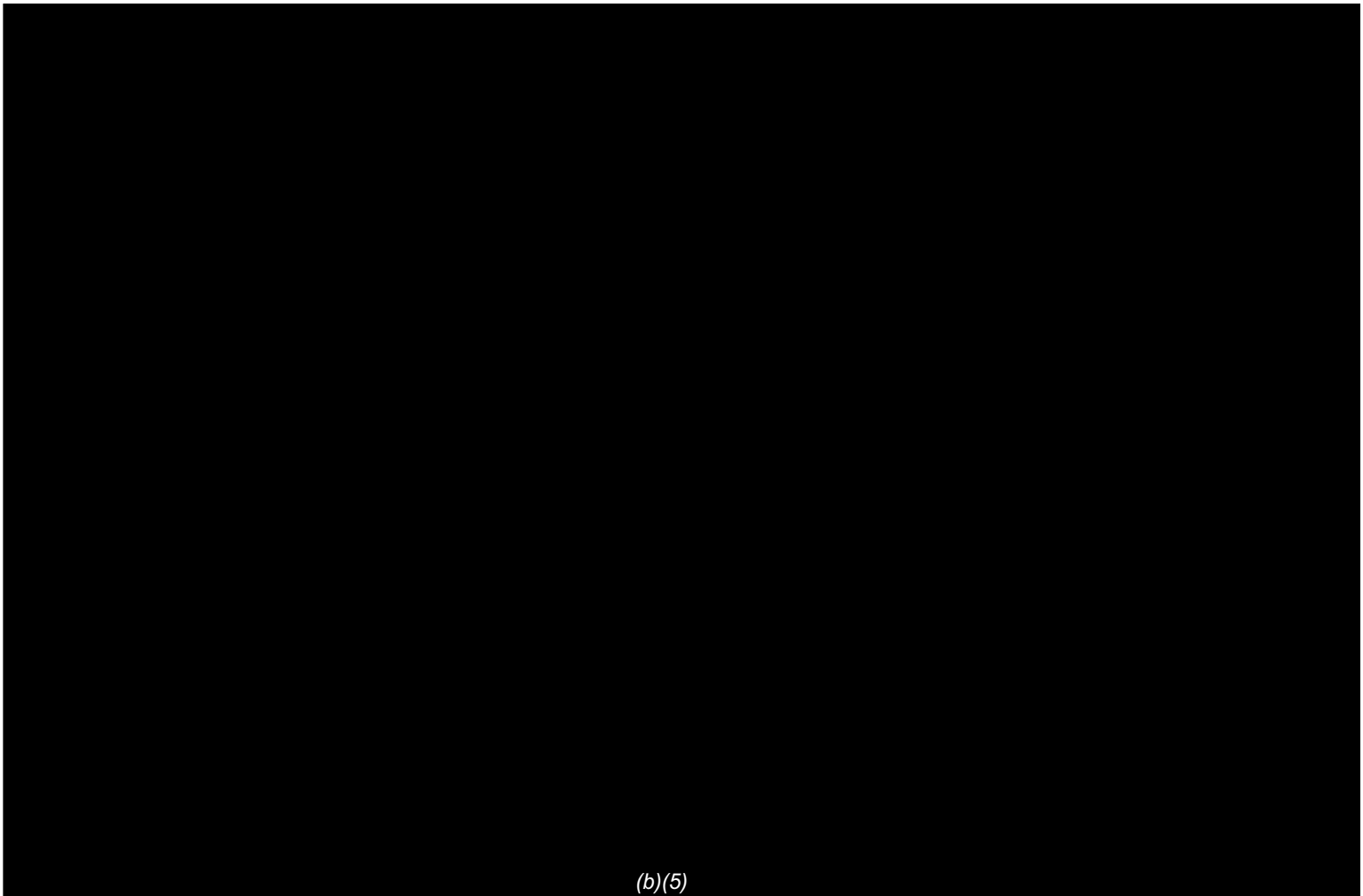
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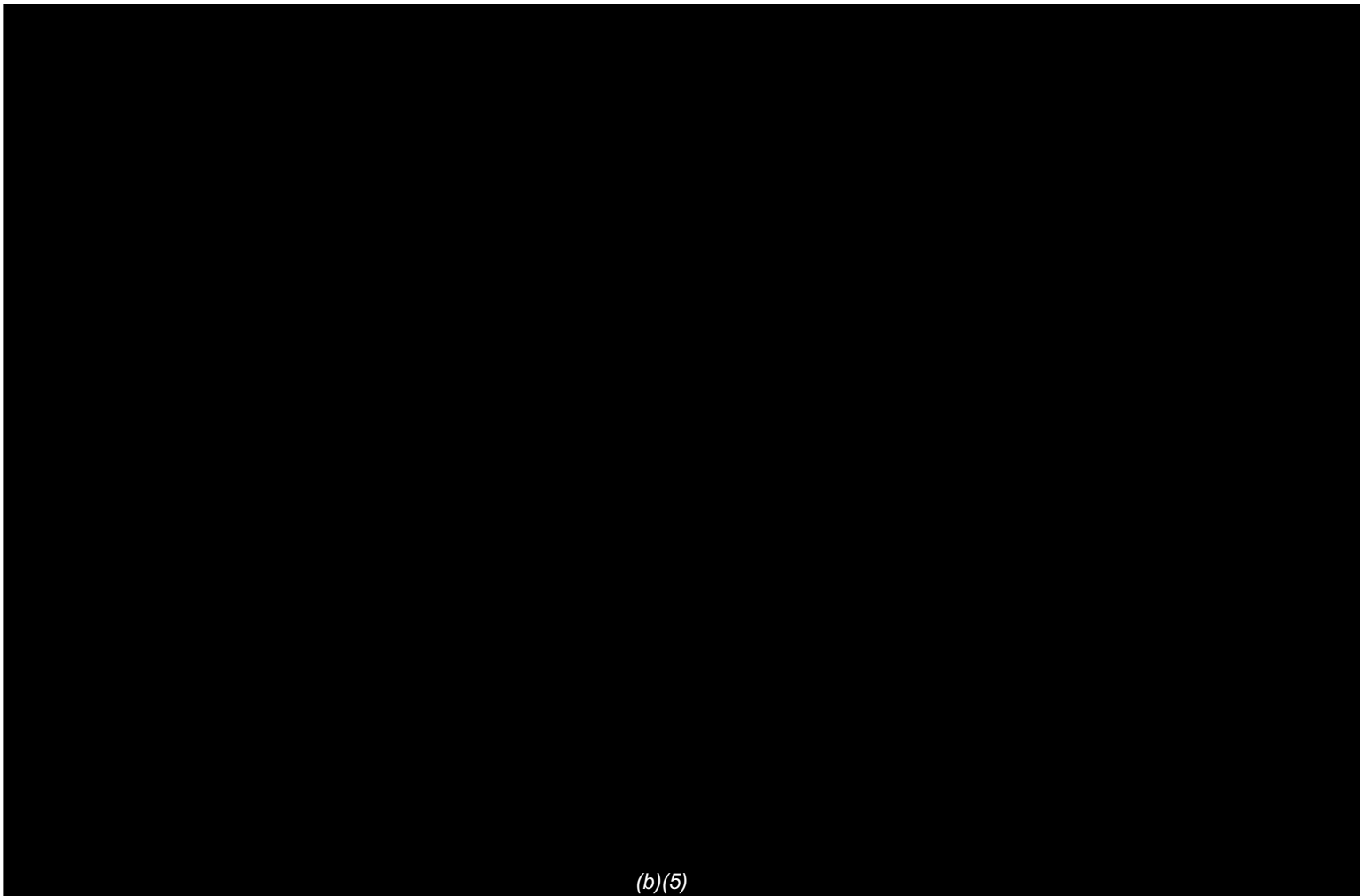
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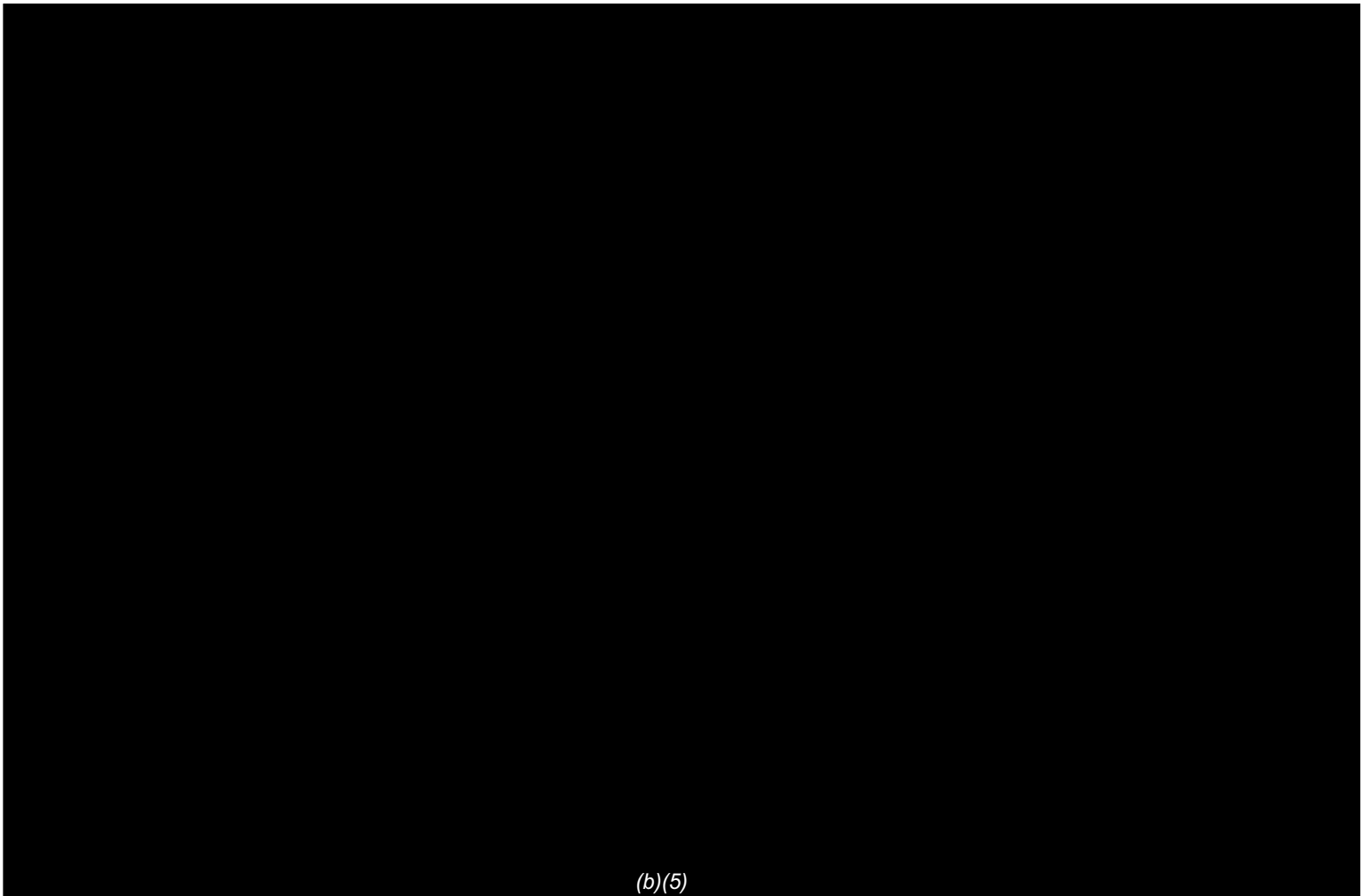
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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No.

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceedings Below ii
Corporate Disclosure Statement ii
Opinions Below.....1
Jurisdiction.....1
Statutes and Regulations Involved 1
Statement 2
A. The Statutory And Regulatory Scheme.....5
B. The ESA's Critical Habitat Provisions 6
C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog 9
D. The District Court Decision 12
E. The Fifth Circuit's Divided Panel Decision And En Banc Vote 13
Reasons For Granting The Petition.....14
I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.....14
A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat. 15
B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit. 24
II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance. 26
A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.....26

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review. 30

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law" 31

Conclusion 33

Appendix A — Opinion of the court of appeals (June 30, 2016).....1a

Appendix B — Opinion of the district court (Aug. 22, 2014) 78a

Appendix C — Order denying rehearing en banc (Feb. 13, 2017) 123a

Appendix D — Statutes Involved 163a

Appendix E — Regulations Involved.....166a

TABLE OF AUTHORITIES

Page(s)

Cases

All. for Wild Rockies v. *Lyder*,
728 F.Supp.2d 1126 (D. Mont. 2010).....25

Am. Forest Res. Council v. *Ashe*,
946 F. Supp. 2d 1 (D.D.C. 2013), *aff'd*,
601 F. App'x 1 (D.C. Cir. 2015).....25

Arizona Cattle Growers' Ass'n v. *Salazar*,
606 F.3d 1160 (9th Cir. 2010).....4, 24

Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*,
515 U.S. 687 (1995).....6, 20

Bennett v. *Spear*,
520 U.S. 154 (1997).....5, 6, 14, 32, 33

Cape Hatteras Access Pres. All. v. *U.S. Dep't of Interior*,
344 F.Supp.2d 108 (D.D.C. 2004).....25

Chevron, U.S.A., Inc. v. *N.R.D.C.*,
467 U.S. 837 (1984).....18

Clark v. *Martinez*,
543 U.S. 371 (2005).....21

Ctr. for Biological Diversity v. *Kelly*,
93 F.Supp.3d 1193 (D. Idaho 2015).....25

Esquivel-Quintana v. *Sessions*,
137 S. Ct. 1562 (2017) 18

Home Builders Ass'n of N. Cal. v. *U.S. Fish & Wildlife Services*,
616 F.3d 983 (9th Cir. 2010) 24

Mach Mining, LLC v. *EEOC*,
135 S. Ct. 1645 (2015) 32

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 32, 33

Nat'l Ass'n of Home Builders v. *Babbitt*,
130 F.3d 1041 (D.C. Cir. 1997) 22

Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*,
551 U.S. 644 (2007) 6, 18

Nat'l Fed. of Indep. Business v. *Sebelius*,
567 U.S. 519 (2012) 22

Rapanos v. *United States*,
547 U.S. 715 (2006) 4, 22, 23

Solid Waste Agency of N. Cook Cty. v. *Army Corps*,
531 U.S. 159 (2001) 5, 21, 22, 23

Tenn. Valley Auth. v. *Hill*,
437 U.S. 153 (1978) 6, 7

Util. Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014) 20

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

Statutes, Rules, and Regulations

15 U.S.C. § 1536(a)(2) 18

16 U.S.C.
§ 1531 1
§ 1531(c)(2) 23
§ 1532(5)(A) 7, 17
§ 1532(5)(A)(i) 17
§ 1532(5)(A)(ii) 3, 8
§ 1532(5)(C) 7, 19
§ 1532(6) 20
§ 1533(a) 5, 15
§ 1533(a)(1)(A) 20
§ 1533(a)(3)(A) 7
§ 1533(a)(3)(A)(i) 3, 15
§ 1533(b)(2) 11, 32
§ 1533(b)(5)(A)(ii) 20
§ 1533(c)(1) 19, 20
§ 1534 20
§ 1535(c)(1)(A)-(E) 20
§ 1535(d)(1)(C) 20
§ 1536(a)(2) 5, 19
§ 1536(a)(3) 6
§ 1536(b)(3) 6
§ 1536(b)(4) 6

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1344 6

50 C.F.R.
§ 424.12 (2011) 2, 30
§ 424.12(b) (2012) 8
§ 424.12(e) 8

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

62 Fed. Reg. 39129 (July 22, 1997).....28

68 Fed. Reg. 46684 (Aug. 6, 2003) 28

75 Fed. Reg. 31387 (June 3, 2010).....10

76 Fed. Reg. 59774 (Sept. 27, 2011) 10, 20

77 Fed. Reg. 35118 (June 12, 2012)..... *passim*

81 Fed. Reg. 7414 (Feb.11, 2016).....8, 30, 31

Miscellaneous

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BLACK'S LAW DICTIONARY (5th ed. 1979) 17

Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013).....33

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17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

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OXFORD ENGLISH DICTIONARY (2d ed. 1989).....19

RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987).....16, 18, 19

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S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980 (COMM. PRINT 1982).....8, 21

Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE (10th ed. 2013).....16

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678 (2013) 26

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) 16, 18

Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67 (2006).....28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra.* Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

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[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20*.

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity–of–Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

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nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

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

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

> fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

* * *

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill,* 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.,* 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
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> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club,* 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.,* 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson,* 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear,* 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor,* 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler,* 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA,* 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft,* 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA,*—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour,* 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior,* 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA,* 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson,* 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York,* 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.,* 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin,* 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar,* 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior,* 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton,* 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez,* 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez,* which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States,* 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF,* 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez,* 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service,* 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar,* 606 F.3d 1160 (2010), *cert. denied,* 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne,* 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.,* 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.,* 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White,* 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436–39 (10th

[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall,* 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant
v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

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ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

tionate costs that are likely to result from the designation." *Id*. at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

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tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id. See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non–Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

17-01174_019158;17-01174_019158;17-01174_019159;17-01174_019160;17-01174_019161;17-01174_019162;1...

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

To: Kevin Haugrud[jack.haugrud@sol.doi.gov]
From: Jorjani, Daniel
Sent: 2017-08-17T10:51:58-04:00
Importance: Normal
Subject: Fwd: Discussion of SG's Opposition to Cert. Petitions in Markle/Weyerhauser
Received: 2017-08-17T10:53:46-04:00
Goverment's Opposition to Petition for Cert. - Markle Investments (2).docx
APPELLATE-#355213-v1-Markle_-_Weyerhaueser_s_cert__petition (3).PDF
APPELLATE-#355251-v1-Markle_-_Petition_for_cert__of_Markle_Interests (4).PDF

Where does this matter stand over at DOJ?

---------- Forwarded message ----------
From: **Goeken, Richard** <richard.goeken@sol.doi.gov>
Date: Thu, Aug 17, 2017 at 10:25 AM
Subject: Discussion of SG's Opposition to Cert. Petitions in Markle/Weyerhauser
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Preparatory to our meeting next Tuesday, attached are the pending Cert. Petitions and the Solicitor General's draft Opposition to them.

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No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

INTRODUCTION 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 18

I This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act 18

II This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat 24

TABLE OF CONTENTS - Continued

Page

III This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear* 29

IV This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species 32

CONCLUSION..... 40

APPENDIX A – Panel Opinion of U.S. Court of Appeals, Fifth Circuit, and Dissent, 827 F.3d 452 (5th Cir. 2016) (June 30, 2016) A-1

APPENDIX B - Opinion of U.S. District Court, Eastern District of Louisiana, 40 F. Supp. 3d 744 (Aug. 22, 2014)..... B-1

APPENDIX C – Order of U.S. Court of Appeals, Fifth Circuit Denying En Banc Review, and Dissent from Denial, 848 F.3d 635 (5th Cir. 2016) (Feb. 13, 2017) C-1

TABLE OF CONTENTS - Continued

Page

APPENDIX D – Complaint for Declaratory and Injunctive Relief, filed in U.S. District Court, Eastern District of Louisiana (Feb. 7, 2013) D-1

APPENDIX E – Excerpts from Mar. 12, 2012, Public Comment on Behalf of P&F Lumber, Etc. E-1

APPENDIX F – Excerpts from Nov. 23, 2011, Public Comment on Behalf of P&F Lumber, Etc. F-1

TABLE OF AUTHORITIES

Page

CASES

Alabama-Tombigbee Rivers Coal. v. Kempthorne,
477 F.3d 1250 (11th Cir. 2007) 36

All. for Wild Rockies v. Lyder,
728 F. Supp. 2d 1126 (D. Mont. 2010) 27

Am. Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 27-28

Arizona Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 27

Bennett v. Spear, 540 U.S. 154 (1997)..... 5, 29-32, 40

Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 12, 28

Ctr. for Biological Diversity v. Kelly,
93 F. Supp. 3d 1193 (D. Idaho 2015) 27

Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 37

GDF Realty Invs. v. Norton,
326 F.3d 622 (5th Cir. 2003) 36

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 36

Home Builders Ass'n of N. California v. United States Fish and Wildlife Service,
616 F.3d 983 (9th Cir. 2010) 27

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 20

TABLE OF AUTHORITIES - Continued

Page

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 21, 22

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
40 F. Supp. 3d 744 (E.D. La. 2014)..... 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
827 F.3d 452 (5th Cir. 2016) 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
848 F.3d 635 (5th Cir. 2016) 1

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 22

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins., 463 U.S. 29 (1983) 32

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997) 36

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 38

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,
469 U.S. 189 (1985) 21

Pittston Coal Grp. v. Sebben,
488 U.S. 105 (1988) 22

Rancho Viejo, LLC v. Norton,
323 F.3d 1062 (D.C. Cir. 2003) 36

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

TABLE OF AUTHORITIES - Continued

Page

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) 36

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 37-40

United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) 20, 21

United States v. Bass, 404 U.S. 336 (1971)..... 39

United States v. Lopez, 514 U.S. 549 (1995) 38

United States v. Morrison, 529 U.S. 528 (2000) 37

FEDERAL STATUTES

16 U.S.C. § 1532(5)(A)(i)–(ii) 2, 19

§ 1532(5)(A)(ii) 22

§ 1533(a)(3)(A)(i)–(ii) 3, 20, 22

§ 1533(b)(2) 3, 11, 30

§ 1536(a)(2) 12

U.S. CONSTITUTION

U.S. Const., amend. X..... 2

U.S. Const., art. I, § 8, cl. 3..... 2

RULE OF COURT

Sup. Ct. Rule 13.3 1

TABLE OF AUTHORITIES - Continued

Page

FEDERAL REGULATIONS

50 C.F.R. § 402.01(a)..... 21
§ 424.12(b) 8
66 Fed. Reg. 62993 (Dec. 4, 2001) 5
75 Fed. Reg. 31389 (June 3, 2010) 6
75 Fed. Reg. 39396 (July 8, 2010) 13
76 Fed. Reg. 59774 (Sept. 27, 2011) 7
77 Fed. Reg. 35118 (June 12, 2012) 8
81 Fed. Reg. 7414 (Feb. 11, 2016) 35

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2014) 19
Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) 11, 12, 13
Index Map, Critical Habitat for the Dusky Gopher Frog 10
The Random House Dictionary of the English Language (1969) 18
Webster's Third New International Dictionary (1961)..... 18

PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

The term "critical habitat" for a threatened or endangered species means:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

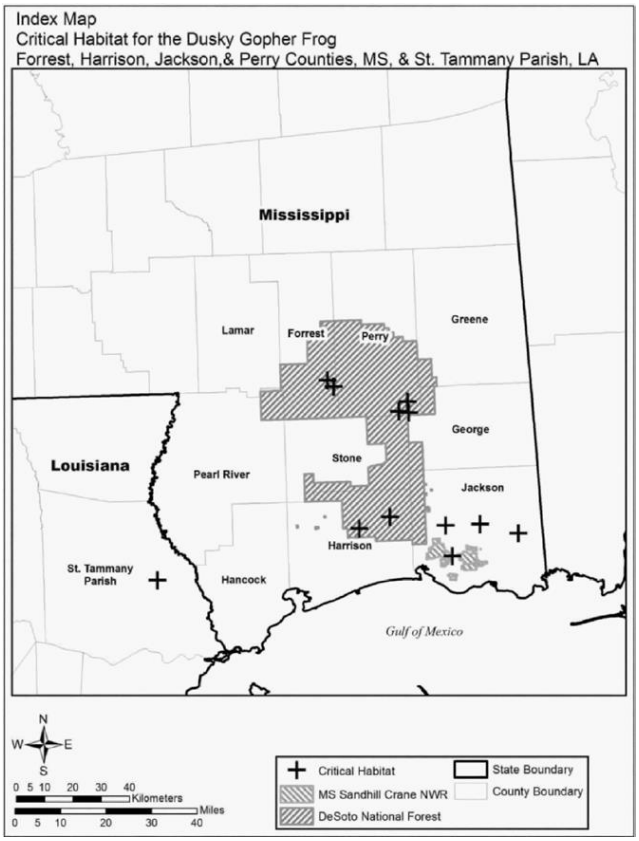
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

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

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

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

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

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

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id*. at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id*. at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id*. at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id*. at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*. In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id*. Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id*.

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id*., Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id.* On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id*. § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id*. Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id*. (citing *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

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

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id*. at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id*. Unit 1 does not contain the upland features necessary for the frog's survival. *Id*.

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id*. at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id*. at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

> species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any

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

16 U.S.C. § 1533(b)(2) (emphasis added).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

has not been for more than fifty years." *Id*. at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id*. at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id*. at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id*. at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id*. at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id*. at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id*. Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id*. Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id*. In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id*.

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id*. at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id*. at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id*. *See United States v. Morrison*, 529 U.S. 598, 613

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

17-01174_019405;17-01174_019405;17-01174_019406;17-01174_019407;17-01174_019408;17-01174_019409;1...

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id*. at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

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Respectfully submitted,

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Appendix A-1

United States of Appeals
Fifth Circuit
FILED
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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix A-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private

property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open canopied pine forests.[2] They migrate to isolated,

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[1] *Se* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi go*e*pher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you

ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531– 1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review

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hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the

designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross- motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen- suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory

explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.* As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly defines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437

U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III

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[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing. [9]*See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development— is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that

"considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so

speculative fear" that the government would imminently target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen

immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court— that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of- interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone- of-interests test. We thus conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical-Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131

determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical- habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding

that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mississippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts

agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35,124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35,133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1

provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35,124.

Finally, in addition to ephemeral ponds, dusky gopher frogs alsorequire upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35,131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35,134. This value, which was based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

> Altogether, the Service concluded:
> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports

> metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's determination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that, when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that

the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument.

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra* note 20

There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F. Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not

demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habitat if these areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The statute defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation

goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii),

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

(b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into

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> arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in effect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider

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account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective

designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any more "necessary" to a

given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental- take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

conservation of the dusky gopher frog.[19]

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the

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[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field essential for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C.

situation here, and the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

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§ 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that in this case, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. See, e.g., Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them.

Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." See 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat designation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . . ." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We

thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical

> habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical- habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, at *7–8 (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which

is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05- 0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit 1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832)). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the

conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in Michigan, the ESA explicitly mandates "consideration" of "economic impact."16 U.S.C.§ 1533(b)(2); see Bennett, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. See Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number

of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. See Bldg. Indus. Ass'n of Bay Area, 2015 WL 4080761, at *5–6. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the

critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is intrastate (not interstate) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." Markle Interests, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." Id.

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third Lopez prong. See United States v. Morrison, 529 U.S. 598, 609– 12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." Id. at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to

instances that "have an explicit connection with or effect on interstate commerce." Id. at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. Id. at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. Id. The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in Morrison. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the "take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff–developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species)

in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. See GDF Realty, 326

F.3d at 639 ("ESA's protection of endangered species is economic in nature."); id. at 640 ("ESA is an economic regulatory scheme . . . ."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. See id. § 1538(a)(1)(E)–(F); GDF Realty, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical- habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic activity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress

has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 214 F.3d

483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C.§ 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habitat—one that the Service has already found to be essential for the conservation of the species—to escape designation

would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted))

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the

regulation of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical- habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical- habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177– 78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect[ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will

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(1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in nature, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under

NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of- interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact- statement requirement

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district Court

PRISCILLA R. OWEN, Circuit Judge, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species" [1]because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3]to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] Id.

[3] Id.

play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one

feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A)

[6] 77 Fed. Reg. at 35,118

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the

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[10] *Id.* at 35,133

[11] *Id.* at 35,135

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . . . However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.")

[13] *Id.* (noting "we hope to work with the landowners").

habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then replaced with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

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[14] *Id.* at 35,129.

[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171-75 (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the endangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example,

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[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

[21] *Ante* at 19.

sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species. [22]The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" To the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24] In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C.§ 203(a) required long-distance communications common carriers to file tariffs with the Federal

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[22] *Bear Valley*, 790 F.3d at 994.

[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long- distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[31] The same can be said of the Service's, and the majority opinions, construction of the Endangered Species Act in the present case. It may be a good idea to

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[25] *Id*. at 220

[26] *Id*. at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id*. at 220.

[28] *Id*. at 228.

[29] *Id*. at 229-31.

[30] *Id*. at 231.

[31] *Id*. at 231-32.

permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation goes beyond the meaning that the statute can bear.[32] That court was fully cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges. This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI*

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[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[34] Sw. Bell Corp., 43 F.3d at 1521 (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)).

[35] Id.

[36] *Id.;* see also id. ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

Telecommunications Corp. is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of."[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the

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[37] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will

be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[s] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not *when the species will be conserved*, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation. The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species. [42]The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

[42]*See* ante at 22

to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species"

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[43] Id.

requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habitat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists

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[44] *See ante* at 22 n.17; 24 n.18.

[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24

and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that uninhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the

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[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant

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[51] *Ante* at 24-25.

[physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat,

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[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] See also ante at 20

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

[56] *See ante* at 25 n.19.

[57] *Id.*

the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[] that virtually *any* part of the United States could be designated as 'critical habitat' for any given

> endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging

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[58] *Id.* (citation omitted).
[59] *Id.*

that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that

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[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[61] *Id.*

are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

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[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id*. (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population)

[64] Ante at 13-14 (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)).

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation of the species" is therefore not supported by substantial evidence, and the

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[65] See 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . . .").

designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However, the Service found that Unit 1 has only one of the three

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[66] 77 Fed. Reg. at 35,131.

[67] Id.

[68] *Id.*

[69] *Id.*

primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed- canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The Service

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.; see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded:

> Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover;

found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact

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(3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] Id. at 35,140.

depended on the extent to which it might be developed,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The Service

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[77] *Id*.

[78] *Id*.

[79] *Id*.

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id*. at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no

reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results

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Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact

[84] *Id*. at 35,140-41:

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to

in development on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to

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section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

Appendix B-1

Filed
August 22, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	CIVIL ACTION
v.	NO. 13-234
UNITED STATES	c/w 13-362 and
FISH AND WILDLIFE	(Pertains to all
SERVICE, ET AL 13-413	cases)
	SECTION "F"

ORDER AND REASONS

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross- motion.

Additionally before the Court are two motions to strike extra- record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases -- landowners and a lessee of a tree farm in Louisiana -- challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately-owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

Appendix B-3

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species ... to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16

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[1]Technically, administration responsibilities are divided between the Department of Interior and the Department of Commerce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine...."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. §, 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A)("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable ... (i) shall concurrently with making a [listing] determination ... designate any habitat of such species...."). Like its listing duty, FWS's habitat designation duty is mandatory;[2]the designation must

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[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001)("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'"). It is incumbent on the Secretary -- "to the maximum extent prudent and determinable" -- to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later designation. *See* 16 U.S.C. § 1532(a)(3)(B)("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established...."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii)(if "critical habitat of [listed] species is not ... determinable [at the time of listing], the Secretary ... may extend the one-year

be based on "the best scientific data available ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines ... that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Id.

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means–
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary

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period specified in paragraph (A) by not more than one additional year....") and 50 C.F.R. § 424.17(b)(2).

> that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical occupied habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3]50 C.F.R. § 424.12(b). FWS may designate as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat...." 16 U.S.C. § 1536(a)(2).[4] If

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival andrecovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442-43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and*

FWS or the consulting federal agency determines that a contemplated action "may affect ... critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (Rana Sevosa) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129 - 35131. They travel to small, isolated

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survival of a species imposes a higher threshold than the statutory language permits.")(emphasis in original).

[5] Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking

[7] Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Id. at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. Id. at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

species. FWS determined that the frog was endangered due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

historical breeding sites for the frog. Based on the comments, FWS re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana.[11] FWS identified additional critical habitat in Mississippi and Louisiana[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetica scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9

[11] FWS was not able to identify critical habitat in Alabama.

million").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

land in Unit 1 is owned by Weyerhaeuser Company, which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaueuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531, et seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-record

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for Supplementing, or challenging, the administrative record; no party requested to supplement the record.

evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions,

to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed.R.Civ.P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA -- in particular, a final rule designating critical habitat -- the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174-75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)(Courts must be particularly deferential to agency determinations

made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent

Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001)(citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985))("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February

8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County*, 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record; (2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA, U.S,* 133 S.Ct. 1138, 1146 (2013). "One element of the case-

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545
(5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See S*ummers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); see also *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)(citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[19]

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but

The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. V. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C.Cir. 2006)(an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as

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in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C.Cir. 2005)(firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation ... has immediately devalued the land within Unit 1 for commercial purposes by bringing increased ... regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they

in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117-18 (D.D.C. 2004)(business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

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submit that the designation "limits the usability and saleability of the property" to their detriment.

[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser ... periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce... among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. See *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008)(vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-Lopez Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. V. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. V. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend Lopez, which dealt with a

challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United State*s, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" GDF, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally

valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640-41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n. 9 (1984)("[T]he

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining

that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which

> likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on recovery of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat because Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

occupied habitat must contain all of the relevant PCEs. See 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide. Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere

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[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010)(rejecting argument that FWS must first identify the point at which the endangered species is considered

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008)("While tempting in its logical simplicity...the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), aff'd, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), cert. denied, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly rebutted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument -- to the extent it is reviewable (see *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010)(Service's decision not to

exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map…[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." Id. FWS "chose the value of 621 m...by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog…and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use...." Id. FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." Id. With respect to Unit 1, FWS explained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. Id. at 35123-25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. See *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010("Where an agency's particular technical expertise is

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa*, will be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List...to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants

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involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

acceptance as its own species...and the scientific name for the species was changed to *Rana sevosa."* 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30]And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama Tombigee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position...on the question and is supported by...peer review[,] and by the opinion of the Service's own experts.")

Wyerhaeuser, a co- owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why -- (assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies -- FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the

landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat ... on the basis of the best scientific data available and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. See 16 U.S.C. § 1533(b)(2)(the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)(citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D.Ariz. 2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations' economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens imposed by simply listing the frog) are treated as part of the regulatory baseline and are not

factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation... to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results

million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion -- its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered -- is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

these economic impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013)(*quoting Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. Id. To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

environment."

U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003)(NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed.

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities

Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436-39 (10th Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. Id. Unlike the critical habitat designation in that case -- where the environmental impact of the critical habitat designation "will be immediate and disastrous" -- the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. Douglas County v. Babbitt, 48 F.3d 1495, 1501-08 (9th Cir. 1995)(considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. Id. Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain

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such as timber management lack a federal nexus and are therefore exempt.

terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009)(setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

***

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 202 F. Supp. 2d 594, 646-48 (W.D.Tex. 2002) (citations omitted).

[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

New Orleans, Louisiana, August 22, 2014.

s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse -- contrary to the express terms and scope of the statute -- a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

Appendix C-1

United States Courts of Appeals
Fifth Circuit
FILED
February 13, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix C-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

Opinion June 30, 2016, 827 F.3d 452)

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

ENTERED FOR THE COURT:

S/ STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." See 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied)

Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the

> species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

> Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012.

Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii)

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plantations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical- habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and

benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." [1]*Id.* at 472 n.20. Finally, the panel majority held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

> The ESA states that the Service
>
> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* … and ... may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical"

portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species ... and habitat of such species that has designated as critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant[.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the

species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical*.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This

predecessor provision, like the current consultation requirements, refers to the destruction or modification of "habitat of such species which is determined by the Secretary. . . to be critical."[3] From the very beginning, Congress rooted the concept of

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . . . I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . . . While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . . . In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

critical habitat in the relevant species' actual habitat.

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation. [4]As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be*

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

habitat. A diagram explains this statutory plan:

Figure 1: Under the ESA, a species critical habitat is necessarily a subset of the species habitat

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit decision. Neither of these objections should be persuasive. The first objection—that this textualist argument was waived—is easily disposed of. Throughout this

litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement exists,[5] but a reviewing court could not cite the same context and related regulations to say a

[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

habitability requirement does in fact exist. This objection is meritless

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. the Ninth Circuit appeared to assume that critical- habitat designation of those unoccupied, uninhabitable areas was the only means

of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally

live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)-(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by

chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features* . . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas*. . . [that] are essential for the

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose.[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conservation would be a more substantial

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions.[9] Mirroring the respective Houses' proposals, [10]Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied"

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat");

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional

purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of *unoccupied* critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to

the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious concern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species' occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally

limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical- habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472 n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity ofa Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to articulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances

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[12] *Markle Interests*, 827 F.3d at 471.

merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one

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[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no

would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C. § 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the

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support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent . . . .").

panel majority's one- feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

"unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non- Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical

> habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best

expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary." The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [] economic impact is not reviewable."*Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it— "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Cheney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the ESA's permissive language: "[t]he Secretary

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed,

and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard. The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

Appendix D-1

Filed
February 7, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO.

MARKLE INTERESTS, LLC,

Plaintiff,
v.

UNITED STATES FISH AND WILDLIFESERVICE, DANIEL M. ASHE, Director of United States Fish and Wildlife Service, in his official capacity; United States DEPARTMENT OF INTERIOR; and, KENNETH SALAZAR, Secretary of the Department of Interior, in his official capacity

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIE

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against Defendants for violating federal statutes and the U.S. Constitution. By final rule, dated June 12, 2012, 77 Fed. Reg. 35118, *et seq.*, Defendants, through the U.S. Fish and Wildlife

Service, designated critical habitat for the dusky gopher frog (previously Mississippi Gopher Frog) in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., in that the designation erroneously includes large areas of private land that do not contain the physical and biological features essential to the conservation of the species and the economic analysis is invalid for failing to properly consider the cumulative effects of the designation. Moreover, the designation was issued without the environmental review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*., and in excess of constitutional authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Defendants‟ actions are contrary to law and must be set aside.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (actions arising under the citizen suit provision of the Endangered Species Act); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

3. Plaintiff, Markle Interests, LLC (Markle), satisfied the notice requirement of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(2). More than 60 days ago, by letter dated September 27, 2012, Markle provided Defendants written notice of the violations that are the subject of this complaint in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as

Exhibit 1 and is incorporated herein by reference. Defendants have not responded to this notice or taken any action to withdraw the final rule at issue here, or to otherwise remedy their violations of law.

4. An actual, justiciable controversy now exists between Markle and Defendants. Relief is proper under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

5. The federal government has waived sovereign immunity in this action under 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

6. Markle has exhausted all administrative remedies.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in this district.

PARTIES

Plaintiff

8. Markle Interests, LLC, is a limited liability company that owns an undivided interest in forested property identified in the final rule as Unit 1 in St. Tammany Parish, Louisiana, and included as critical habitat for the dusky gopher frog. This designation imposes significant regulatory burdens on the property such that costly federal approval may be required for any activity deemed to affect the species, including adverse habitat modification. In addition to

these regulatory burdens, the destination of Unit 1 as critical habitat results in a drastic reduction in value and limits the usability and saleability of the property.

Defendants

9. Defendant United States Department of Interior (Department) is an agency of the United States. Congress has charged the Department with administering the Endangered Species Act for certain species, including the dusky gopher frog.

10. Defendant Kenneth Salazar is Secretary of the United States Department of Interior (Secretary). He oversees the Department‟s administration of the Endangered Species Act and is sued in his official capacity.

11. Defendant United States Fish and Wildlife Service (Service) is an agency of the United States Department of Interior. The Service has been delegated responsibility by the Secretary for day-to-day administration of the Endangered Species Act, including the designation of critical habitat.

12. Defendant Daniel M. Ashe is Director of the United States Fish and Wildlife Service. He oversees the Service‟s administration of the Endangered Species Act and is sued in his official capacity.

13. All of these Defendants are responsible for the violations alleged in this complaint.

LEGAL FRAMEWORK

Listing of Threatened or Endangered Species

14. Under Section 4 of the Endangered Species Act, Defendants must list a species as "threatened" or "endangered" based on certain factors relating to habitat, overutilization, disease or predation, existing regulatory mechanisms, or other factors. *See* 16 U.S.C. § 1532(20).

15. An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

16. Endangered species are specifically protected by Section 9 of the Endangered Species Act, which, among other things, makes it unlawful for any person to "take" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, hunt, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," and may include habitat modification. 16 U.S.C. § 1532(19)

Critical Habitat Designation

17. Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, Defendants must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

18. Critical habitat is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> ….
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

16 U.S.C. § 1532(5)(A)-(C).

19. "The statute thus differentiates between „occupied" and „unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Grower's Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

20. The term "conservation" means the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at

which the protections of the Act are no longer required. 16 U.S.C. § 1532(3).

21. The Secretary must

> [d]esignate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

Consultation

22. Private property designated as critical habitat is subject to federal regulation.

23. In consultation with the Secretary, federal agencies are required to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

24. Section 7 of the Endangered Species Act also requires a federal agency to consult with the

Secretary at the request of a permit applicant, if the applicant "has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

25. Under Section 7, the Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If it is determined that the project is likely to jeopardize the species" "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.*

26. If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action will not" jeopardize the species" continued existence or result in the destruction or adverse modification of critical habitat of such species, a written "incidental take statement" must be issued that (1) specifies the impact of such incidental taking on the species; (2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3), sets forth the terms and conditions with which the agency or applicant must comply to implement the specified measures. 16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv).

National Environmental Policy Act

27. The National Environmental Policy Act requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency‟s decision making. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

28. An environmental impact statement must include:

> (i) The environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man‟s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

29. The NEPA implementing regulations provide federal agencies with the opportunity to prepare an "environmental assessment" that either determines that an environmental impact statement is required or concludes with a "finding of no

significant impact," which terminates the agency's NEPA obligations. 40 C.F.R. § 1508.9.

Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act, a court must set aside agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D).

31. Section 704 of the Administrative Procedure Act states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

U. S. Constitution

32. Commerce Clause enactments, like the Endangered Species Act, are subject to the limits of that power. "The Constitution grants Congress the power to „*regulate* commerce." Art. 1, § 8, cl. 3. (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012).

FACTUAL ALLEGATIONS

Listing and Critical Habitat Designation

33. On December 4, 2001, the U.S. Fish and Wildlife Service listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*.

34. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq*.

35. Although critical habitat may only include those areas "essential to the conservation of the species," the Service made no finding as to the quantity or location of habitat necessary to conserve the gopher frog or identify "the point" at which the protections of the ESA are no longer required.

36. The critical habitat designation covers 6,477 acres in two states, including 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1. *Id.* at 35118.

37. Unit 1 is private land in which the Plaintiff, Markle, owns an undivided interest. *Id.* at 35134-35135.

38. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35134-35135.

39. Unit 1 is not suitable for gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. *Id.* at 35135.

40. Unit 1 cannot be made suitable for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site. *Id.* at 35129-35130.

41. Unit 1 landowners submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123.

42. The Service acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35126.

43. The Service did not show how Unit 1—which is unoccupied and unsuitable as habitat for the gopher frog—is essential to the conservation of the species.

Economic Impacts Analysis

44. In conjunction with the critical habitat designation, the Service completed an economic impacts analysis mandated by Section 4 of the Endangered Species Act. *See id.* at 35140-35141.

45. That analysis showed that designating Unit 1 as critical habitat could have an adverse impact on the landowners as high as $33.9 million. *See id.* at 35141.

46. On the record, the Service did not conduct a balancing analysis that weighed the economic impact on the landowners of Unit 1 against the benefit of including Unit 1 in the critical habitat designation.

47. Notwithstanding the fact that Unit 1 is unsuitable for gopher frog habitat, the Service concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

48. The Service relied on the "baseline approach" and did not consider the *quantitative* economic impacts of the critical habitat designation coextensively (or cumulatively) with the listing of the gopher frog as an endangered species. *Id.* at 35140-35142.

NEPA Compliance

49. The government admitted that it did not subject the critical habitat designation for the dusky gopher frog to review under the National Environmental Policy Act. *See id.* at 35144.

APA Compliance

50. The rule designating critical habitat for the dusky gopher frog, 77 Fed. Reg. 35118, *et seq.*, is the culmination of the Service‟s decision making and constitutes final agency action.

Constitutional Compliance

51. The Service made no finding that the designation of Unit 1 as critical habitat constitutes the regulation of existing commercial activity as the Constitution and U.S. Supreme Court precedent require. *See United States v. Lopez*, 514 U.S. 549 (1995).

INJUNCTIVE RELIEF ALLEGATIONS

52. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 51 as though fully set forth herein.

53. If an injunction does not issue enjoining Defendants from enforcing the critical habitat designation for the dusky gopher frog, Markle will be irreparably harmed.

54. Markle has no plain, speedy, and adequate remedy at law.

55. If not enjoined by this Court, Defendants will continue to enforce or rely on the critical habitat designations in derogation of Markle‟s rights.

56. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

57. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 as though fully set forth herein.

58. An actual and substantial controversy exists between Markle and Defendants as to their legal rights and duties with respect to the ESA, NEPA, the APA, and the U.S. Constitution in the designation of critical habitat for the dusky gopher frog.

59. This case is presently justiciable because Defendants‟ failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Markle. Markle has a vital interest in knowing whether the critical habitat designation, to which Markle is subject, is statutorily and constitutionally valid.

60. Declaratory relief is therefore appropriate to resolve this controversy.

CLAIMS FOR RELIEF

First Claim for Relief

Failure to Make Threshold Determination for Designating Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(e); Alternatively, APA, 5 U.S.C. § 706)

61. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 60 as though fully set forth herein.

62. The Endangered Species Act defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5). In turn, the Act defines "conservation" to mean the use of all methods and procedures necessary to bring a "threatened" or "endangered" species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3). The Act does not define "essential" but it is axiomatic that to determine what is "essential to the conservation of the species," the Service must first identify "the point" when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. However, those threshold determinations are entirely missing from the final rule.

63. The effect of the Service‟s failure to determine a viable population and minimum habitat

size is that the Service is logically incapable of ascertaining which areas are "essential to the conservation of the species" and whether the designation of any particular unoccupied area is required. *See* 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). In this case, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area. Without the foundational underpinning of a viable population, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

64. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); federal regulation, 50 C.F.R. § 424.12(e); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Second Claim for Relief

Failure to Apply Correct Standard to Determine Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); Alternatively, APA, 5 U.S.C. § 706)

65. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. The Secretary does not have unfettered discretion to designate unoccupied areas as critical

habitat. Such areas must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(ii). Logically, this would include areas that at least contain those physical and biological features that are themselves "essential to the conservation of the species." The Service has identified such features as Primary Constituent Elements (or PCEs). For the dusky gopher frog, there are three: (1) ephemeral wetland habitat; (2) upland forested nonbreeding habitat; and (3) upland connectivity habitat. *See* 77 Fed. Reg. 35131. The Service maintains that all of these PCEs are essential to the conservation of the species. However, the Service admits that Unit 1 does not contain all these PCEs. *See id.* at. 35135. In fact, Unit 1 contains none of the PCEs essential to the conservation of the species. Therefore, Unit 1 is currently not suitable habitat for the dusky gopher frog at all, let alone critical habitat.

67. Nevertheless, the Secretary included this unoccupied area in the designation. In effect, the Secretary designated Unit 1 as critical habitat on the premise that the area would be essential for the conservation of the species, if it ever did contain the requisite PCEs. *See id.* But it doesn‟t now and likely never will. The private owners have no intent to convert their property to conservation purposes and, according to the Service, they can‟t be compelled to do so.

68. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Third Claim for Relief
Inadequate Economic Analysis
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

69. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 68 as though fully set forth herein.

70. The Economic Analysis (EA) adopts the "baseline" approach whereby the Service only considers the *qualitative* impacts that occur "without critical habitat," such as those impacts caused by listing of the species, whereas the incremental impacts occurring "with critical habitat" are given a *quantitative* analysis. *See* 77 Fed. Reg. at 35140-35141. The result of this approach is that neither the Service nor the public are ever provided a meaningful cumulative economic impacts analysis. This "baseline" approach was rejected by the Tenth Circuit in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). According to the Tenth Circuit, the "baseline" approach is meaningless and inconsistent with the language of the Act and the intent of Congress. Therefore, that Circuit held the Economic Analysis must consider all of the impacts of critical habitat designation, including those impacts co-extensive with the listing. In other words, the EA must consider the cumulative impacts of the listing and the critical habitat designation together, not just the incremental impacts of the designation. (For a contrary view see *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir 2010).) In *Home Builders Association of Northern California v. Norton*, 293 F.

Supp. 2d 1 (D.D.C. 2002), the Service appears to have represented to the court that it would follow the *New Mexico Cattle Growers'* co-extensive approach in all future critical habitat designations. But it has not done so here.

71. Moreover, the EA failed to quantify economic and other impacts of the designation on oil and gas exploration, forestry, and those impacts resulting from conservation activities such as controlled burns.

72. By these acts or omissions Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fourth Claim for Relief
Failure to Exclude
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

73. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The Service acknowledged, as it must, that Unit 1 will only become suitable habitat if the land is managed to develop the requisite PCEs. *See* 77 Fed. Reg. 35135. The Service also acknowledged that Unit 1 is comprised entirely of private land, *id.* at 35134-35135, and that private landowners cannot be compelled to manage the land for recovery purposes, *id.* at 35126. In fact, because Unit 1 is unoccupied and used for timber harvesting and has the potential for

development of oil and gas exploration, that the Service valued at approximately $34 million, the private owners have no intent to convert their property to conservation purposes. Not only do these facts compel a finding that Unit 1 is not "essential for the conservation of the species," but they also compel a finding that the benefits of exclusion outweigh the benefits of inclusion under Section 4(b)(2) of the Act. The Service‟s unsupported conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," 77 Fed. Reg. 35141, is arbitrary and irrational. *See Natural Resources Defense Council v. U.S. Department of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) ("Essentially, we must ask „whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.‟" (citation omitted)).

75. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fifth Claim for Relief
Failure to Conduct NEPA Review
(Violation of NEPA, 42 U.S.C. § 4321, *et seq.*;
Alternatively, APA, 5 U.S.C. § 706)

76. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. In its final rule designating critical habitat for the dusky gopher frog, the Service stated

categorically that the National Environmental Policy Act does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35121. But the better argument is to the contrary.

78. Neither the Endangered Species Act nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Preservation Alliance v. U. S. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), have held that critical habitat designations are subject to review under NEPA. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit parted ways with the Tenth Circuit and held that NEPA review was not required for critical habitat designations where there is no physical change to the environment. However, this case is different.

79. Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for human interference with the environment through management of the habitat by, among other things, regular controlled burns. Frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog"s aquatic and terrestrial habitat. *See* 77 Fed. Reg. 35129-35130. These burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and habitat for other species. But the critical habitat designation does not discuss these effects. That can only be done

through the NEPA review process. Therefore, notwithstanding the Ninth Circuit decision, and in accordance with the Tenth Circuit decision, NEPA review should have been undertaken here.

80. By these acts or omissions Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.*; and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Sixth Claim for Relief
U.S. Constitutional Violation
(Commerce Clause, Article 1, Section 8, Clause 3, and APA, 5 U.S.C. § 706)

81. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. The Service cites a long list of cases that have upheld the agency‟s authority to regulate intrastate, noncommercial species under the commerce power. *See* 77 Fed. Reg. at 35120. However, those cases do not address whether the agency has authority under the Commerce Clause to regulate private land that has no connection to the protected species other than through the critical habitat designation itself. The designation of Unit 1 as critical habitat for the dusky gopher frog is contrary to U.S. Supreme Court precedent not only because the frog is not a regulable entity but also because the critical habitat designation creates, rather than regulates, the putative economic activity. *See United States v. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); and, more recently, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573-74 (2012) ("This

Court‟s precedent reflects this understanding: As expansive as this Court‟s cases construing the scope of the commerce power have been, they uniformly describe the power as reaching „activity.‟ *E.g.*, *United States v. Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626. The [challenged provision], however, does not regulate existing commercial activity.”). Simply put, the uncontested facts show that the Service is not regulating existing commercial activity. The regulation of Unit 1 as critical habitat is unconstitutional because the land does not contain the listed species or any usable habitat and any activity on the land cannot affect the species or its habitat.

83. By these acts or omissions Defendants violated art. 1, § 8, cl. 3, of the U.S. Constitution and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

PRAYER FOR RELIEF

Wherefore, Markle prays:

As to the First Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to make the threshold determination as to the quality and location of habitat essential to the conservation of the species in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or alternatively, that the final rule is void under the APA, U.S.C. § 706.

As to the Second Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to apply the proper standard for designating critical habitat in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Third Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because the economic analysis was inadequate in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fourth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants‟ failure to exclude Unit 1 was arbitrary and irrational in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fifth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to comply with NEPA, 42 U.S.C. § 4321, *et seq.*, and the final rule is void under the APA, 5 U.S.C. § 706.

As to the Sixth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid under the Commerce Clause, U.S. Constitution, art. 1, § 8, cl. 3, and the final rule is void under the APA, 5 U.S.C. § 706.

As to all Claims for Relief:

That this Court:

(a) issue a judgment and order enjoining Defendants from enforcing or otherwise acting pursuant to the final rule, vacating the rule, and remanding the rule for redesignation of critical habitat in accordance with ESA, NEPA, the APA, and the U.S. Constitution;

(b) award Plaintiff attorneys‟ fees and costs to the extent permitted by law; and

(c) grant such other relief as the Court shall deem just and proper.

DATED: February 7, 2013.

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Appendix E-1

Excerpts from Mar. 12, 2012
Public Comment on Behalf of
P&F Lumber, Etc.

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16,
and Weyerhaeuser's comments of November 28, 2011 at page

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed bums would be necessary")

the only known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,201 I at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23,2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also sec proposed Rule at page 59777.

In *United States v. Lopez,* 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel,* 301 U.S. **1,** 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is

absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Commerce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist-- and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any

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Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?,* 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

Appendix F-1

Excerpts from Nov. 23, 2011 Public Comment on Behalf of P&F Lumber, Etc.

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands-- and, indeed, the FWS in the

Proposed Rule concludes that (by its own investigation on the Lands) the MGF does not now actually occupy the Lands-- it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both

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[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

the St. Tammany Parish Planning and Zoning Commission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish..

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million' dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

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[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

Appendix F-5

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.

Nos. 17-71, 17-74

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No.

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceedings Below ii
Corporate Disclosure Statement ii
Opinions Below.....1
Jurisdiction.....1
Statutes and Regulations Involved 1
Statement 2
A. The Statutory And Regulatory Scheme.....5
B. The ESA's Critical Habitat Provisions 6
C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog 9
D. The District Court Decision 12
E. The Fifth Circuit's Divided Panel Decision And En Banc Vote 13
Reasons For Granting The Petition.....14
I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.....14
A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat. 15
B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit. 24
II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance. 26
A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.....26

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review. 30
III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law" 31
Conclusion 33
Appendix A — Opinion of the court of appeals (June 30, 2016) 1a
Appendix B — Opinion of the district court (Aug. 22, 2014) 78a
Appendix C — Order denying rehearing en banc (Feb. 13, 2017) 123a
Appendix D — Statutes Involved 163a
Appendix E — Regulations Involved 166a

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467 U.S. 837 (1984).....18

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543 U.S. 371 (2005).....21

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93 F.Supp.3d 1193 (D. Idaho 2015).....25

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

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137 S. Ct. 1562 (2017) 18

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135 S. Ct. 1645 (2015) 32

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547 U.S. 715 (2006) 4, 22, 23

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531 U.S. 159 (2001) 5, 21, 22, 23

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437 U.S. 153 (1978) 6, 7

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134 S. Ct. 2427 (2014) 20

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

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15 U.S.C. § 1536(a)(2) 18

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§ 1531 1
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§ 1532(5)(A) 7, 17
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§ 1532(5)(A)(ii) 3, 8
§ 1532(5)(C) 7, 19
§ 1532(6) 20
§ 1533(a) 5, 15
§ 1533(a)(1)(A) 20
§ 1533(a)(3)(A) 7
§ 1533(a)(3)(A)(i) 3, 15
§ 1533(b)(2) 11, 32
§ 1533(b)(5)(A)(ii) 20
§ 1533(c)(1) 19, 20
§ 1534 20
§ 1535(c)(1)(A)-(E) 20
§ 1535(d)(1)(C) 20
§ 1536(a)(2) 5, 19
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§ 1536(b)(3) 6
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§ 424.12(b) (2012) 8
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17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

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17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

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WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961) 16, 18

Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67 (2006).....28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra.* Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

> Under the arbitrary-and-capricious standard,
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> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20*.

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity–of–Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

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nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

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

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

> fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

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I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill,* 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.,* 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club,* 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.,* 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson,* 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear,* 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor,* 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler,* 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA,* 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft,* 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA,*—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour,* 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior,* 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA,* 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson,* 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York,* 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.,* 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin,* 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar,* 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior,* 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton,* 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez,* 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez,* which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States,* 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF,* 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez,* 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service,* 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar,* 606 F.3d 1160 (2010), *cert. denied,* 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne,* 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.,* 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.,* 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White,* 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436–39 (10th

[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall,* 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant
v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

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ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

tionate costs that are likely to result from the designation." *Id*. at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

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naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

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tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

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For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id. See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non–Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

---

[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

17-01174_019662;17-01174_019662;17-01174_019663;17-01174_019664;17-01174_019665;17-01174_019666;1...

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

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Rick may have already sent this to you, but out of abundance of caution here is the draft brief from Appellate on the cert. petition in the dusky gopher frog critical habitat case.

Ben
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Colleagues,

Attached is a draft brief in opposition to cert. for your review. I would like to get comments by COB Tuesday, so I can get a reviewed version to our front office on Wednesday. I'm also attaching the two petitions. Let me know if you have questions. Thanks, David

David C. Shilton

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--
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No. _____

In the
Supreme Court of the United States

MARKLE INTERESTS, LLC, et al.,

Petitioners,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal Endangered Species Act (ESA) defines "critical habitat" as habitat "essential to the conservation" of a species. Critical habitat is strictly regulated, often impairing or precluding ordinary use. Here, the government designated over 1,500 acres of private land as critical habitat for the dusky gopher frog that is not used or occupied by the species; is not near areas inhabited by the species; is not accessible to the species; cannot sustain the species without modification; and, does not support the existence or conservation of the species in any way. Yet, the designation may cost the landowners up to $34 million in lost value.

Relying on administrative deference, a split Fifth Circuit panel upheld the government's expansive interpretation of critical habitat. On denial of an en banc hearing, six judges filed a thirty-two page dissent calling for further review because the panel decision gave the government "virtually limitless" power to designate critical habitat and "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated."

Question:

Does the Endangered Species Act authorize the federal government to designate as critical habitat private land that is unsuitable as habitat and has no connection with a protected species? If so, does the U.S. Constitution allow such a designation?

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

LIST OF ALL PARTIES

Petitioners here are Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC. Weyerhaeuser Company is filing a separate Petition for Writ of Certiorari.

Respondents are United States Fish and Wildlife Service; Jim Kurth, acting director of the United States Fish and Wildlife Service; United States Department of Interior; and Ryan K. Zinke, Secretary of the Department of Interior.

Respondent Intervenors are Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, have no parent corporations and no publicly held company owns 10% or more of their stock.

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF ALL PARTIES ii

CORPORATE DISCLOSURE STATEMENT ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 1

INTRODUCTION 4

STATEMENT OF THE CASE 5

REASONS FOR GRANTING THE PETITION 18

I This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act 18

II This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat 24

TABLE OF CONTENTS - Continued

Page

III This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear* 29

IV This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species 32

CONCLUSION..... 40

APPENDIX A – Panel Opinion of U.S. Court of Appeals, Fifth Circuit, and Dissent, 827 F.3d 452 (5th Cir. 2016) (June 30, 2016) A-1

APPENDIX B - Opinion of U.S. District Court, Eastern District of Louisiana, 40 F. Supp. 3d 744 (Aug. 22, 2014)..... B-1

APPENDIX C – Order of U.S. Court of Appeals, Fifth Circuit Denying En Banc Review, and Dissent from Denial, 848 F.3d 635 (5th Cir. 2016) (Feb. 13, 2017) C-1

TABLE OF CONTENTS - Continued

Page

APPENDIX D – Complaint for Declaratory and Injunctive Relief, filed in U.S. District Court, Eastern District of Louisiana (Feb. 7, 2013) D-1

APPENDIX E – Excerpts from Mar. 12, 2012, Public Comment on Behalf of P&F Lumber, Etc. E-1

APPENDIX F – Excerpts from Nov. 23, 2011, Public Comment on Behalf of P&F Lumber, Etc. F-1

TABLE OF AUTHORITIES

Page

CASES

Alabama-Tombigbee Rivers Coal. v. Kempthorne,
477 F.3d 1250 (11th Cir. 2007) 36

All. for Wild Rockies v. Lyder,
728 F. Supp. 2d 1126 (D. Mont. 2010) 27

Am. Forest Res. Council v. Ashe,
946 F. Supp. 2d 1 (D.D.C. 2013) 27-28

Arizona Cattle Growers' Ass'n v. Salazar,
606 F.3d 1160 (9th Cir. 2010) 27

Bennett v. Spear, 540 U.S. 154 (1997)..... 5, 29-32, 40

Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior,
344 F. Supp. 2d 108 (D.D.C. 2004) 12, 28

Ctr. for Biological Diversity v. Kelly,
93 F. Supp. 3d 1193 (D. Idaho 2015) 27

Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council,
485 U.S. 568 (1988) 37

GDF Realty Invs. v. Norton,
326 F.3d 622 (5th Cir. 2003) 36

Gibbs v. Babbitt, 214 F.3d 483 (4th Cir. 2000) 36

Home Builders Ass'n of N. California v. United States Fish and Wildlife Service,
616 F.3d 983 (9th Cir. 2010) 27

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 20

TABLE OF AUTHORITIES - Continued

Page

Lamie v. U.S. Tr.,
540 U.S. 526 (2004) 21, 22

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
40 F. Supp. 3d 744 (E.D. La. 2014)..... 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
827 F.3d 452 (5th Cir. 2016) 1

Markle Interests, LLC v. U.S. Fish and Wildlife Service,
848 F.3d 635 (5th Cir. 2016) 1

MCI Telecomms. Corp. v. AT&T Co.,
512 U.S. 218 (1994) 22

Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins., 463 U.S. 29 (1983) 32

Nat'l Ass'n of Home Builders v. Babbitt,
130 F.3d 1041 (D.C. Cir. 1997) 36

Nat'l Fed'n of Indep. Bus. v. Sebelius,
132 S. Ct. 2566 (2012) 38

Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,
469 U.S. 189 (1985) 21

Pittston Coal Grp. v. Sebben,
488 U.S. 105 (1988) 22

Rancho Viejo, LLC v. Norton,
323 F.3d 1062 (D.C. Cir. 2003) 36

TABLE OF AUTHORITIES - Continued

Page

San Luis & Delta-Mendota Water Auth. v. Salazar, 638 F.3d 1163 (9th Cir. 2011) 36

Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers, 531 U.S. 159 (2001) 37-40

United States v. Am. Trucking Ass'ns, 310 U.S. 534 (1940) 20, 21

United States v. Bass, 404 U.S. 336 (1971)..... 39

United States v. Lopez, 514 U.S. 549 (1995) 38

United States v. Morrison, 529 U.S. 528 (2000) 37

FEDERAL STATUTES

16 U.S.C. § 1532(5)(A)(i)–(ii) 2, 19

§ 1532(5)(A)(ii) 22

§ 1533(a)(3)(A)(i)–(ii) 3, 20, 22

§ 1533(b)(2) 3, 11, 30

§ 1536(a)(2) 12

U.S. CONSTITUTION

U.S. Const., amend. X..... 2

U.S. Const., art. I, § 8, cl. 3..... 2

RULE OF COURT

Sup. Ct. Rule 13.3 1

TABLE OF AUTHORITIES - Continued

Page

FEDERAL REGULATIONS

50 C.F.R. § 402.01(a)..... 21
§ 424.12(b) 8
66 Fed. Reg. 62993 (Dec. 4, 2001) 5
75 Fed. Reg. 31389 (June 3, 2010) 6
75 Fed. Reg. 39396 (July 8, 2010) 13
76 Fed. Reg. 59774 (Sept. 27, 2011) 7
77 Fed. Reg. 35118 (June 12, 2012) 8
81 Fed. Reg. 7414 (Feb. 11, 2016) 35

MISCELLANEOUS

Black's Law Dictionary (10th ed. 2014) 19
Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) 11, 12, 13
Index Map, Critical Habitat for the Dusky Gopher Frog 10
The Random House Dictionary of the English Language (1969) 18
Webster's Third New International Dictionary (1961)..... 18

PETITION FOR A WRIT OF CERTIORARI

Markle Interests, LLC; P&F Lumber Company 2000, LLC; and PF Monroe Properties, LLC, respectfully petition this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The panel opinion of the Court of Appeals is reported at 827 F.3d 452 (5th Cir. 2016). Petitioner's Appendix (Pet. App.) A. The opinion of the district court is reported at 40 F. Supp. 3d 744 (E.D. La. 2014). Pet. App. B. The denial of en banc review, with dissent, is reported at 848 F.3d 635 (5th Cir. 2016), Pet. App. C.

JURISDICTION

The Court of Appeals for the Fifth Circuit entered judgment on June 30, 2016. That court denied the petition for rehearing en banc on February 13, 2017. This Court granted an extension to file the Petition for Writ of Certiorari to and including July 13, 2017. This Court has jurisdiction under 28 U.S.C. § 1254(1). *See* Sup. Ct. Rule 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

The U.S. Constitution provides in pertinent part:

> The Congress shall have Power to . . . regulate commerce with foreign Nations,

> and among the several States, and with the Indian tribes.

U.S. Const., art. I, § 8, cl. 3.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U.S. Const., amend. X.

The Endangered Species Act provides in pertinent part:

The term "critical habitat" for a threatened or endangered species means:

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii).

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

Id. § 1533(b)(2).

INTRODUCTION

The Fifth Circuit's decision to authorize the designation of non-habitat as critical habitat is unprecedented in its potential to expand federal authority over local land and water use. It vests federal agencies with virtually limitless power to regulate any and all areas of the Nation based solely on the government's bald assertion that the regulated areas are "essential to the conservation of a protected species." This is so, even when the designated area is unsuitable and inaccessible as species habitat. Moreover, the government may exercise this authority with impunity because under the Fifth Circuit decision the government's designation of critical habitat is unreviewable in a court of law. This alone is sufficient to warrant review by this Court. But there is more.

The Fifth Circuit decision effectively rewrites the statutory text. It conflicts with all relevant judicial decisions. It ignores controlling Supreme Court precedent. And, it raises irreconcilable constitutional conflicts.

This Court should grant review to address four issues of national importance:

First, this Court should determine whether private property that is unsuitable as habitat and does not contribute to the conservation of a listed species meets the definition of critical habitat under the Endangered Species Act.

Second, this Court should resolve the conflict the Fifth Circuit created with other lowers courts that

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

universally hold the designation of unoccupied critical habitat requires a more rigorous standard than the designation of occupied critical habitat.

Third, this Court should resolve the conflict between the Fifth Circuit decision and this Court's opinion in *Bennett v. Spear*, 540 U.S. 154 (1997), that held the decision to not exclude an area from critical habitat is reviewable for an abuse of discretion under the Administrative Procedure Act.

And, fourth, this Court should review this case to resolve the constitutional conflict created by the Fifth Circuit decision that allows the federal government unlimited authority to regulate land and water resources even if they have no connection with a protected species.

STATEMENT OF THE CASE

In 2001, the U.S. Fish and Wildlife Service (Service) listed the Mississippi gopher frog as an endangered species. *See* Final Rule to List the Mississippi Gopher Frog as Endangered, 66 Fed. Reg. 62993 (Dec. 4, 2001). The Mississippi gopher frog is darkly colored, with a "stubby appearance," a back densely covered with warts, and a "belly . . . thickly covered with dark spots and dusky markings from chin to mid-body." *Id.* at 62993. Historically, it was present in parts of Louisiana, Mississippi, and Alabama. Pet. App. at A-4. At the time of listing, however, it was known to exist only in Harrison County, Mississippi. 66 Fed. Reg. at 62994.

In 2007, the Center for Biological Diversity and the Friends of Mississippi Public Lands sued the

Service for failure to designate critical habitat for the Mississippi gopher frog. *See* Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog (the Proposed Rule), 75 Fed. Reg. 31389 (June 3, 2010). The Service issued a Proposed Rule in June 2010 to designate 1,957 acres in Mississippi as critical habitat. *Id.* at 31387, 31395. At that time, "two new naturally occurring populations of the Mississippi gopher frog [had been] found in Jackson County, Mississippi." 75 Fed. Reg. 31389. Additionally, the frogs had been successfully reintroduced at an additional site in Harrison County. *Id.*

In designating critical habitat, the Service searched for additional locations . . . that the frog could occupy. *Id.* The Service determined that "most of the potential restorable habitat for the species occurred in Mississippi." *Id.* And that, "Habitat in Alabama and Louisiana is severely limited, so our focus was on identifying sites in Mississippi." *Id.* at 31394.

The Proposed Rule identified 11 proposed "units" for designation as critical habitat in Mississippi. All within the DeSoto National Forest. *See id.* at 31396-31399. These included, "[f]ederal land being managed by the State [of Mississippi] as a Wildlife Management Area," and "private land being managed as a wetland mitigation bank." *Id.* at 31394. Four of the 11 units were completely or partially occupied by the frog at the time of the Proposed Rule, whereas the remaining units were unoccupied. *See id.* at 31396-31399. Significantly, however, *all* of the unoccupied areas

were "actively manag[ed] . . . to benefit the recovery of the Mississippi gopher frog." *Id.*

In September, 2011, the Service issued a Revised Proposed Rule expanding the critical habitat designation from the original 1,957 acres to 7,015 acres. *See* Revised Proposed Rule for the Designation of Critical Habitat for the Mississippi Gopher Frog 76 Fed. Reg. 59774 (Sept. 27, 2011). It did so in response to comments that more habitat was required to conserve the species. The Service expanded the radius of protection around frog breeding sites and designated an entirely new unit (Unit 1) consisting of more than 1,500 acres of privately owned land in St. Tammany Parish, Louisiana, based on a report that gopher frogs were seen on a small portion of the site decades earlier in 1965. 76 Fed. Reg. at 59781, 59783. According to the Service, Unit 1 had the potential to provide habitat for the Mississippi gopher frog, but only if Unit 1 was restored and the frog were transferred there. *Id.* at 59783.

Although Unit 1 may have the "potential" to serve as suitable habitat for the frog, if it were modified, it is entirely owned by private parties (the Petitioners before this Court) who intend to harvest and build on the site. Pet. App.at D-19, 20; *see also* March 2, 2012, Public Comment on Behalf of P&F Lumber, Etc. (Pet. App. at E-2; *id.* at E-1) ("The frog will never be present on the Lands as the [Service] cannot move the frog there and the Landowners will not allow them to be moved there . . . ."); *id.* ("The Lands do not now, and will not in the future, contain the required 'primary constituent elements' the [Service] says are needed for the frog to live on the

Lands."); November 23, 2011 Public Comment on Behalf of P&F Lumber, Etc., at 4 (Pet. App. at F-1) ("[I]t is certain that both the critical habitat and the [Mississippi gopher frog] will never exist on the Lands."). Instead, the landowners have leased the land for timber operations for the foreseeable future, and intend to develop homes and businesses on the land when this becomes feasible. Pet. App. at A-5; *see also* November 23, 2011, Public Comment on Behalf of P&F Lumber, Etc., at 4-5 (Pet App. at F-1 – F-2). As the Service recognized, the timber lease on Unit 1 does not expire until 2043. Pet. App. at B-5; *see also* Final Rule for the Designation of Critical Habitat for the Dusky Gopher Frog (the "Final Rule"), 77 Fed. Reg. 35118, 35123 (June 12, 2012). The Service expressly acknowledged it cannot compel the Landowners to convert Unit 1 into suitable habitat, and the designation of critical habitat itself does not "establish a refuge, wilderness, reserve, preserve, or other conservation area." *See* Revised Proposed Rule, 76 Fed. Reg. at 59776.

The Service issued its Final Rule on June 12, 2012, which announced the "Mississippi gopher frog" would now be called the "dusky gopher frog." Final Rule, 77 Fed. Reg. 35118. Additionally, the Final Rule designated a total of 6,477 acres as critical habitat, and included Unit 1 for a total of 12 units. *Id.* at 35118. The Service identified three "primary constituent elements" (PCEs), which are defined by regulation as "the principal biological or physical constituent elements [within a defined area] that are essential to the conservation of the species." *Id.* at 35128; *see* 50 C.F.R. § 424.12(b).

These three essential PCEs are:

(1) small, isolated, ephemeral, acidic breeding ponds having an "open canopy with emergent herbaceous vegetation," appropriate water quality, surface water present for at least 195 days during the breeding season, and no predatory fish;

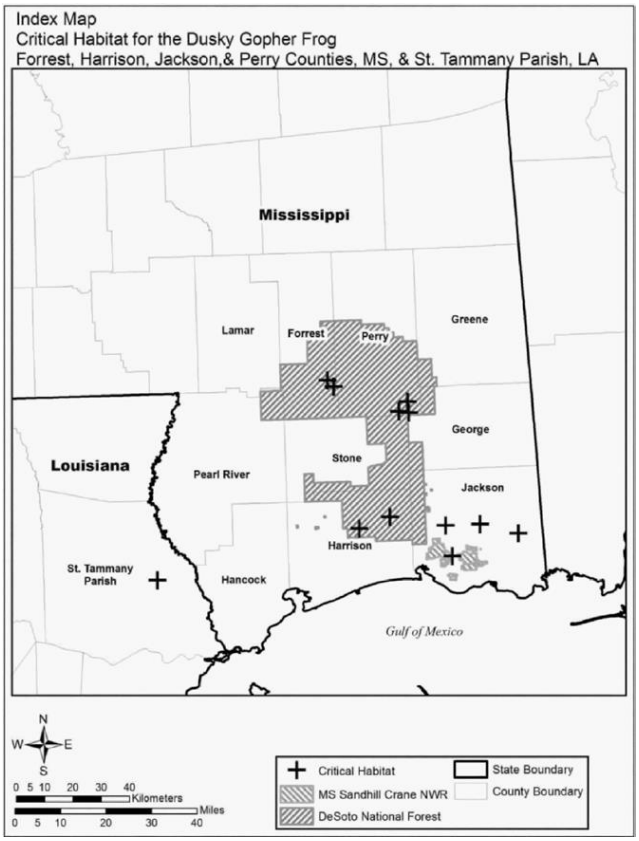
(2) upland forests "historically dominated by longleaf pine, adjacent to and accessible to and from breeding ponds, that are maintained by fires frequent enough to support an open canopy," also having "abundant herbaceous ground cover" and underground habitat in the form of burrows or holes; and,

(3) "[a]ccessible upland habitat between breeding and nonbreeding habitats to allow for dusky gopher frog movements between and among such sites," with "open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter . . . during seasonal movements."

Final Rule, 77 Fed. Reg. at 35131.

The Service's standards for determining critical habitat units confirm what common sense suggests—that the essential PCEs must all be present within each unit. The Service explained that its unit boundaries for the dusky gopher frog were determined by locating the frog breeding sites and buffering these locations by a radius of 621 meters. *Id.* at 35134. The

Service further explained: "We believe the area created will protect the majority of a dusky gopher frog population's breeding and upland habitat *and incorporate all primary constituent elements within the critical habitat unit*." *Id.* (emphasis added). Eleven of the twelve units designated as critical habitat contain all three PCEs. *Id.* at 35131. But Unit 1 does not; the Service designated Unit 1 as critical habitat for the frog despite the fact that at best it contains perhaps *only one* of the PCEs and therefore lacks two of the elements essential to conserve the gopher frog.



Id. at 35146. As viewed on a map, Unit 1 in St. Tammany Parish is curiously distant and isolated from the other units. Whereas the other 11 units are

in eastern Mississippi, Unit 1 is located in Louisiana, at least 50 miles from any of the other units. The Service estimates the range of an individual dusky gopher frog extends less than half a mile from its breeding site. *See* Final Rule, 77 Fed. Reg. at 35130. Nevertheless, the Service maintains Unit 1 could provide a refuge for the frog should the other sites suffer catastrophic events. *Id.* at 35124. In other words, the Service designated Unit 1 as "potential" back-up habitat.

Under the ESA, the Service must "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat," and it "may exclude any area from critical habitat" based on economic impacts. 16 U.S.C. § 1533(b)(2). Before the Final Rule was published, the Service prepared a final Economic Analysis[1] analyzing the potential economic impacts associated with the designation of critical habitat for the dusky gopher frog. Final Rule, 77 Fed. Reg. at 35140-41. This analysis "measures lost economic efficiency associated with residential and commercial development and public projects and activities," and may be used "to assess whether the effects of the designation might unduly burden a particular group or economic sector." *Id.* at 35140. The Service found "most of the estimated incremental impacts [of the designation] are related to possible lost development value in Unit 1." *Id.* The Service recognized the Unit 1 landowners "have invested a

[1] *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, (https://www.regulations.gov/contentStreamer?documentId=FWS-R4-ES-2010-0024-0157&contentType=pdf) (last visited June 28, 2017) (Final Economic Analysis).

significant amount of time and dollars into their plans to develop this area," Final Economic Analysis at 4-3 (¶ 73), and, under Section 7 of the ESA, the critical habitat designation could severely limit, or even foreclose entirely, such development.

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

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

- In the first scenario, development on Unit 1 does not impact wetlands or otherwise

present a federal nexus, meaning that Section 7 consultation is not triggered. This results in no incremental economic impact.

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

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

Final Economic Analysis at 4-3, 4-4, 4-7 (¶¶ 73-77, 87).

The total incremental economic impact of the critical habitat designation on the other 11 units is only $102,000 over 20 years. *See* Final Rule, 77 Fed. Reg. at 35140. Therefore, under either the second or third scenario, *more than 99 percent* of the entire economic impact of the critical habitat designation is attributable to the designation of Unit 1. This is primarily because the 11 remaining units are already actively managed for the recovery of the frog. *See* 75 Fed. Reg. 39396-99 (July 8, 2010).

Despite the heavy and lopsided economic impact attributable to the designation of Unit 1 that contains neither dusky gopher frogs themselves nor the essential habitat features for their continued existence, the Service could not identify any definite direct benefits to the frog from designating Unit 1. The Service's economic analysis found only ancillary benefits, such as increased property value for *adjacent* properties due to decreased development on Unit 1, aesthetic benefits, and possible benefits to the ecosystem. *Id.* In the Final Rule, the Service stated "it may not be feasible to monetize or quantify the benefits of environmental regulations," and that "the benefits of the proposed rule are best expressed in biological terms that can then be weighed against the expected costs of the rulemaking." Final Rule, 77 Fed. Reg. at 35127. The Service never specifically identified these "biological" benefits or attempted to determine their likelihood or weigh them against the heavy costs imposed on the Landowners—instead, the Service simply concluded without explanation that its economic analysis "did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

The Landowners filed separate suits against the Federal Defendants challenging the Final Rule as to Unit 1. Pet. App. at B-12. These lawsuits sought identical declaratory and injunctive relief, and were consolidated in the district court. *Id.* The Center for Biological Diversity and the Gulf Restoration Network intervened as defendants. *Id.* The district court found the Landowners had standing but rejected their challenge that Unit 1 did not qualify as critical habitat even though it was not habitable and provided no

conservation benefit to the species. *Id*. at B-2, 46. The court described the Service's critical habitat designation of Unit 1 as "odd," "troubling," "harsh," and "remarkably intrusive [with] all the hallmarks of governmental insensitivity to private property." *Id*. at B-25, 27, 37, and 39. Nevertheless, the court deferred to the agency decision and affirmed the Final Rule. *Id.* at B-46, 47.

The Landowners appealed. The Fifth Circuit affirmed in a 2-1 split opinion. In reaching that result, the panel majority concluded the Service's designation was entitled to *Chevron* deference, despite the Service's concession that the frog does not occupy Unit 1, that Unit 1 cannot sustain the frog, and that the changes that would have to be made to make Unit 1 habitable will not be made in the foreseeable future, if ever. *Id.* at A-17.

In addition to their statutory claim that critical habitat must be actual habitat, the Landowners challenged the designation under the Commerce Clause. *Id.* at A-8. The panel majority rejected the Commerce Clause challenge relying on a prior Fifth Circuit decision holding the Endangered Species Act is a constitutionally permissible market regulatory scheme. *Id*. at A-39 – A-47. Next, the majority rejected the argument that the Service should have excluded Unit 1 because of the disproportionate economic impacts the Landowners will suffer from its designation, concluding that the Service's decision on that point was wholly discretionary and "unreviewable." *Id*. at A-35 – A-39. Lastly, the court held critical habitat designations are not subject to the

National Environmental Policy Act. *Id.* at A-48 – A-50.

Judge Owen dissented from the panel decision, identifying "a gap in the reasoning of the majority opinion that cannot be bridged[]." Judge Owen observed the designated area is not essential for the conservation of the species "because it plays no part in the conservation" of the species. *Id*. at A-51. More specifically, Unit 1's "biological and physical characteristics will not support a dusky gopher frog population." *Id*. In fact, Judge Owen continued, "[t]here is no evidence of a reasonable probability (or any probability for that matter)" that the designated area will ever become essential to the conservation of the species. *Id*. Judge Owen concluded: "Land that is not 'essential' for conservation does not meet the statutory criteria for 'critical habitat.'" *Id*.

Because the majority opinion interpreted the ESA to allow the government to impose restrictions on private land that "is not occupied by the [] species," and "is not near areas inhabited by the species," and "cannot sustain the species without substantial alterations and future annual maintenance," that the government cannot effectuate, *id*., Judge Owen warned the panel decision would unduly subject large areas of the United States to strict federal regulation:

> If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not

> probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

Id. at A-51, 52.

The full court rejected the Landowners' motion for *en banc* review with an 8-6 vote. Writing for the six-member dissent, Judge Jones argued the Service's actions in this case fell far outside the parameters of the ESA. "The panel opinion . . . approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by *nor connected in any way* to the [dusky gopher frog]." *Id.* at C-4 (emphasis added). The dissent was troubled by the fact that "[n]o conservation benefits accrue to [the frog], but this designation costs the Louisiana landowners $34 million in future development." *Id*. On the merits, the dissent concluded the panel decision was wrong on three counts: (1) that the ESA and its regulations have no habitability requirement; (2) that the designated area is essential to the conservation of the species in the absence of those features essential to the species survival; and (3), that the decision to not exclude Unit 1 from critical habitat is discretionary and therefore judicially unreviewable. *Id.* at C-4, 5. The dissent was unequivocal, "Properly construed, the ESA does not authorize this wholly unprecedented regulatory action." *Id.* at C-4.

From the panel decision and the denial of en banc review, the Landowners submit this Petition.

REASONS FOR GRANTING THE PETITION

I

This Court Should Grant the Petition To Determine Whether Private Property That Is Unsuitable as Habitat and Does Not Contribute to the Conservation of a Listed Species Satisfies the Statutory Definition of Critical Habitat Under the Endangered Species Act

For the first time in the history of the Endangered Species Act, the U.S. Fish and Wildlife Service designated private land as critical habitat that is uninhabitable by and has no connection to a listed species. "The panel decision, over Judge Owen's cogent dissent [], approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the 'shy [dusky gopher] frog.'" Pet. App. at C-4. This designation of non-habitat as critical habitat conflicts with the plain meaning of the ESA and the intent of Congress.

The term "critical habitat" is not a term of art divorced from its plain language. It is descriptive. The word "habitat" denotes a place where species live and grow. *See* Pet. App. at C-14 ("'Habitat' is defined as 'the place where a plant or animal species naturally lives and grows.' Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ('[T]he

kind of place that is natural for the life and growth of an animal or plant[.]'); Habitat, Black's Law Dictionary (10th ed. 2014) ('The place where a particular species of animal or plant is normally found.'")).

The statutory definition of critical habitat is consistent with the term's ordinary meaning. Under the ESA, critical habitat means:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

Subsection (i) describes occupied *habitat* while subsection (ii) describes unoccupied *habitat*. This is clear from another provision of the ESA that states:

> The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable:
>
> (i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat*; and
>
> (ii) may, from time-to-time, thereafter as appropriate, revise such designation.

Id. § 1533(a)(3)(A)(i)–(ii) (emphasis added).

This language is clear and determinative. Under the statutory text, critical habitat is a subset of a species' larger habitat.

"In the interpretation of statutes, the function of the courts is easily stated. It is to construe the language so as to give effect to the intent of congress." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 542 (1940). The starting point in discerning congressional intent is the existing statutory text. *See Hughes Aircraft Co. v. Jacobson,* 525 U.S. 432, 438 (1999). The ordinary meaning of language employed by Congress is assumed accurately to express its

legislative purpose. *See Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.,* 469 U.S. 189, 194 (1985).

Where the words are clear, they are controlling. *See Lamie v. U.S. Tr.*, 540 U.S. 526, 542 (2004) (holding the courts should look at the words of the statute to determine the intent of Congress); *Am. Trucking*, 310 U.S. at 543 ("There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes. Often, these words are sufficient in and of themselves to determine the purpose of the legislation. In such cases we have followed their plain meaning."). So it is here. The plain meaning of §1533(a)(3)(A)(i)–(ii) is that "critical habitat" must be, at a minimum, "habitat"—a place naturally usable and accessible to the species.

Contrary to the unprecedented position taken by the Service in this case, the agency's own regulations support the plain text of the ESA. Federal regulations implementing Section 7 of the ESA "impose[] requirements upon Federal agencies regarding endangered or threatened species . . . *and habitat of such species that has been designated as critical ('critical habitat')*." 50 C.F.R. § 402.01(a) (emphasis added). Because Unit 1 is not "habitat," the designation of 1,544 acres of Unit 1 as critical habitat is contrary to the plain meaning of the ESA and the express intent of Congress.

> It is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

> absurd—is to enforce it according to its terms."

Lamie, 540 U.S. at 534 (citations omitted).

In this case, it is the government's reading of the statutory text, contrary to its plain language, that is absurd. The Service and the panel majority ignored the limiting text of 16 U.S.C. § 1533(a)(3)(A)(i)–(ii) and focused exclusively on that portion of the definition of critical habitat that authorizes the Secretary to designate areas "essential for the conservation of the species." *Id*. § 1532(5)(A)(ii). But the Secretary's authority is not without bounds. As Judge Owen stated, the word "essential" vests the Service with significant discretion in determining which areas are necessary for the conservation of a species, "but there are limits to a word's meaning and hence the Service's discretion." Pet. App. at A-59. In this case, the Service's interpretation of essential "goes beyond the boundaries of what 'essential' can reasonably be interpreted to mean." *Id*. Therefore, as this Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." *Id*. (citing *MCI Telecomms. Corp. v. AT&T Co*., 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)). This is such an interpretation.

Even if the Secretary may deem an area "essential for the conservation of the species," that falls outside the species' actual habitat, the Secretary erred when he designated Unit 1 as critical habitat in this case because that area provides no conservation benefit to the dusky gopher frog whatsoever. The land

is not used or occupied by the species; it is not near areas inhabited by the species; it is not accessible to the species; it cannot sustain the species without modification; and, it does not support the existence or conservation of the species in any way. *Id*. at A-51, 52. It is axiomatic that an area that has no connection to a species or its habitat cannot be "essential for the conservation of the species" as contemplated by the statutory (and regulatory) text.

Unit 1 provides no conservation benefit to the dusky gopher frog. Those benefits are provided by the thousands of acres of actual habitat designated as critical habitat in the State of Mississippi.

In effect, the Service and the panel majority wrote "habitat" and "essential" out of the ESA. To uphold the intent of Congress, as expressed in the plain language of the Act, this Court should grant the Petition for a Writ of Certiorari to determine whether private property that is unsuitable as habitat, and does not contribute to the conservation of a listed species, constitutes critical habitat under the ESA.

II

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and Other Lower Courts That Universally Hold the Designation of Unoccupied Critical Habitat Requires a More Rigorous Standard Than the Designation of Occupied Critical Habitat

The ESA defines critical habitat in two ways:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A)(i)–(ii).

The first subsection (i) defines "occupied" critical habitat in terms of the physical and biological features the area must possess. The Service calls these features primary constituent elements, or PCEs. The Service identified three PCEs for the dusky gopher frog:

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

Final Rule, 77 Fed. Reg. at 35131.

All three of these PCEs must be present for the frog to survive. Eleven areas designated as critical

habitat for the dusky gopher frog contain all three PCEs; Unit 1 does not. *Id*. at 35146. That unit contains only one (if any) of the required PCEs—ephemeral ponds. *Id*. Unit 1 does not contain the upland features necessary for the frog's survival. *Id*.

The second subsection (ii) defines "unoccupied" habitat in terms that require the Secretary to determine if the area is "essential for the conservation of the species" before the Secretary may designate the area as critical habitat.

According to Judge Jones, and the 5 other judges who joined her dissent to the denial of rehearing en banc, Congress established a separate, stricter standard for designating unoccupied areas as critical habitat for the express purpose of limiting the agency's historically overbroad critical habitat designations. "When Congress took up the critical habitat issue in 1978, members of both houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat." Pet. App. at C-27. Therefore, Congress "took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions." *Id*. at C-27, 28. Thus, "Congress intentionally curtailed unoccupied critical habitat designation." *Id*. at C-28.

In addition to the legislative history, the dissent surveyed all of the relevant case law and cited a decision by the Ninth Circuit wherein the court held:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Arizona Cattle Growers' Ass'n v. Salazar, 606 F.3d 1160, 1164 (9th Cir. 2010).

Later, that court reiterated in *Home Builders Ass'n of N. California v. United States Fish and Wildlife Service*, 616 F.3d 983, 990 (9th Cir. 2010) (cert. denied), that the unoccupied critical habitat standard "is a more demanding standard than that of occupied critical habitat."

As the Jones' dissent observed, the district courts have come to the same conclusion:

> *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the

> species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

Pet. App. at C-29, 30.

Every court to consider the matter holds that the showing the Secretary must make to designate unoccupied areas as critical habitat is *more* onerous than designating occupied areas that contain all of the PCEs essential for the species' survival. However, the Service lowered the bar in this case and asserts it may designate any unoccupied area as critical habitat so long as that area contains at least one of the PCEs. This approach makes it *less* onerous to designate unoccupied areas as critical habitat contrary to the intent of Congress and the relevant case law.

But the district and circuit courts ignored this argument, perhaps because there is no credible response. The designation of Unit 1, based on the presence of a single PCE, does not satisfy the more onerous test the ESA requires for designating unoccupied areas as critical habitat. It certainly does

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

not limit the scope of critical habitat designations with which Congress was concerned when it amended the ESA in 1978. "In sum, we know from the ESA's text, [legislative] history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation." Pet. App. at C-30). Accordingly, "the panel majority misconstrue[d] the statute and create[d] a conflict with *all* relevant precedent." *Id*.

To resolve this conflict, this Court should grant the Petition for a Writ of Certiorari.

III

This Court Should Grant the Petition To Resolve the Conflict Between the Fifth Circuit and This Court's Decision in *Bennett v. Spear*

Before the Secretary of Interior may designate critical habitat, the Secretary must consider the economic and other impacts the designation would have on any particular area:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

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

16 U.S.C. § 1533(b)(2) (emphasis added).

The Secretary completed an economic analysis of Unit 1 as critical habitat, but the weighing of benefits was virtually nonexistent and the conclusion that the benefits of inclusion outweighed the impacts on the landowners was clearly arbitrary. "One shocking fact is that the landowners could suffer up to $34 million in economic impact." Pet. App. at C-39. "Another shocking fact is that there is virtually nothing on the other side of the economic ledger." *Id*. But more importantly, the analysis shows no biological benefits to the species to balance the harm to the landowners. "The report ends—abruptly with no weighing or comparison of costs and benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog." *Id*. at C-40.

Notwithstanding these deficiencies, the Fifth Circuit held the Secretary's decision to not exclude Unit 1 is subject to the sole discretion of the Secretary and is not reviewable in a court of law. But that

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

decision conflicts with this Court's decision in *Bennett v. Spear*, 520 U.S. 154, wherein this Court expressly held the Secretary's decision is judicially reviewable for abuse of discretion under the Administrative Procedure Act:

> It is true that . . . except where extinction of the species is at issue, "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Ibid.* (emphasis added). However, the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion [under the APA] does not alter the categorical *requirement* that, in arriving at his decision, he "tak[e] into consideration the economic impact, and any other relevant impact," and use "the best scientific data available."

Id. at 172.

In this case, the Secretary ultimately decided: "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. at 35141.

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

With a potential $34 million impact to the landowners on one side and no articulated benefit to the species on the other side, the Secretary's decision defies reason and is arbitrary and capricious. The decision "runs counter to the evidence before the agency" and "is so implausible that it [cannot] be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mutual Auto Ins.*, 463 U.S. 29, 43 (1983). This decision calls out for judicial review which is required by this Court in *Bennett v. Spear*.

This Court should grant the Petition for a Writ of Certiorari to resolve the conflict between the Fifth Circuit and this Court as to the reviewability of agency action to not exclude an area from critical habitat under the ESA.

IV

This Court Should Grant the Petition To Resolve the Constitutional Conflicts Created by the Fifth Circuit Decision That Allows the Federal Government Unlimited Authority To Regulate Land and Water Resources That Have No Connection with a Protected Species

Strict federal regulation applies to critical habitat, often limiting or precluding ordinary land or water use. In this case, the government designated as critical habitat for the dusky gopher frog over 1,500 acres of private land that may cost the landowners up

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

to $34 million in lost value, although it is undisputed that the dusky gopher frog cannot inhabit the designated area. Pet. App. at C-4. The panel majority held Unit 1 may be designated critical habitat for the dusky gopher frog because it purportedly contains one of three features—ephemeral ponds—required for the frog's survival, even though Unit I will likely never provide sustainable habitat for the species. *Id*. at A-78. That decision, if allowed to stand, establishes a dangerous precedent authorizing the federal government to designate any area of land or water as critical habitat so long as it (1) contains a single feature characteristic of species habitat and (2) provides the potential, after modification, to sustain the introduction or reintroduction of a species. The decision effectively grants the federal government unlimited power to regulate private, state, and local land and water resources for species conservation without regard to established constitutional limits on federal power.

In a thirty-two page dissent from the denial of en banc review, six judges on the Fifth Circuit argued the panel decision gave the government "virtually limitless" power to designate critical habitat. *Id*. at C-36. The dissent called for further review, remarking that "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id*. at C-5.

Judge Owen's dissent in the panel opinion expressed similar concerns. According to Judge Owen, the majority opinion interprets the ESA to impose onerous restrictions on private land use even though the land is not occupied by the species "and

has not been for more than fifty years." *Id*. at A-51. Moreover, the land "is not near areas inhabited by the species;" the land "cannot sustain the species;" and the land "does not play any supporting role in the existence of current habitat for the species." *Id*. at A-51, 52. This will lead, Judge Owen warns, to the designation of "vast portions" of the Nation as critical habitat subject to strict federal control. *Id*. at A-52.

Judge Owen observed the majority "has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species." *Id*. at A-58, 59. The majority opinion is, therefore, unreasonable.

> The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of [the Act].

Id. at A-57.

Using less charitable terms, the en banc dissent stated: "This kind of interpretation is, frankly,

execrable and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition." *Id*. at C-31.

To underscore the unprecedented scope of the power granted the federal government under the Fifth Circuit decision, the en banc dissent provided a sampling of physical and biological features the U.S. Fish and Wildlife Service identifies as essential to the conservation of protected species. These include, "individual trees with potential nesting platforms," "forested areas within 0.5 mile[s] . . . of individual trees with potential nesting platforms," "aquatic breeding habitat," "upland areas," and a "natural light regime within the coastal dune ecosystem." *Id*. at C-37. According to the dissent: "These are just a few of the myriad of commonplace 'essential physical and biological features' the Service routinely lists in its critical habitat designations." *Id*. Thus the dissent cautioned: "With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id*. Under the majority opinion, "the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features." *Id*. In the end, the majority opinion "threatens to expand the Service's power in an 'unprecedented and sweeping' way." *Id*.

This power is indeed "unprecedented and sweeping." The government recently codified the *Markle* single-feature standard in a new rule redefining critical habitat. *See Listing Endangered*

and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat. 81 Fed. Reg. 7414, 7427 (Feb. 11, 2016). Under this rule, the *Markle* decision, authorizing nonhabitat as critical habitat, is now a rule of general applicability establishing a nationwide precedent. This is troubling because it raises a constitutional conflict, in two ways. First, federal regulation of local land and water resources, like Unit 1, that have no connection to a protected species, exceeds the commerce power on which the Endangered Species Act is based. And, second, federal regulation of local land and water use unduly impinges on the power of the states in violation of the Tenth Amendment to the U.S. Constitution.

Enforcement of the ESA to protect species found on private, state, and local lands and waters creates a line-drawing problem that implicates the outer boundaries of constitutional power. Although many challenges have been brought to test the constitutionality of the ESA, as applied to particular species,[2] this Court has never addressed the issue. However, this Court did address a similar line-drawing problem with respect to federal regulation of land and water resources under the Clean Water Act wherein this Court acknowledged such regulation raised constitutional concerns and held the challenged

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[2] *See San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250 (11th Cir. 2007); *GDF Realty Invs. v. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997).

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

statutory provisions should be read to avoid a constitutional conflict.

In *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001) (*SWANCC*), the Corps asserted jurisdiction over remote water bodies that had no connection to any navigable-in-fact waters subject to regulation under the Clean Water Act, as authorized by the Commerce Clause. This Court rejected the Corps' interpretation of the Act, explaining that "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result." *Id*. at 172 (citing *Edward L. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988)). The basis for that policy lies in this Court's desire "not to needlessly reach constitutional issues" and this Court's assumption "that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *Id*. at 172-73.

According to this Court, the Corps pushed the limits of congressional authority in *SWANCC* when it "claimed jurisdiction over petitioner's land because it contains water areas used as habitat" by migratory waterfowl and nothing more. *Id*. at 173. The constitutional conflict arose because the Corps could not identify a consistent basis for such regulation under the commerce power. This is significant, the Court stated, because it had twice affirmed "the proposition that the grant of authority under the Commerce Clause, though broad, is not unlimited." *Id*. *See United States v. Morrison*, 529 U.S. 598, 613

(2000) ("[T]hus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity only where that activity is economic in nature."); *United States v. Lopez*, 514 U.S. 549, 559 (1995) (Congress may regulate intrastate economic activity where the activity substantially affects interstate commerce.). More recently, this Court explained: "[A]s expansive as this Court's cases construing the scope of the commerce power have been, they uniformly describe the power as reaching 'activity;'" specifically, "existing commercial activity." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2572-2573 (2012).

This Court could have been talking about this case, because the same conflict arises. It is unclear what, if any, Commerce Clause connection the Service relies on to claim jurisdiction over the land and water in Unit 1. The record is devoid of any jurisdictional statement. It is undisputed that the dusky gopher frog is an intrastate, noncommercial species. The only connection between Unit 1 and the dusky gopher frog is the critical habitat designation itself. This Court has never upheld a Commerce Clause regulation based on such a tenuous link to interstate commerce. Like the hydrologically isolated ponds in *SWANCC*, that this Court held could not be regulated without raising a constitutional conflict under the Commerce Clause, the biologically isolated ponds in Unit 1 also raise a constitutional conflict under the Commerce Clause. Therefore this Court should interpret the ESA to avoid this conflict.

This Court's concern over needlessly reaching constitutional issues, unless Congress clearly intends

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

to push the limits of constitutional power, "is heightened where the administrative interpretation alters the federal-state framework by permitting federal encroachment upon a traditional state power." *Id*. at 173 (citing *United States v. Bass*, 404 U.S. 336, 349 (1971)). The traditional state power that concerned this Court in *SWANCC* was the power of the state to control local land and water use, much like this case. "Permitting respondents to claim federal jurisdiction over ponds and mudflats . . . would result in a significant impingement of the State's traditional and primary power over land and water use." *Id*. at 174. That impingement created a constitutional conflict. It is no wonder that 15 states filed an amicus brief in support of Petitioners and en banc review in this case. The designation of local land and water features as critical habitat, like Unit 1, that do not provide any conservation benefit to a listed species is a quintessential impingement on the powers of the States in violation of the Tenth Amendment.

To avoid needlessly reaching these constitutional issues, this Court should grant the Petition for a Writ of Certiorari and hold the government to a proper interpretation of the statutory text. Under the ESA, critical habitat must be habitat.

CONCLUSION

The essentially boundless authority granted the federal government by the Fifth Circuit, to control local land and water use under the guise of species protection, conflicts with a plain reading of the Endangered Species Act and the lower courts interpreting the Act. It also conflicts with this Court's decisions in *Bennett* and *SWANCC*, and long-held constitutional precedent. This Court should therefore grant the Petition for a Writ of Certiorari and resolve these conflicts.

DATED: July 2017.

Respectfully submitted,

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Appendix A-1

United States of Appeals
Fifth Circuit
FILED
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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix A-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private

property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L. C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open canopied pine forests.[2] They migrate to isolated,

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[1] *Se* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi go*e*pher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you

ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531– 1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review

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hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs–Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the

designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross- motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of Interior*, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen- suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or

otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

Under the arbitrary-and-capricious standard,

> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory

explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly defines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437

U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III

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[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing. [9]*See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)).

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible

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[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development— is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that

"considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so

speculative fear" that the government would imminently target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court— that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of- interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th

[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone- of-interests test. We thus conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical-Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131

determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical- habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding

that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mississippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts

agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader portion of the species' historic distribution." *Id.* at 35,125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35,124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35,133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1

provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35,124.

Finally, in addition to ephemeral ponds, dusky gopher frogs alsorequire upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35,131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35,134. This value, which was based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

> Altogether, the Service concluded:
> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports

> metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's determination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that, when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that

the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument.

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra* note 20

There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F. Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not

demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habitat if these areas are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The statute defines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation

goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designations, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii),

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

(b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into

> arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in effect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider

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account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective

designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any more "necessary" to a

given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental- take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

conservation of the dusky gopher frog.[19]

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the

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[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field essential for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually any part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C.

situation here, and the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

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§ 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that in this case, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. See, e.g., Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them.

Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." See 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity-of-Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat designation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . . ." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We

thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

> *may* exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless [it] determines, based on the best scientific and commercial data available, that the failure to designate such area as critical

> habitat will result in the extinction of the species concerned.

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical- habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, at *7–8 (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . . , which

is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05- 0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit 1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832)). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the

conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the limits of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in Michigan, the ESA explicitly mandates "consideration" of "economic impact."16 U.S.C.§ 1533(b)(2); see Bennett, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. See Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number

of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. See Bldg. Indus. Ass'n of Bay Area, 2015 WL 4080761, at *5–6. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the

critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is intrastate (not interstate) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." Markle Interests, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." Id.

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third Lopez prong. See United States v. Morrison, 529 U.S. 598, 609– 12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." Id. at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to

instances that "have an explicit connection with or effect on interstate commerce." Id. at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. Id. at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. Id. The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in Morrison. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the "take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff–developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species)

in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gonzales v. Raich*, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. See GDF Realty, 326

F.3d at 639 ("ESA's protection of endangered species is economic in nature."); id. at 640 ("ESA is an economic regulatory scheme . . . ."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. See id. § 1538(a)(1)(E)–(F); GDF Realty, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical- habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic activity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress

has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 214 F.3d

483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C.§ 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habitat—one that the Service has already found to be essential for the conservation of the species—to escape designation

would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted))

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the

regulation of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical- habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical- habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . . ."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177– 78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect[ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will

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(1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in nature, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under

NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of- interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact- statement requirement

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district Court

PRISCILLA R. OWEN, Circuit Judge, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species" [1]because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3]to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] Id.

[3] Id.

play any supporting role in the existence of current habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one

feature of an area when that one feature cannot support the existence of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A)

[6] 77 Fed. Reg. at 35,118

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the

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[10] *Id.* at 35,133

[11] *Id.* at 35,135

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . . . However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.")

[13] *Id.* (noting "we hope to work with the landowners").

habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then replaced with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

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[14] *Id.* at 35,129.

[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171-75 (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the endangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example,

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[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

[21] *Ante* at 19.

sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species. [22]The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is significantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" To the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24] In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C.§ 203(a) required long-distance communications common carriers to file tariffs with the Federal

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[22] *Bear Valley*, 790 F.3d at 994.

[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long- distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.[31] The same can be said of the Service's, and the majority opinions, construction of the Endangered Species Act in the present case. It may be a good idea to

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[25] *Id*. at 220

[26] *Id*. at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id*. at 220.

[28] *Id*. at 228.

[29] *Id*. at 229-31.

[30] *Id*. at 231.

[31] *Id*. at 231-32.

permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation goes beyond the meaning that the statute can bear.[32] That court was fully cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges. This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI*

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[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995

[33] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984).

[34] Sw. Bell Corp., 43 F.3d at 1521 (quoting Nat'l R.R. Passenger Corp. v. Boston & Maine Corp., 503 U.S. 407, 417 (1992)).

[35] Id.

[36] *Id.;* see also id. ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

Telecommunications Corp. is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of."[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the

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[37] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

17-01174_019880;17-01174_019880;17-01174_019881;17-01174_019882;17-01174_019883;17-01174_019884;1...

forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will

be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[s] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not *when the species will be conserved*, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation. The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species. [42]The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

[42]*See* ante at 22

to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species"

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[43] Id.

requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habitat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists

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[44] *See ante* at 22 n.17; 24 n.18.

[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24

and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that uninhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the

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[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant

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[51] *Ante* at 24-25.

[physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat,

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[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] See also ante at 20

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

[56] *See ante* at 25 n.19.

[57] *Id.*

the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[] that virtually *any* part of the United States could be designated as 'critical habitat' for any given

> endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging

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[58] *Id.* (citation omitted).
[59] *Id.*

that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that

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[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

[61] *Id.*

are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

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[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id*. (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population)

[64] Ante at 13-14 (quoting Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc., 462 U.S. 87, 103 (1983)).

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation of the species" is therefore not supported by substantial evidence, and the

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[65] See 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . . .").

designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However, the Service found that Unit 1 has only one of the three

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[66] 77 Fed. Reg. at 35,131.

[67] Id.

[68] *Id.*

[69] *Id.*

primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed- canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The Service

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.; see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded:

> Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover;

found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact

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(3) maintaining forest underground structure such as gopher tortoise burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] Id. at 35,140.

depended on the extent to which it might be developed,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The Service

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[77] *Id*.

[78] *Id*.

[79] *Id*.

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id*. at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no

reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results

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Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog critical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact

[84] *Id*. at 35,140-41:

According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate.

Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to

in development on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to

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section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

Appendix B-1

Filed
August 22, 2014

UNITED STATES DISTRICT COURT EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC	CIVIL ACTION
v.	NO. 13-234
UNITED STATES	c/w 13-362 and
FISH AND WILDLIFE	(Pertains to all
SERVICE, ET AL 13-413	cases)
	SECTION "F"

ORDER AND REASONS

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross- motion.

Additionally before the Court are two motions to strike extra- record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases -- landowners and a lessee of a tree farm in Louisiana -- challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately-owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

Appendix B-3

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species ... to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16

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[1]Technically, administration responsibilities are divided between the Department of Interior and the Department of Commerce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine...."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.*, 16 U.S.C. §, 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A)("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable ... (i) shall concurrently with making a [listing] determination ... designate any habitat of such species...."). Like its listing duty, FWS's habitat designation duty is mandatory;[2]the designation must

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[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001)("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'"). It is incumbent on the Secretary -- "to the maximum extent prudent and determinable" -- to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later designation. *See* 16 U.S.C. § 1532(a)(3)(B)("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established...."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii)(if "critical habitat of [listed] species is not ... determinable [at the time of listing], the Secretary ... may extend the one-year

be based on "the best scientific data available ... after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines ... that the failure to designate such area as critical habitat will result in the extinction of the species concerned." Id.

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means–
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
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> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary

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period specified in paragraph (A) by not more than one additional year....") and 50 C.F.R. § 424.17(b)(2).

> that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical occupied habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3]50 C.F.R. § 424.12(b). FWS may designate as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat...." 16 U.S.C. § 1536(a)(2).[4] If

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival andrecovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club*, 245 F.3d at 442-43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where an action affects the value of critical habitat to both the recovery *and*

FWS or the consulting federal agency determines that a contemplated action "may affect ... critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (Rana Sevosa) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129 - 35131. They travel to small, isolated

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survival of a species imposes a higher threshold than the statutory language permits.")(emphasis in original).

[5] Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking

[7] Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." Id. at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. Id. at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

species. FWS determined that the frog was endangered due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

historical breeding sites for the frog. Based on the comments, FWS re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana.[11] FWS identified additional critical habitat in Mississippi and Louisiana[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetica scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9

[11] FWS was not able to identify critical habitat in Alabama.

million").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

land in Unit 1 is owned by Weyerhaeuser Company, which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaueuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531, et seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551, et seq., and the National Environmental Policy Act, 42 U.S.C. § 4321, et seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-record

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for Supplementing, or challenging, the administrative record; no party requested to supplement the record.

evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. See id. Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. Id. at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In this regard, the non moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions,

to buttress his claims. Id. Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.*, 819 F.2d 547, 549 (5th Cir. 1987); Fed.R.Civ.P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson*, 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA -- in particular, a final rule designating critical habitat -- the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear*, 520 U.S. 154, 174-75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor*, 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal*, 230 F.3d 170, 175 (5th Cir. 2000)(Courts must be particularly deferential to agency determinations

made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415-16 (1971)("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), overruled on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977)). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler*, 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA*, 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent

Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft*, 252 F.3d 383, 391 n.15 (5th Cir. 2001)(citing *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985))("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February

8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County*, 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record; (2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, ... (2) the district court needed to supplement the record with "background information" in order to determine whether the agency considered all of the relevant factors, or (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA, U.S,* 133 S.Ct. 1138, 1146 (2013). "One element of the case-

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott*, 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour*, 529 F.3d 538, 545
(5th Cir. 2008).

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." See S*ummers v. Earth Island Institute*, 555 U.S. 488, 493 (2009); see also *Doe v. Beaumont Independent School Dist.*, 240 F.3d 462, 466 (5th Cir. 2001)(citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.*, 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).[19]

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but

The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior*, 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. V. Sands*, 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561-62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA*, 472 F.3d 882, 895–96 (D.C.Cir. 2006)(an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect ... even a single" member of the association); *see also Am. Petroleum Institute v. Johnson*, 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as

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in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they challenge whether the injury is likely to be redressed by a favorable ruling.

here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York*, 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.*, 429 F.3d 1113, 1119 (D.C.Cir. 2005)(firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive effect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" *Lujan*, 504 U.S. at 561 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation ... has immediately devalued the land within Unit 1 for commercial purposes by bringing increased ... regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they

in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117-18 (D.D.C. 2004)(business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

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submit that the designation "limits the usability and saleability of the property" to their detriment.

[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser ... periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce... among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. See *Chichakli v. Szubin*, 546 F.3d 315, 317 (5th Cir. 2008)(vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich*, 545 U.S. 1, 16-17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-Lopez Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. V. Salazar*, 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. V. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. V. Norton*, 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez*, 514 U.S. 549, 558-59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend Lopez, which dealt with a

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challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United State*s, 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" GDF, 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbit*, 130 F.3d 1041, 1053-54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the de minimis character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez*, 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally

valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640-41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron*, U.S.A., Inc. v. NRDC, 467 U.S. 837, 843 n. 9 (1984)("[T]he

judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining

that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which

> likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on recovery of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat because Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

occupied habitat must contain all of the relevant PCEs. See 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide. Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical unoccupied habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere

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[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service*, 616 F.3d 983, 989 (9th Cir. 2010)(rejecting argument that FWS must first identify the point at which the endangered species is considered

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008)("While tempting in its logical simplicity...the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), aff'd, *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (2010), cert. denied, 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly rebutted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument -- to the extent it is reviewable (see *The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010)(Service's decision not to

exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map…[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked time it was listed...that were determined to be essential for the conservation of the species...." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." Id. FWS "chose the value of 621 m...by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog…and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use...." Id. FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." Id. With respect to Unit 1, FWS explained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. Id. at 35123-25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. See *Medina County Environmental Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010("Where an agency's particular technical expertise is

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa*, will be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List...to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants

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involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

acceptance as its own species...and the scientific name for the species was changed to *Rana sevosa."* 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30]And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama Tombigee Rivers Coalition v. Kempthorne*, 477 F.3d 1250, 1260 (11th Cir. 2007)("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position...on the question and is supported by...peer review[,] and by the opinion of the Service's own experts.")

Wyerhaeuser, a co- owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why -- (assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies -- FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the

landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat ... on the basis of the best scientific data available and after taking into consideration the economic impact ... of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. See 16 U.S.C. § 1533(b)(2)(the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior, 731 F. Supp. 2d 15, 29-30 (D.D.C. 2010)(citing *Arizona Cattle Growers' Ass'n v. Kempthorne*, 534 F. Supp. 2d 1013, 1032 (D.Ariz. 2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations' economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens imposed by simply listing the frog) are treated as part of the regulatory baseline and are not

factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation... to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior*, 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4

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[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results

million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion -- its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered -- is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

these economic impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321, et seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.*, 714 F.3d 841, 850 (5th Cir. 2013)(*quoting Tex. Oil & Gas Ass'n v. U.S. E.P.A.*, 161 F.3d 923, 933 (5th Cir. 1998)).

made available to the public. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. Id. To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

environment."

U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particular result." *Spiller v. White*, 352 F.3d 235, 238 (5th Cir. 2003)(NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed.

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[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities

Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436-39 (10th Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. Id. Unlike the critical habitat designation in that case -- where the environmental impact of the critical habitat designation "will be immediate and disastrous" -- the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. Douglas County v. Babbitt, 48 F.3d 1495, 1501-08 (9th Cir. 1995)(considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. Id. Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain

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such as timber management lack a federal nexus and are therefore exempt.

terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See Sabine River Authority v. U.S. Dept. of Interior*, 951 F.2d 669, 679 (5th Cir. 1992)("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall*, 562 F.3d 712, 721-23 (5th Cir. 2009)(setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

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Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service*, 202 F. Supp. 2d 594, 646-48 (W.D.Tex. 2002) (citations omitted).

[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

New Orleans, Louisiana, August 22, 2014.

s/ Martin L.C. Feldman
MARTIN L. C. FELDMAN
UNITED STATES DISTRICT JUDGE

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse -- contrary to the express terms and scope of the statute -- a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

Appendix C-1

United States Courts of Appeals
Fifth Circuit
FILED
February 13, 2017

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

Plaintiffs - Appellants

v.

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

Defendants – Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants - Appellees

Appendix C-2

Cons. w/ 14-31021
WEYERHAEUSER COMPANY,

Plaintiff - Appellant

v.

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

Defendants - Appellees

CENTER FOR BIOLOGICAL DIVERSITY; GULF RESTORATION NETWORK,

Intervenor Defendants – Appellees

No. 14-31008
Cons. w/ No. 14-31021

Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans

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ON PETITION FOR REHEARING EN BANC

Opinion June 30, 2016, 827 F.3d 452)

Before REAVLEY, OWEN, and HIGGINSON, Circuit Judges. STEPHEN A. HIGGINSON, Circuit Judge:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

ENTERED FOR THE COURT:

S/ STEPHEN A. HIGGINSON
UNITED STATES CIRCUIT JUDGE

JONES, Circuit Judge, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, Circuit Judges, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." See 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied)

Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the

> species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

> Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012.

Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii)

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plantations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical- habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and

benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog." [1]*Id.* at 472 n.20. Finally, the panel majority held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect

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[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

> The ESA states that the Service
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> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* … and ... may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical"

portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species ... and habitat of such species that has designated as critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant[.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the

species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical*.

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This

predecessor provision, like the current consultation requirements, refers to the destruction or modification of "habitat of such species which is determined by the Secretary. . . to be critical."[3] From the very beginning, Congress rooted the concept of

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, and H.R. 4758 Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . . . I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . . . While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . . . In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

critical habitat in the relevant species' actual habitat.

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation. [4]As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be*

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

habitat. A diagram explains this statutory plan:

Figure 1: Under the ESA, a species critical habitat is necessarily a subset of the species habitat

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

Figure 2: The panel majority's erroneous belief that the ESA has no habitability requirement means that, as the panel majority held here, land that is uninhabitable by a species can nonetheless be its critical habitat.

The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit decision. Neither of these objections should be persuasive. The first objection—that this textualist argument was waived—is easily disposed of. Throughout this

litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement exists,[5] but a reviewing court could not cite the same context and related regulations to say a

[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

habitability requirement does in fact exist. This objection is meritless

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. the Ninth Circuit appeared to assume that critical- habitat designation of those unoccupied, uninhabitable areas was the only means

of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

* * *

For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habitat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally

live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)-(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by

chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features* . . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas*. . . [that] are essential for the

conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose.[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conservation would be a more substantial

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate provisions.[9] Mirroring the respective Houses' proposals, [10]Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied"

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat");

Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional

purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of *unoccupied* critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to

the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious concern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species' occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id.* *See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally

limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical- habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472 n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity ofa Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to articulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances

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[12] *Markle Interests*, 827 F.3d at 471.

merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one

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[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no

would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C. § 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the

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support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent . . . .").

panel majority's one- feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

"unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non- Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical

> habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best

expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary." The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [] economic impact is not reviewable."*Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it— "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Cheney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the ESA's permissive language: "[t]he Secretary

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C.§ 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed,

and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard. The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

Appendix D-1

Filed
February 7, 2013

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO.

MARKLE INTERESTS, LLC,

Plaintiff,
v.

UNITED STATES FISH AND WILDLIFESERVICE, DANIEL M. ASHE, Director of United States Fish and Wildlife Service, in his official capacity; United States DEPARTMENT OF INTERIOR; and, KENNETH SALAZAR, Secretary of the Department of Interior, in his official capacity

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIE

INTRODUCTION

1. This is an action for declaratory judgment and injunctive relief against Defendants for violating federal statutes and the U.S. Constitution. By final rule, dated June 12, 2012, 77 Fed. Reg. 35118, *et seq.*, Defendants, through the U.S. Fish and Wildlife

Service, designated critical habitat for the dusky gopher frog (previously Mississippi Gopher Frog) in violation of the Endangered Species Act (ESA), 16 U.S.C. § 1531, *et seq*., and the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq*., in that the designation erroneously includes large areas of private land that do not contain the physical and biological features essential to the conservation of the species and the economic analysis is invalid for failing to properly consider the cumulative effects of the designation. Moreover, the designation was issued without the environmental review required by the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321, *et seq*., and in excess of constitutional authority under the Commerce Clause, U.S. Const. art. 1, § 8, cl. 3. Defendants‟ actions are contrary to law and must be set aside.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action under 28 U.S.C. § 1331 (federal question jurisdiction); 16 U.S.C. § 1540(c) and (g) (actions arising under the citizen suit provision of the Endangered Species Act); and 5 U.S.C. § 702 (providing for judicial review of agency action under the Administrative Procedure Act).

3. Plaintiff, Markle Interests, LLC (Markle), satisfied the notice requirement of the Endangered Species Act citizen suit provision, 16 U.S.C. § 1540(g)(2). More than 60 days ago, by letter dated September 27, 2012, Markle provided Defendants written notice of the violations that are the subject of this complaint in accordance with 16 U.S.C. § 1540(g)(2)(C). The notice is attached as

Exhibit 1 and is incorporated herein by reference. Defendants have not responded to this notice or taken any action to withdraw the final rule at issue here, or to otherwise remedy their violations of law.

4. An actual, justiciable controversy now exists between Markle and Defendants. Relief is proper under 28 U.S.C. § 2201 (authorizing declaratory relief) and § 2202 (authorizing injunctive relief).

5. The federal government has waived sovereign immunity in this action under 16 U.S.C. § 1540(g) and 5 U.S.C. § 702.

6. Markle has exhausted all administrative remedies.

7. Venue is proper in this Court under 28 U.S.C. § 1391(e) in that a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated in this district.

PARTIES

Plaintiff

8. Markle Interests, LLC, is a limited liability company that owns an undivided interest in forested property identified in the final rule as Unit 1 in St. Tammany Parish, Louisiana, and included as critical habitat for the dusky gopher frog. This designation imposes significant regulatory burdens on the property such that costly federal approval may be required for any activity deemed to affect the species, including adverse habitat modification. In addition to

these regulatory burdens, the destination of Unit 1 as critical habitat results in a drastic reduction in value and limits the usability and saleability of the property.

Defendants

9. Defendant United States Department of Interior (Department) is an agency of the United States. Congress has charged the Department with administering the Endangered Species Act for certain species, including the dusky gopher frog.

10. Defendant Kenneth Salazar is Secretary of the United States Department of Interior (Secretary). He oversees the Department‟s administration of the Endangered Species Act and is sued in his official capacity.

11. Defendant United States Fish and Wildlife Service (Service) is an agency of the United States Department of Interior. The Service has been delegated responsibility by the Secretary for day-to-day administration of the Endangered Species Act, including the designation of critical habitat.

12. Defendant Daniel M. Ashe is Director of the United States Fish and Wildlife Service. He oversees the Service‟s administration of the Endangered Species Act and is sued in his official capacity.

13. All of these Defendants are responsible for the violations alleged in this complaint.

Appendix D-5

LEGAL FRAMEWORK

Listing of Threatened or Endangered Species

14. Under Section 4 of the Endangered Species Act, Defendants must list a species as "threatened" or "endangered" based on certain factors relating to habitat, overutilization, disease or predation, existing regulatory mechanisms, or other factors. *See* 16 U.S.C. § 1532(20).

15. An "endangered" species is one "which is in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). A "threatened" species is "any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." 16 U.S.C. § 1532(20).

16. Endangered species are specifically protected by Section 9 of the Endangered Species Act, which, among other things, makes it unlawful for any person to "take" such species. *See* 16 U.S.C. § 1538(a)(1)(B). The term "take" means to "harass, harm, hunt, pursue, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct," and may include habitat modification. 16 U.S.C. § 1532(19)

Critical Habitat Designation

17. Under Section 4 of the Endangered Species Act, when a species is listed as threatened or endangered, Defendants must designate critical habitat for that species "to the maximum extent prudent and determinable." 16 U.S.C. § 1533(a)(3)(A).

18. Critical habitat is defined as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of this Act [15 USCS § 1533], upon a determination by the Secretary that such areas are essential for the conservation of the species.
>
> ….
>
> (C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

16 U.S.C. § 1532(5)(A)-(C).

19. "The statute thus differentiates between „occupied" and „unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species." *Ariz. Cattle Grower's Ass'n v. Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010).

20. The term "conservation" means the use of all methods and procedures necessary to bring a threatened or endangered species to "the point" at

which the protections of the Act are no longer required. 16 U.S.C. § 1532(3).

21. The Secretary must

> [d]esignate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

16 U.S.C. § 1533(b)(2).

Consultation

22. Private property designated as critical habitat is subject to federal regulation.

23. In consultation with the Secretary, federal agencies are required to ensure that any action they authorize, fund, or carry out "is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." 16 U.S.C. § 1536(a)(2).

24. Section 7 of the Endangered Species Act also requires a federal agency to consult with the

Secretary at the request of a permit applicant, if the applicant "has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species." 16 U.S.C. § 1536(a)(3).

25. Under Section 7, the Secretary must provide the consulting federal agency and applicant with a Biological Opinion summarizing the basis for the opinion and detailing how the project will impact a species or its critical habitat. *See* 16 U.S.C. § 1536(b)(3)(A). If it is determined that the project is likely to jeopardize the species" "continued existence" or "result in the destruction or adverse modification of critical habitat" of such species, the opinion must suggest "reasonable and prudent alternatives" that may be taken by the consulting agency or applicant to avoid such impacts. *Id.*

26. If it is determined that the "taking of an endangered species or a threatened species incidental to the agency action will not" jeopardize the species" continued existence or result in the destruction or adverse modification of critical habitat of such species, a written "incidental take statement" must be issued that (1) specifies the impact of such incidental taking on the species; (2) specifies those reasonable and prudent measures that are necessary or appropriate to minimize such impact; and (3), sets forth the terms and conditions with which the agency or applicant must comply to implement the specified measures. 16 U.S.C. § 1536(b)(4)(B)(i), (ii) and (iv).

National Environmental Policy Act

27. The National Environmental Policy Act requires federal agencies to examine the environmental effects of proposed federal actions and to inform the public of the environmental concerns that went into the agency‟s decision making. Among other things, NEPA requires "to the fullest extent possible" all agencies of the federal government to prepare "environmental impact statements" for any "major federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

28. An environmental impact statement must include:

> (i) The environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alternatives to the proposed action, (iv) the relationship between local short-term uses of man‟s environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Id.

29. The NEPA implementing regulations provide federal agencies with the opportunity to prepare an "environmental assessment" that either determines that an environmental impact statement is required or concludes with a "finding of no

significant impact," which terminates the agency's NEPA obligations. 40 C.F.R. § 1508.9.

Administrative Procedure Act

30. Pursuant to the Administrative Procedure Act, a court must set aside agency action that (a) fails to meet statutory, procedural, or constitutional requirements, or (b) is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A)-(D).

31. Section 704 of the Administrative Procedure Act states that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704.

U. S. Constitution

32. Commerce Clause enactments, like the Endangered Species Act, are subject to the limits of that power. "The Constitution grants Congress the power to „*regulate* commerce." Art. 1, § 8, cl. 3. (emphasis added). The power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2586 (2012).

FACTUAL ALLEGATIONS

Listing and Critical Habitat Designation

33. On December 4, 2001, the U.S. Fish and Wildlife Service listed the dusky gopher frog (known then as the Mississippi gopher frog) as an endangered species. *See* 66 Fed. Reg. 62993, *et seq*.

34. On June 12, 2012, the Service designated critical habitat for the dusky gopher frog. *See* 77 Fed. Reg. 35118, *et seq*.

35. Although critical habitat may only include those areas "essential to the conservation of the species," the Service made no finding as to the quantity or location of habitat necessary to conserve the gopher frog or identify "the point" at which the protections of the ESA are no longer required.

36. The critical habitat designation covers 6,477 acres in two states, including 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1. *Id.* at 35118.

37. Unit 1 is private land in which the Plaintiff, Markle, owns an undivided interest. *Id.* at 35134-35135.

38. Unit 1 is not currently occupied by the gopher frog nor was it occupied at the time of the listing in 2001. *Id.* at 35134-35135.

39. Unit 1 is not suitable for gopher frog habitat as it does not currently contain the physical or biological features essential to the conservation of the species. *Id.* at 35135.

40. Unit 1 cannot be made suitable for gopher frog habitat without human intervention, including a change in land use, controlled burns to modify the vegetation, and the transplanting of species to the site. *Id.* at 35129-35130.

41. Unit 1 landowners submitted comments to the Service opposing the designation and expressing their resolve not to manage Unit 1 for gopher frog habitat. *Id.* at 35123.

42. The Service acknowledged that it cannot mandate that Unit 1 be managed to make the area suitable for gopher frog habitat. *Id.* at 35126.

43. The Service did not show how Unit 1—which is unoccupied and unsuitable as habitat for the gopher frog—is essential to the conservation of the species.

Economic Impacts Analysis

44. In conjunction with the critical habitat designation, the Service completed an economic impacts analysis mandated by Section 4 of the Endangered Species Act. *See id.* at 35140-35141.

45. That analysis showed that designating Unit 1 as critical habitat could have an adverse impact on the landowners as high as $33.9 million. *See id.* at 35141.

46. On the record, the Service did not conduct a balancing analysis that weighed the economic impact on the landowners of Unit 1 against the benefit of including Unit 1 in the critical habitat designation.

47. Notwithstanding the fact that Unit 1 is unsuitable for gopher frog habitat, the Service concluded that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation." *Id.* at 35141.

48. The Service relied on the "baseline approach" and did not consider the *quantitative* economic impacts of the critical habitat designation coextensively (or cumulatively) with the listing of the gopher frog as an endangered species. *Id.* at 35140-35142.

NEPA Compliance

49. The government admitted that it did not subject the critical habitat designation for the dusky gopher frog to review under the National Environmental Policy Act. *See id.* at 35144.

APA Compliance

50. The rule designating critical habitat for the dusky gopher frog, 77 Fed. Reg. 35118, *et seq.*, is the culmination of the Service‟s decision making and constitutes final agency action.

Constitutional Compliance

51. The Service made no finding that the designation of Unit 1 as critical habitat constitutes the regulation of existing commercial activity as the Constitution and U.S. Supreme Court precedent require. *See United States v. Lopez*, 514 U.S. 549 (1995).

INJUNCTIVE RELIEF ALLEGATIONS

52. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 51 as though fully set forth herein.

53. If an injunction does not issue enjoining Defendants from enforcing the critical habitat designation for the dusky gopher frog, Markle will be irreparably harmed.

54. Markle has no plain, speedy, and adequate remedy at law.

55. If not enjoined by this Court, Defendants will continue to enforce or rely on the critical habitat designations in derogation of Markle‟s rights.

56. Accordingly, injunctive relief is appropriate.

DECLARATORY RELIEF ALLEGATIONS

57. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 56 as though fully set forth herein.

58. An actual and substantial controversy exists between Markle and Defendants as to their legal rights and duties with respect to the ESA, NEPA, the APA, and the U.S. Constitution in the designation of critical habitat for the dusky gopher frog.

59. This case is presently justiciable because Defendants‟ failure to comply with these laws is the direct result of final agency action that has caused and will continue to cause immediate and concrete injury to Markle. Markle has a vital interest in knowing whether the critical habitat designation, to which Markle is subject, is statutorily and constitutionally valid.

60. Declaratory relief is therefore appropriate to resolve this controversy.

CLAIMS FOR RELIEF

First Claim for Relief

Failure to Make Threshold Determination for Designating Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); 50 C.F.R. § 424.12(e); Alternatively, APA, 5 U.S.C. § 706)

61. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 60 as though fully set forth herein.

62. The Endangered Species Act defines critical habitat as those areas "essential to the conservation of the species." 16 U.S.C. § 1532(5). In turn, the Act defines "conservation" to mean the use of all methods and procedures necessary to bring a "threatened" or "endangered" species to "the point" at which the protections of the Act are no longer required. 16 U.S.C. § 1532(3). The Act does not define "essential" but it is axiomatic that to determine what is "essential to the conservation of the species," the Service must first identify "the point" when the species will no longer be "threatened" or "endangered." That point can be identified only if the Service has determined a viable population size and the minimum habitat necessary to sustain that population. However, those threshold determinations are entirely missing from the final rule.

63. The effect of the Service‟s failure to determine a viable population and minimum habitat

size is that the Service is logically incapable of ascertaining which areas are "essential to the conservation of the species" and whether the designation of any particular unoccupied area is required. *See* 50 C.F.R. § 424.12(e) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). In this case, there are no facts found in the rule from which to draw a rational connection as to the size of the critical habitat area. Without the foundational underpinning of a viable population, no one, including the Service, can determine whether the areas designated as critical habitat are too much or too little.

64. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); federal regulation, 50 C.F.R. § 424.12(e); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Second Claim for Relief

Failure to Apply Correct Standard to Determine Critical Habitat (Violation of ESA, 16 U.S.C. § 1533(b)(2); Alternatively, APA, 5 U.S.C. § 706)

65. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 64 as though fully set forth herein.

66. The Secretary does not have unfettered discretion to designate unoccupied areas as critical

habitat. Such areas must be "essential for the conservation of the species." 16 U.S.C. § 1532(5)(ii). Logically, this would include areas that at least contain those physical and biological features that are themselves "essential to the conservation of the species." The Service has identified such features as Primary Constituent Elements (or PCEs). For the dusky gopher frog, there are three: (1) ephemeral wetland habitat; (2) upland forested nonbreeding habitat; and (3) upland connectivity habitat. *See* 77 Fed. Reg. 35131. The Service maintains that all of these PCEs are essential to the conservation of the species. However, the Service admits that Unit 1 does not contain all these PCEs. *See id.* at. 35135. In fact, Unit 1 contains none of the PCEs essential to the conservation of the species. Therefore, Unit 1 is currently not suitable habitat for the dusky gopher frog at all, let alone critical habitat.

67. Nevertheless, the Secretary included this unoccupied area in the designation. In effect, the Secretary designated Unit 1 as critical habitat on the premise that the area would be essential for the conservation of the species, if it ever did contain the requisite PCEs. *See id.* But it doesn"t now and likely never will. The private owners have no intent to convert their property to conservation purposes and, according to the Service, they can"t be compelled to do so.

68. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Third Claim for Relief
Inadequate Economic Analysis
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

69. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 68 as though fully set forth herein.

70. The Economic Analysis (EA) adopts the "baseline" approach whereby the Service only considers the *qualitative* impacts that occur "without critical habitat," such as those impacts caused by listing of the species, whereas the incremental impacts occurring "with critical habitat" are given a *quantitative* analysis. *See* 77 Fed. Reg. at 35140-35141. The result of this approach is that neither the Service nor the public are ever provided a meaningful cumulative economic impacts analysis. This "baseline" approach was rejected by the Tenth Circuit in *New Mexico Cattle Growers Association v. U.S. Fish and Wildlife Service*, 248 F.3d 1277 (10th Cir. 2001). According to the Tenth Circuit, the "baseline" approach is meaningless and inconsistent with the language of the Act and the intent of Congress. Therefore, that Circuit held the Economic Analysis must consider all of the impacts of critical habitat designation, including those impacts co-extensive with the listing. In other words, the EA must consider the cumulative impacts of the listing and the critical habitat designation together, not just the incremental impacts of the designation. (For a contrary view see *Arizona Cattle Growers' Association v. Salazar*, 606 F.3d 1160 (9th Cir 2010).) In *Home Builders Association of Northern California v. Norton*, 293 F.

Supp. 2d 1 (D.D.C. 2002), the Service appears to have represented to the court that it would follow the *New Mexico Cattle Growers'* co-extensive approach in all future critical habitat designations. But it has not done so here.

71. Moreover, the EA failed to quantify economic and other impacts of the designation on oil and gas exploration, forestry, and those impacts resulting from conservation activities such as controlled burns.

72. By these acts or omissions Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fourth Claim for Relief
Failure to Exclude
(Violation of ESA, 16 U.S.C. § 1533(b)(2);
Alternatively, APA, 5 U.S.C. § 706)

73. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 72 as though fully set forth herein.

74. The Service acknowledged, as it must, that Unit 1 will only become suitable habitat if the land is managed to develop the requisite PCEs. *See* 77 Fed. Reg. 35135. The Service also acknowledged that Unit 1 is comprised entirely of private land, *id.* at 35134-35135, and that private landowners cannot be compelled to manage the land for recovery purposes, *id.* at 35126. In fact, because Unit 1 is unoccupied and used for timber harvesting and has the potential for

development of oil and gas exploration, that the Service valued at approximately $34 million, the private owners have no intent to convert their property to conservation purposes. Not only do these facts compel a finding that Unit 1 is not "essential for the conservation of the species," but they also compel a finding that the benefits of exclusion outweigh the benefits of inclusion under Section 4(b)(2) of the Act. The Service‟s unsupported conclusion that the "economic analysis did not identify any disproportionate costs that are likely to result from the designation," 77 Fed. Reg. 35141, is arbitrary and irrational. *See Natural Resources Defense Council v. U.S. Department of Interior*, 113 F.3d 1121, 1124 (9th Cir. 1997) ("Essentially, we must ask „whether the agency considered the relevant factors and articulated a rational connection between the facts found and the choice made.‟" (citation omitted)).

75. By these acts or omissions, Defendants violated the ESA, 16 U.S.C. § 1533(b)(2); and, alternatively, the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Fifth Claim for Relief
Failure to Conduct NEPA Review
(Violation of NEPA, 42 U.S.C. § 4321, *et seq.*;
Alternatively, APA, 5 U.S.C. § 706)

76. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 75 as though fully set forth herein.

77. In its final rule designating critical habitat for the dusky gopher frog, the Service stated

categorically that the National Environmental Policy Act does not apply to critical habitat designations outside the Tenth Circuit Court of Appeals. *See* 77 Fed. Reg. at 35121. But the better argument is to the contrary.

78. Neither the Endangered Species Act nor any other statute exempts critical habitat designations from NEPA compliance. Both the Tenth Circuit in *Catron County Board of Commissioners v. U.S. Fish and Wildlife Service*, 75 F.3d 1429 (10th Cir. 1996), and the D.C. District Court, in *Cape Hatteras Access Preservation Alliance v. U. S. Department of Interior*, 344 F. Supp. 2d 108 (D.D.C. 2004), have held that critical habitat designations are subject to review under NEPA. In *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), the Ninth Circuit parted ways with the Tenth Circuit and held that NEPA review was not required for critical habitat designations where there is no physical change to the environment. However, this case is different.

79. Contrary to *Douglas County*, the critical habitat designation for the dusky gopher frog literally calls for human interference with the environment through management of the habitat by, among other things, regular controlled burns. Frequent fires are necessary to maintain the open canopy and ground cover vegetation of the gopher frog"s aquatic and terrestrial habitat. *See* 77 Fed. Reg. 35129-35130. These burns can have significant adverse effects on the physical environment, including air pollution, water pollution, loss of forest resources, and habitat for other species. But the critical habitat designation does not discuss these effects. That can only be done

through the NEPA review process. Therefore, notwithstanding the Ninth Circuit decision, and in accordance with the Tenth Circuit decision, NEPA review should have been undertaken here.

80. By these acts or omissions Defendants violated NEPA, 42 U.S.C. § 4321, *et seq.*; and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

Sixth Claim for Relief
U.S. Constitutional Violation
(Commerce Clause, Article 1, Section 8, Clause 3, and APA, 5 U.S.C. § 706)

81. Markle realleges and incorporates by reference the allegations contained in Paragraphs 1 through 80 as though fully set forth herein.

82. The Service cites a long list of cases that have upheld the agency‟s authority to regulate intrastate, noncommercial species under the commerce power. *See* 77 Fed. Reg. at 35120. However, those cases do not address whether the agency has authority under the Commerce Clause to regulate private land that has no connection to the protected species other than through the critical habitat designation itself. The designation of Unit 1 as critical habitat for the dusky gopher frog is contrary to U.S. Supreme Court precedent not only because the frog is not a regulable entity but also because the critical habitat designation creates, rather than regulates, the putative economic activity. *See United States v. Lopez*, 514 U.S. 549; *United States v. Morrison*, 529 U.S. 598 (2000); and, more recently, *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2573-74 (2012) ("This

Court‟s precedent reflects this understanding: As expansive as this Court‟s cases construing the scope of the commerce power have been, they uniformly describe the power as reaching „activity.‟ *E.g.*, *United States v. Lopez*, 514 U.S. at 560, 115 S. Ct. 1624, 131 L. Ed. 2d 626. The [challenged provision], however, does not regulate existing commercial activity.”). Simply put, the uncontested facts show that the Service is not regulating existing commercial activity. The regulation of Unit 1 as critical habitat is unconstitutional because the land does not contain the listed species or any usable habitat and any activity on the land cannot affect the species or its habitat.

83. By these acts or omissions Defendants violated art. 1, § 8, cl. 3, of the U.S. Constitution and the APA, 5 U.S.C. § 706. The final rule designating critical habitat for the dusky gopher frog is, therefore, invalid.

PRAYER FOR RELIEF

Wherefore, Markle prays:

As to the First Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to make the threshold determination as to the quality and location of habitat essential to the conservation of the species in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or alternatively, that the final rule is void under the APA, U.S.C. § 706.

As to the Second Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to apply the proper standard for designating critical habitat in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Third Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because the economic analysis was inadequate in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fourth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants‟ failure to exclude Unit 1 was arbitrary and irrational in violation of Section 4(b)(2) of the ESA, 16 U.S.C. § 1533(b)(2), or, alternatively, that the final rule is void under the APA, 5 U.S.C. § 706.

As to the Fifth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid because Defendants failed to comply with NEPA, 42 U.S.C. § 4321, *et seq.*, and the final rule is void under the APA, 5 U.S.C. § 706.

As to the Sixth Claim for Relief:

That this Court declare the final rule designating critical habitat for the dusky gopher frog invalid under the Commerce Clause, U.S. Constitution, art. 1, § 8, cl. 3, and the final rule is void under the APA, 5 U.S.C. § 706.

As to all Claims for Relief:

That this Court:

(a) issue a judgment and order enjoining Defendants from enforcing or otherwise acting pursuant to the final rule, vacating the rule, and remanding the rule for redesignation of critical habitat in accordance with ESA, NEPA, the APA, and the U.S. Constitution;

(b) award Plaintiff attorneys‟ fees and costs to the extent permitted by law; and

(c) grant such other relief as the Court shall deem just and proper.

DATED: February 7, 2013.

Respectfully submitted,

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Appendix E-1

Excerpts from Mar. 12, 2012
Public Comment on Behalf of
P&F Lumber, Etc.

POSITIONS OF LANDOWNERS AND FWS

Simply put, the Proposed Rule boils down to whether the FWS should declare the Lands to be critical habitat for the MGF under the ESA, given the following:

1. The frog has not occupied or been seen on the Lands since at least 1 965.[1] The FWS admits this in the Proposed Rule.[2]

2. The frog will never be present on the Lands as the FWS cannot move the frog there and the Landowners will not allow them to be moved there, as the FWS will then require that the Lands be burned periodically to maintain the frogs' habitat.[3] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[4] Burning the Lands will also create a terrible potential for loss of life and injury as smoke and flames will drift onto LA Highway 36, which bisects the Lands. See also 66 FR 62999 where FWS says that " ... fire is

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[1] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 16 and 17.

[2] See, Proposed Rule at page 59783.

[3] For detailed reasons on this point, see Landowners' comments of November 23, 2011 at pages 5,6,8, 15 and 16,
and Weyerhaeuser's comments of November 28, 2011 at page

[4] See, Proposed Rule at page 59783. See, Draft Economic Analysis page 4-3 ("The Service has indicated that in order to properly manage the breeding sites [on the Lands], prescribed bums would be necessary")

the only known management tool that will maintain [MGF habitat]." (Emphasis added).

3. Designating the Lands as critical habitat for the frog will utterly destroy all of the value of the Lands and Landowners' adjacent lands and will cost the Landowners at least $36.3 million.[5] The FWS admits this in the Proposed Rule and in its Economic Analysis for the Proposed Rule.[6]

4. The Lands do not now, and will not in the future, contain the required "primary constituent elements" the FWS says are needed for the frog to live on the Lands.[7] The FWS admits this in the Proposed Rule. [8]

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[5] For detailed reasons on this point, sec Landowners' comments of November 23,201 I at pages 5, 6,9,10 and 19, and Weyerhaeuser's comments of November 28, 2011 at pages 13 and 14.

[6] See, Proposed Rule at pages 59789 and 509790. See, Draft Economic Analysis, Chapter 4.

[7] For detailed reasons on this point, see Landowners' comments of November 23,2011 at pages 4, to, 11, 13,14, 15,and 18, and Weyerhaeuser's comments of November 28, 2011 at pages 4-9.

[8] FWS admits that the Lands do not "contain sufficient PCEs to support ... the [MGF]." 76 FR 59780. Also sec proposed Rule at page 59777.

In *United States v. Lopez,* 514 U.S. 549, 556-57, 115 S. Ct. 1624, 131 L.Ed.2d 626 (1995); the US Supreme Court defined the limits of the Commerce Clause by mandating that (i) Congress may only regulate an activity that "substantially affect(s)" interstate commerce, and (ii) there must be a rational basis for Congress' conclusion that the regulated activity sufficiently affects interstate commerce.

The Supreme Court has also clearly stated that the Commerce Clause cannot be extended to embrace effects upon interstate commerce that are merely indirect and remote. *NLRB v. Jones and Laughlin Steel,* 301 U.S. **1,** 37, 57 S. Ct. 615, 81 L. Ed. 893 (1937).

The FWS' attempt to regulate the "ecosystem" of the Lands in this wholly intrastate setting for the MGF, which has no known commercial, scientific, tourism, food, medical or other value, and where (as here) the MGF do not now and will not ever exist in the future, and where the elements of its critical habitat do not now exist and will not ever exist in the future, defies all logic and reason. Thus, the FWS' attempt to designate the Lands as critical habitat is plainly unconstitutional as it constitutes an attempt by the FWS to regulate a frog that does not occupy or exist on the Lands. The FWS goes beyond *Jones and Laughlin Steel's* "indirect and remote" standard of in this matter as it attempts to regulate nothingness and no commerce or commercial link to the Lands.

The FWS does not cite any link of any sort between the frog or the designation of the Lands as critical habitat to commerce of any nature whatsoever, be it travel, tourism, scientific research, or agriculture. Indeed, the FWS cannot do this because there is

absolutely no such link and no commercial tie between the designation of the Lands as critical habitat under the ESA and the Commerce Clause. In turn, this means that the FWS' powers under ESA to designate the Lands as critical habitat do not pass constitutional muster.

Under the ESA there is no "market" at all for the MGF that applies to the Lands. Thus, this essential element necessary to justify exertion of the Commerce Clause power is missing. In this wholly intrastate context, as the frog is not present on the Lands and the frogs' habitat does not exist-- and the FWS cannot "translocate the frogs to the Lands without the Landowners' approval (which they will not give) or recreate the frogs' habitat without the landowners' approval (which they also will not give)[9], the Proposed Rule neither has nor demonstrates any

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Endangered Species Act's Precarious Perch: A Constitutional Analysis Under The Commerce Clause And The Treaty Power, 27 Ecology L. Q. 215 (2000); Bradford C. Mank, *Protecting Intrastate Threatened Species: Does The Endangered Species Act Encroach On Traditional State Authority And Exceed The Outer Limits Of The Commerce Clause?,* 36 Ga. L. Rev. 723 (Spring 2002).

[9] The Landowners will not do this for two primary reasons: (i) doing so will destroy the value of the lands and the value of the Landowners' adjacent lands due to habitat modification and required burnings to maintain it and (ii) as the FWs knows, the Lands are subject to a long-term timber lease with Weyerhaeuser expiring in 2043, under which Weyerhaeuser has the right to use the Lands exclusively to grow and harvest timber. The Landowners would thus breach the timber lease (and be required to pay damages for the breach) by turning the Lands over to support "translocated" frogs on the modified habitat. Both the habitat modification and the burnings would make the Lands wholly unusable and unsuitable for timber growing and harvesting

Appendix F-1

Excerpts from Nov. 23, 2011 Public Comment on Behalf of P&F Lumber, Etc.

The Landowners are virtually all descendants of John Poitevent, one of the founders of the Poitevent & Favre Lumber Co., who acquired the lands starting in the 1880s. The Lands have thus largely been in family hands for well over 100 years. The current owners wish to have their children and grandchildren take over ownership of the Lands in the future. This goal will be thwarted by the designation of the Lands as critical habitat for the MGF.

The Landowners are a "small entity" under applicable federal law. *See*, Draft August 17, 2011 Economic Analysis of Critical Habitat Designation for the Mississippi Gopher Frog published along with the Proposed Rule (the "DEA") (page A-5) at Federal Register Docket ID: FWS-R4-ES-2010-0024. The provisions of the DEA are incorporated herein.

Weyerhaeuser Company leases the Lands from the Landowners under its long term timber lease expiring in 2043 to grow and harvest timber, primarily pine sawtimber. The Landowners will continue employing the same silviculture methods and techniques employed by Weyerhaeuser after the timber lease expires in 2043 if the Lands are designated as critical habitat so that the Landowners may obtain some economic benefit from them, unless they are developed by the Landowners sooner if the Lands do not become critical habitat for the MGF. Thus, as is amply demonstrated in this letter of comment, because the Lands do not now contain the "primary constituent elements" to permit the MGF to exist on the Lands-- and, indeed, the FWS in the

Proposed Rule concludes that (by its own investigation on the Lands) the MGF does not now actually occupy the Lands-- it is certain that both the critical habitat and the MGF will never exist on the Lands.

(iii) Recent Events Affecting the Lands

Following the devastation of the New Orleans area by Hurricane Katrina on August 29, 2005, it became clear that many South Louisiana residents were not going to continue to live in low-lying areas. St. Tammany Parish experienced a dramatic growth rate in population on that date that has continued.[1] See also, DEA at page 4-2 and 4-3. As fully documented in the DEA, the location of the Lands in St. Tammany Parish north (above) Interstate 12 ideally suits them for future development where people can live safely in this area without the fear of the devastating flooding that accompanied Hurricane Katrina.[2]

Beginning in 2006, the Landowners and their partner (Weyerhaeuser Real Estate Development Co.) spent several hundred thousand dollars on a massive comprehensive planning and zoning effort to accommodate this future development on the Lands. The results of this effort were then approved by both

---

[1] The 2010 US census shows that there are some 240,000 residents in St. Tammany Parish, which is an astonishing growth rate of 22.2% for the decade. See http://quickfacts.census.gov/qfd/states/22/22103.html

[2] The Federal Emergency Management Agency has declared that Interstate 12, which runs on an east-west route through the Parish, is the line below which there will be mandatory evacuations when the next hurricane comes *The Role of Social Science Research on Preparedness and Response ftp.resource.org/gpo.gov/hearing109h/24463.pdf*

the St. Tammany Parish Planning and Zoning Commission and the St. Tammany Parish Council.[3] Thus, CHU #1 is ready for the development of homes, businesses and recreation that will surely come once the current real estate crisis has passed. *See,* DEA at pages 4-1 and following for a detailed description of what the Lands represent to St. Tammany Parish.

There is no doubt that the location of the Lands makes them ideal for human habitation as they are safe from hurricane flood inundation as experienced in other areas during Hurricane Katrina. Moreover, the sensitive planning and zoning efforts by the Landowners and their partner will provide traditional neighborhoods with open space, housing and parks for current and future residents and businesses in St. Tammany Parish..

(iv) Highly Negative Direct and Indirect Economic Consequences to Landowners, St. Tammany Parish and the State of Louisiana Come From Designation

Designation of the Lands by the FWS as critical habitat for the MGF will destroy these carefully-made plans and remove the site from commerce, with an adverse direct economic impact on the "small entity" Landowners of some $36.2+ million' dollars. See, pages A-6, ES-4, ES-5, ES-8, ES-9, 4-1, 4-6 and 4-14 of the DEA. As such, the huge $36.2+ million economic burden confirmed by the DEA of designating the Lands as critical habitat for the MGF will adversely impact the small entity Landowners exclusively.

---

[3] The details of these extensive efforts by the Landowners and their partner are set out on pages 4-2 and 4-3 of the DEA.

There are other highly negative economic consequences that will befall both the Landowners, St. Tammany Parish and the State of Louisiana as a result of the proposed designation that are utterly ignored by the DEA, but which are real.

In addition to the direct impact of $36.2+ million to the Landowners, the Landowners will also clearly suffer economic harm to their adjacent lands in the vicinity of CHU #1. The FWS in the DEA and in the Proposed Rule indicates that frequent burning of the Lands in CHU #1 for the proposed critical habitat will be required. See, DEA at pages 1-4 and 4-3 ("The Service has indicated that in order to properly manage ... CHU #1, prescribed burnings would be necessary") and Proposed Rule at page 59780 and 59788. Smoke and flames from these burnings will drift and flames will imperil homes and businesses nearby. Indeed, the very real presence of such burnings will also very likely halt all development of Landowners' adjacent lands as the danger and health hazards from the smoke and flames will likely chill any residents or businesses from locating there.

When asked by the Landowners' attorney to address these very real negative economic impacts of burning, the FWS threw up its hands and ignored them in the DEA, along with inquiries about the negative economic impact of oil and gas drilling on the Lands.[4]

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[4] See attached email correspondence to and from FWS representatives on this subject, attached hereto and made a part hereof as Exhibit "B".

Appendix F-5

Additional negative economic consequences of the burning includes the loss of revenue from the Lands and the Landowners' adjacent lands and lost ad valorem property tax and sales taxes that would have gone to St. Tammany Parish and the State of Louisiana.

No.

In the Supreme Court of the United States

WEYERHAEUSER COMPANY,

Petitioner,

v.

UNITED STATES FISH AND WILDLIFE SERVICE, ET AL.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress enacted the Endangered Species Act to conserve "ecosystems upon which endangered species * * * depend." 16 U.S.C. § 1531(b). To that end, the Act requires the Secretary of the Interior to "designate any habitat of such species which is then considered to be critical habitat." *Id.* § 1533(a)(3)(A). "Critical habitat" may include areas "occupied by the species," as well as "areas outside the geographical area occupied by the species" that are determined to be "essential for the conservation of the species." *Id.* § 1532(5)(A).

The Fish and Wildlife Service designated as critical habitat of the endangered dusky gopher frog a 1500-acre tract of private land that concededly contains no dusky gopher frogs and cannot provide habitat for them absent a radical change in land use because it lacks features necessary for their survival. The Service concluded that this designation could cost $34 million in lost development value of the tract. But it found that this cost is not disproportionate to "biological" benefits of designation and so refused to exclude the tract from designation under 16 U.S.C. § 1533(b)(2).

A divided Fifth Circuit panel upheld the designation. The questions presented, which six judges of the court of appeals and fifteen States urged warrant further review because of their great importance, are:

1. Whether the Endangered Species Act prohibits designation of private land as unoccupied critical habitat that is neither habitat nor essential to species conservation.

2. Whether an agency decision not to exclude an area from critical habitat because of the economic impact of designation is subject to judicial review.

PARTIES TO THE PROCEEDINGS BELOW

In addition to petitioner Weyerhaeuser Company, plaintiffs-appellants below, respondents here, are Markle Interests, LLC, P&F Lumber Company 2000, LLC, and PF Monroe Properties, LLC, which are filing a separate petition for certiorari.

Defendants-appellees below, the federal agency respondents here, are the United States Fish and Wildlife Service; and, by operation of Rule 35.3, Greg Sheehan, in his official capacity as Acting Director of the United States Fish and Wildlife Service, and Ryan Zinke, in his official capacity as Secretary of the Department of Interior.

Intervenor-defendants-appellees below, and respondents here, are the Center for Biological Diversity and Gulf Restoration Network.

CORPORATE DISCLOSURE STATEMENT

Petitioner Weyerhaeuser Company is a publicly held company. It has no parent corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Questions Presented i
Parties to the Proceedings Below ii
Corporate Disclosure Statement ii
Opinions Below.....1
Jurisdiction.....1
Statutes and Regulations Involved 1
Statement 2
A. The Statutory And Regulatory Scheme.....5
B. The ESA's Critical Habitat Provisions 6
C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog 9
D. The District Court Decision 12
E. The Fifth Circuit's Divided Panel Decision And En Banc Vote 13
Reasons For Granting The Petition.....14
I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.....14
A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat. 15
B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit. 24
II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance. 26
A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.....26

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review. 30

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law" 31

Conclusion 33

Appendix A — Opinion of the court of appeals (June 30, 2016).....1a

Appendix B — Opinion of the district court (Aug. 22, 2014) 78a

Appendix C — Order denying rehearing en banc (Feb. 13, 2017) 123a

Appendix D — Statutes Involved 163a

Appendix E — Regulations Involved.....166a

TABLE OF AUTHORITIES

Page(s)

Cases

All. for Wild Rockies v. *Lyder*,
728 F.Supp.2d 1126 (D. Mont. 2010).....25

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946 F. Supp. 2d 1 (D.D.C. 2013), *aff'd*,
601 F. App'x 1 (D.C. Cir. 2015).....25

Arizona Cattle Growers' Ass'n v. *Salazar*,
606 F.3d 1160 (9th Cir. 2010).....4, 24

Babbitt v. *Sweet Home Chapter of Communities for a Great Oregon*,
515 U.S. 687 (1995).....6, 20

Bennett v. *Spear*,
520 U.S. 154 (1997).....5, 6, 14, 32, 33

Cape Hatteras Access Pres. All. v. *U.S. Dep't of Interior*,
344 F.Supp.2d 108 (D.D.C. 2004).....25

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467 U.S. 837 (1984).....18

Clark v. *Martinez*,
543 U.S. 371 (2005).....21

Ctr. for Biological Diversity v. *Kelly*,
93 F.Supp.3d 1193 (D. Idaho 2015).....25

Esquivel-Quintana v. *Sessions*,
137 S. Ct. 1562 (2017) 18

Home Builders Ass'n of N. Cal. v. *U.S. Fish & Wildlife Services*,
616 F.3d 983 (9th Cir. 2010) 24

Mach Mining, LLC v. *EEOC*,
135 S. Ct. 1645 (2015) 32

Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*,
463 U.S. 29 (1983) 32, 33

Nat'l Ass'n of Home Builders v. *Babbitt*,
130 F.3d 1041 (D.C. Cir. 1997) 22

Nat'l Ass'n of Home Builders v. *Defenders of Wildlife*,
551 U.S. 644 (2007) 6, 18

Nat'l Fed. of Indep. Business v. *Sebelius*,
567 U.S. 519 (2012) 22

Rapanos v. *United States*,
547 U.S. 715 (2006) 4, 22, 23

Solid Waste Agency of N. Cook Cty. v. *Army Corps*,
531 U.S. 159 (2001) 5, 21, 22, 23

Tenn. Valley Auth. v. *Hill*,
437 U.S. 153 (1978) 6, 7

Util. Air Regulatory Grp. v. *EPA*,
134 S. Ct. 2427 (2014) 20

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

Statutes, Rules, and Regulations

15 U.S.C. § 1536(a)(2) 18

16 U.S.C.
§ 1531 1
§ 1531(c)(2) 23
§ 1532(5)(A) 7, 17
§ 1532(5)(A)(i) 17
§ 1532(5)(A)(ii) 3, 8
§ 1532(5)(C) 7, 19
§ 1532(6) 20
§ 1533(a) 5, 15
§ 1533(a)(1)(A) 20
§ 1533(a)(3)(A) 7
§ 1533(a)(3)(A)(i) 3, 15
§ 1533(b)(2) 11, 32
§ 1533(b)(5)(A)(ii) 20
§ 1533(c)(1) 19, 20
§ 1534 20
§ 1535(c)(1)(A)-(E) 20
§ 1535(d)(1)(C) 20
§ 1536(a)(2) 5, 19
§ 1536(a)(3) 6
§ 1536(b)(3) 6
§ 1536(b)(4) 6

28 U.S.C. § 1254(1) 1

33 U.S.C. § 1344 6

50 C.F.R.
§ 424.12 (2011) 2, 30
§ 424.12(b) (2012) 8
§ 424.12(e) 8

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

62 Fed. Reg. 39129 (July 22, 1997).....28

68 Fed. Reg. 46684 (Aug. 6, 2003) 28

75 Fed. Reg. 31387 (June 3, 2010).....10

76 Fed. Reg. 59774 (Sept. 27, 2011) 10, 20

77 Fed. Reg. 35118 (June 12, 2012)..... *passim*

81 Fed. Reg. 7414 (Feb.11, 2016).....8, 30, 31

Miscellaneous

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BLACK'S LAW DICTIONARY (5th ed. 1979) 17

Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013).....33

H.R. Rep. No. 95-1625 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453.....4, 7, 8, 21

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17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

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Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE (10th ed. 2013).....16

Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678 (2013) 26

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Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67 (2006).....28

PETITION FOR A WRIT OF CERTIORARI

Petitioner Weyerhaeuser Company respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-77a) is reported at 827 F.3d 452. The court of appeals' denial of rehearing en banc and opinion of six dissenting judges (Pet. App. 123a-162a) is reported at 848 F.3d 635. The decision of the district court (Pet. App. 78a-122a) is reported at 40 F.Supp.3d 744.

JURISDICTION

The judgment of the district court granting in relevant part the defendants' motions for summary judgment was entered on August 22, 2014. RE100, Dkt. 130.[1] Weyerhaeuser Company ("Weyerhaeuser") timely appealed. RE49-50, Dkt. 133. The judgment of the court of appeals was entered on June 30, 2016. The court of appeals' order denying the petition for rehearing en banc was entered on February 13, 2017. Justice Thomas extended the time to file a petition for certiorari to July 13, 2017. No. 16A916 (Mar. 27 & June 9, 2017). Jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq*. ("ESA"), are reproduced at Pet. App. 163a-165a. U.S. Fish and Wildlife Service ("FWS") regulations describing the "criteria for

[1] The Record Excerpts of the Appellants filed in the Court of Appeals are cited as "RE."

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

designating critical habitat" that applied in this case appear at 50 C.F.R. § 424.12 (2011) and are reproduced at Pet. App. 166a-169a. The final designation of critical habitat for the dusky gopher frog is published at 77 Fed. Reg. 35118 (June 12, 2012).

STATEMENT

The endangered dusky gopher frog, it is undisputed, needs three things for its habitat. 77 Fed. Reg. at 35131.

First, for breeding, it needs small isolated, ephemeral ponds embedded in open canopy forest.

Second, it needs upland, open canopy forest close to its breeding ponds to serve as non-breeding habitat. This forest needs to be "maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover." *Ibid.*

Third, the frog needs upland habitat connecting its breeding and non-breeding grounds to allow movement between them. This too must have "an open canopy" and the "abundant native herbaceous species" of groundcover produced by frequent fires. *Ibid.*

These three "primary constituent elements" ("PCEs") of frog habitat are each essential to "support the life-history processes of the species." *Ibid.* If one is missing, the frog will not survive.

Respondent FWS designated as critical habitat for the dusky gopher frog areas of Mississippi occupied by the frog and other areas that the frog does not occupy but which have each of these three features. In addition—and at issue here—FWS designated 1544 acres of private forestry land in Louisiana. *Id.* at 35135.

There is no dispute that this Louisiana property ("Unit 1") is not occupied by the frog. *Ibid.* ("the last

observation of a dusky gopher frog in Louisiana was in 1965"). There also is no dispute that Unit 1 has at best one of the features necessary for frog habitat—ephemeral ponds. FWS recognized that "uplands associated with th[ose] ponds do not currently contain the essential physical or biological features of critical habitat." *Ibid.* To the contrary, Unit 1 contains a "closed-canopy forest" of loblolly pines that is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35129. And Unit 1's management does not "includ[e the] frequent fires" necessary to "support a diverse ground cover of herbaceous plants" in "the uplands and in the breeding ponds." *Ibid.* In other words, "Unit 1 is uninhabitable" by the frog barring a radical change in the land's use by its private owners. Pet. App. 129a; see 77 Fed. Reg. at 35132.

The problem with FWS's designation of Unit 1 as critical habitat for the dusky gopher frog is that the ESA does not authorize it. That is so for two independent reasons. First, the only land FWS is statutorily authorized to designate is "*any habitat* of [an endangered species] which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). As six dissenters from denial of en banc review explained, that plain statutory language means that "[w]hatever is 'critical habitat' * * * must first be 'any habitat of such species'"—that is, it must be "a place where the species" could "naturally live or grow." Pet. App. 132a, 142a. Unit 1 does not fit that description.

Second, areas not occupied by the endangered species, like Unit 1, may be designated as critical habitat only if "such areas are *essential for the conservation of the species*." 16 U.S.C. § 1532(5)(A)(ii) (emphasis added). There is no plausible reading of that phrase that includes areas that are uninhabitable by the species. The Fifth Circuit's ruling offends that

plain statutory language and perversely makes it easier to designate unoccupied areas than occupied areas, in conflict with decisions of other circuits and Congress's intent. See, *e.g.*, *Arizona Cattle Growers' Ass'n* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010) (the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas"); H.R. Rep. No. 95-1625, at 18 (1978), *reprinted in* 1978 U.S.C.C.A.N. 9453, 9468 (FWS "should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species").

The cost of FWS's vast expansion of federal power over private land is enormous. If the ponds on Unit 1 are jurisdictional under the Clean Water Act ("CWA"), any proposed change in the use of the land that requires a CWA permit will trigger an ESA Section 7 consultation with FWS. 77 Fed. Reg. 35140-35141. That means that any CWA permit would be conditioned on the landowners complying with FWS demands to create a preserve for the frog—or would be denied altogether if "the Service recommends that no development occur within the unit." *Id.* at 35141. FWS's own economic analysis estimated that the resulting lost development opportunities could cost the landowners $34 million. *Id.* at 35141. Multiplied for the 2000+ animals and plants listed as endangered or threatened, FWS's expansion of its powers imposes a multi-billion dollar drain on our economy.

FWS's misinterpretation of the ESA undermines our federal system of government. It substitutes federal agency authority over vast tracts of private land for the "quintessential state and local power" over "[r]egulation of land use." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006). No "'clear and manifest' statement from Congress" authorizes that "unprecedented intrusion into traditional state authority."

Ibid. That is why fifteen States, including Louisiana, urged en banc review in this case to "protec[t] the private property rights of citizens and the sovereign interests of the States." Br. Am. Curiae of Alabama, *et al.*, in Support of Rhg. En Banc, at 1 (Aug. 9, 2016). FWS's interpretation furthermore "invokes the outer limits of Congress' power" over interstate commerce. *Solid Waste Agency of N. Cook Cty.* v. *Army Corps*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). This Court reads "statute[s] as written to avoid [such] significant constitutional and federalism questions"—which here calls for rejection of FWS's expansive interpretation of its powers. *Id.* at 174.

The en banc dissenters recognized "the importance of further review" of the Fifth Circuit's erroneous decision, which garnered only bare panel and full court majorities. Pet. App. 162a. This Court should intervene now to ensure that the majority's "non-textual interpretations" of the ESA do not abrogate "Congress's efforts to prescribe limits on the designation of [critical habitat]." *Ibid.*

A. The Statutory and Regulatory Scheme

ESA Section 4, 16 U.S.C. § 1533(a), "requires the Secretary of the Interior to promulgate regulations listing those species of animals that are 'threatened' or 'endangered' under specified criteria, and to designate their 'critical habitat.'" *Bennett* v. *Spear*, 520 U.S. 154, 157-158 (1997). Section 7, 16 U.S.C. § 1536(a)(2), "further requires each federal agency to 'insure that any action authorized, funded, or carried out by such agency'" is not likely to "'result in the destruction or adverse modification of [critical] habitat.'" *Id.* at 158.

If an agency finds that proposed federal action may have an adverse effect on critical habitat, "it must engage in formal consultation with [FWS]," which then

"provide[s] the agency with a written statement (the Biological Opinion) explaining how the proposed action will affect the species or its habitat" and outlining "reasonable and prudent alternatives" to "avoid that consequence." *Bennett*, 520 U.S. at 158; see 16 U.S.C. § 1536(a)(3), (b)(3)-(4). "Following the issuance of a 'jeopardy' opinion, the agency must either terminate the action, implement the proposed alternative, or seek an exemption from the Cabinet-level Endangered Species Committee." *Nat'l Ass'n of Home Builders* v. *Def. of Wildlife*, 551 U.S. 644, 652 (2007).

The Section 7 consultation requirement means that federal agencies must "ensure that none of their activities, including the granting of licenses and permits," adversely affect critical habitat. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). Accordingly, the Act's requirements apply to any proposed use of private land for which a federal permit is required, such as a permit to discharge fill material into wetlands under Section 404 of the CWA, 33 U.S.C. § 1344.

B. The ESA's Critical Habitat Provisions

As enacted in 1973, the ESA mentioned critical habitat only in Section 7's consultation provision. See Norman D. James & Thomas J. Ward, *Critical Habitat's Limited Role Under the Endangered Species Act and Its Improper Transformation into "Recovery" Habitat*, 35 J. ENVTL. L. 1, 12 (2016). The 1973 Act "d[id] not define 'critical habitat.'" *Tenn. Valley Auth.* v. *Hill*, 437 U.S. 153, 160 n.9 (1978).

Five years later, this Court held that the Tennessee Valley Authority must cease building a nearly completed dam to prevent the destruction of the snail darter's critical habitat. *Hill*, 437 U.S. at 165. Because the completion of the Tellico Dam would

"result in total destruction of the snail darter's habitat," the statute required that the threat to the fish be halted "whatever the cost." *Id.* at 162, 184.

The Tellico Dam litigation led Congress to believe that more "flexibility is needed in the Act." H.R. Rep. No. 95-1625, at 13, 1978 U.S.C.C.A.N. at 9463. Congress responded by "defin[ing] for the first time" the term "critical habitat" to "narro[w] the scope of the term" and address the problem that too broad a definition "could conceivably lead to the designation of virtually all of the habitat of a listed species as its critical habitat." *Id.* at 25, 1978 U.S.C.C.A.N. at 9475.

As amended, ESA Section 4 requires FWS "by regulation," "to the maximum extent prudent and determinable," to "designate any habitat of [the listed] species which is then considered to be critical habitat." 16 U.S.C. § 1533(a)(3)(A). Section 3, in turn, defines "critical habitat" to mean:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed * * *, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed * * * upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). The 1978 amendments also provided that except in "circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the [listed] species." *Id.* § 1532(5)(C).

Explaining these amendments, the House Merchant Marine and Fisheries Committee urged that "the Secretary should be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18, 1978 U.S.C.C.A.N. at 9468. Representative Murphy, a sponsor, confirmed that the amendments created an "extremely narrow definition" of critical habitat. S. Comm. on Env't & Pub. Works, 97th Cong., A LEGISLATIVE HISTORY OF THE ENDANGERED SPECIES ACT OF 1973, AS AMENDED IN 1976, 1977, 1978, 1979, AND 1980, at 1221 (Comm. Print 1982) ("LEG. HIST.").

At the time FWS designated critical habitat for the dusky gopher frog, its regulations provided that it "may designate as critical *occupied* habitat" areas "that contain certain physical or biological features called 'primary constituent elements,' or 'PCEs,'" such as space for normal behavior, nutritional or physiological requirements, breeding sites, and shelter. Pet. App. 83a (quoting 50 C.F.R. § 424.12(b) (2012)).

FWS regulations provided that the agency could "designate as critical *unoccupied* habitat" areas outside the geographical areas occupied by the species if it determined the habitat "'is essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" Pet. App. 83a (quoting 16 U.S.C. § 1532(5)(A)(ii) and 50 C.F.R. § 424.12(e)).[2]

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[2] Citing this case, FWS amended its regulations in 2016 to align with the designation criteria it applied to dusky gopher frog habitat. 81 Fed. Reg. 7439 (Feb. 11, 2016). See Part II.B, *infra*.

C. FWS's Designation Of Unoccupied Critical Habitat For The Dusky Gopher Frog

The dusky gopher frog "is a terrestrial amphibian endemic to the longleaf pine ecosystem." Pet. App. 84a-85a. It spends most of its life "underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." *Ibid.* (quoting 77 Fed. Reg. at 35129-35131). Frogs travel from their underground retreats to "small, isolated ephemeral ponds to breed"—because ephemeral ponds lack predator fish—"then return to their subterranean forested environment." Pet. App. 85a. "Frequent fires" are "critical to maintaining the prey base" for the frog and the necessary "diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 85a n.7 (quoting 77 Fed. Reg. at 35130).

FWS designated the dusky gopher frog as endangered in 2001, but did not at that time designate critical habitat. It did so in 2012, after settling litigation to compel designation. Pet. App. 85a-86a.

1. FWS's final designation. FWS identified three habitat elements essential to the conservation of the frog: ephemeral wetlands for breeding; upland forest for non-breeding habitat; and upland areas connecting the two. 77 Fed. Reg. at 35131. Essential to all three are an "open canopy," "herbaceous vegetation," and "fires frequent enough to support" those features. *Ibid.*

FWS conceded that the dusky gopher frog is currently known to occur only in Mississippi. *Id.* at 35120. It nevertheless designated as critical habitat 1544 acres of forested land in St. Tammany Parish, Louisiana, known as Unit 1, where the frog "had not been seen * * * since the 1960s" and which is 50 miles

from where the frog now lives. Pet. App. 86a; see 77 Fed. Reg. at 35146 (map).

FWS designated Unit 1 because it contains isolated ponds "into which dusky gopher frogs could be translocated" to establish a new population. 77 Fed. Reg. at 35135. FWS acknowledged that apart from these ponds Unit 1 does not contain the necessary elements for frog habitat: its uplands "do not currently contain the essential physical or biological features of critical habitat." *Ibid.*; see *id.* at 35129 (Unit 1 is "a closed-canopy forest unsuitable as habitat for dusky gopher frogs"). But FWS asserted that "the presence of the PCEs is not a necessary element for this [unoccupied critical habitat] determination." *Id.* at 35123. Although a new frog population could not be established on Unit 1 without dramatically changing the use of this privately owned land to "fire-maintained, open-canopied, pine woodlands" (*id.* at 35129), FWS deemed Unit 1's designation "essential for the conservation of the species" because with all those changes it could provide habitat for population expansion. *Id.* at 35135.[3]

2. FWS's economic analysis. ESA Section 4(b)(2) requires the Secretary to "tak[e] into consideration the economic impact" of specifying critical habitat and provides that he "may exclude any area" if "he determines that the benefits of such exclusion

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[3] After years of study FWS initially proposed a designation that did not include Unit 1, only Mississippi sites. 75 Fed. Reg. 31387 (June 3, 2010). In response to comments, FWS later added Unit 1 "as a future site for frog reestablishment," though "it only contains one primary constituent element" of frog habitat, to address the "risk of extirpation and extinction from stochastic events" (76 Fed. Reg. 59774, 59780 (Sept. 27, 2011))—*i.e.*, as a "backup" site to those in Mississippi.

outweigh the benefits of [designation]" (unless exclusion would result in extinction of the species). 16 U.S.C. § 1533(b)(2).

Petitioner Weyerhaeuser owns part of Unit 1 and leases the remainder from longtime family owners to grow and harvest timber. Its lease expires in 2043. RE 108. After Hurricane Katrina, Unit 1's higher elevation made it desirable for residential and commercial development. The landowners, including Weyerhaeuser, undertook comprehensive joint planning for future development, obtaining zoning changes and local approvals. RE 108-109. FWS acknowledged that the owners "invested a significant amount of time and dollars into their plans to develop" Unit 1, which is "particularly attractive for development" because "Louisiana Highway 36 runs through [it]." IEC, *Economic Analysis of Critical Habitat Designation for the Dusky Gopher Frog*, at 4-3 ¶ 73 (Apr. 6, 2012) ("Final Econ. Analysis").[4]

FWS recognized that designation of Unit 1 could interfere with the planned development. If the ponds fall within CWA jurisdiction, that would necessitate a Section 7 consultation and result in the imposition of CWA permit conditions. FWS calculated that permit

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[4] St. Tammany Parish is "fast-growing," with "[t]he area immediately surrounding [Unit 1] experiencing particularly rapid growth" that includes "large warehousing facilities," a "new high school," and "major transportation infrastructure" to serve a population that increased "22 per cent[] between 2000 and 2010" and continues to grow rapidly. Final Econ. Analysis at 4-2 ¶ 71. The Parish Council opposed the designation of Unit 1 because it would "adversely impact small businesses and families" and reduce tax revenues, and frequent fires would be a safety hazard. St. Tammany Parish Council, Res. Council Ser. No. C-3274 (Nov. 3, 2011).

conditions requiring 60 percent of Unit 1 to be set aside as frog habitat would destroy $20.4 million of development value. If development were prohibited altogether, the loss would be $33.9 million. RE 119-120; 77 Fed. Reg. at 35140-35141. This "reduction in land value occurs immediately at the time of designation." RE 120.

FWS recognized that no monetary benefits from the designation can be quantified, but found benefits "expressed in biological terms." 77 Fed. Reg. at 35141; RE 121-123. Balancing the up-to-$34 million loss to the landowners against unquantified biological benefits, FWS "did not identify any disproportionate costs" of designation and so declined to exclude Unit 1 from designation. *Id.* at 35141. Notably, however, even if CWA permits were denied, "the Government is aware that Unit 1 cannot be used for the conservation of the [frog] because someone" would "have to significantly modify Unit 1 to make it suitable for frog habitat" and the "only evidence in the record is that the owners do not plan to do so." Pet. App. 76a-77a (Owen, J., dissenting).

D. The District Court Decision

The landowners brought Administrative Procedure Act challenges to designation of Unit 1 as critical habitat. The district court observed that the Service's "remarkably intrusive" designation "has all the hallmarks of governmental insensitivity to private property" and raises "troubling question[s]." Pet. App. 103a. Nevertheless, on cross-motions for summary judgment the court "[r]eluctantly" upheld the designation against challenges that it violated the ESA because "Unit 1 does not meet the statutory definition of 'critical habitat'"; that it was arbitrary and capricious because "FWS unreasonably determined

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

that Unit 1 is 'essential' for conservation of the frog"; and that FWS's economic analysis was flawed. *Id.* at 102a-103a.

E. The Fifth Circuit's Divided Panel Decision And En Banc Vote

The Fifth Circuit affirmed by a divided vote. The majority undertook an "extremely limited and highly deferential" review. Pet. App. 6a. It rejected the landowners' "argu[ments] that the Service 'exceeded its statutory authority' under the ESA and acted arbitrarily and capriciously." *Id.* at 21a. Without engaging in close analysis of statutory text, structure, or history, the majority held that "[t]here is no habitability requirement in the text of the ESA" and that only occupied critical habitat need contain all the elements necessary to provide habitat—unoccupied critical habitat need not do so. *Id.* at 23a-24a. It concluded that FWS acted reasonably "when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog." *Ibid.*

The court also held that once FWS fulfilled its duty to consider the economic impacts of designation, its determination whether to exclude an area from designation based on those impacts is discretionary, that there are no manageable standards a reviewing court could apply to that decision, and that the decision therefore is not judicially reviewable. Pet. App. 33a-35a.

Judge Owen dissented from this "unprecedented and sweeping" holding that "re-writes the Endangered Species Act." Pet. App. 50a, 65a. She would have held that "an area cannot be 'essential for the conservation of the species' if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species." *Id.* at 60a.

Six judges dissented from denial of en banc review. Writing for the dissenters, Judge Jones would have granted review because "the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated." *Id.* at 126a.

The dissenters would have held, first, that the ESA's plain language and history "unequivocally establish that only 'habitat of such species' may be designated as critical habitat." Pet. App. 132a-142a. Because the dusky gopher frog cannot "naturally live and grow in" Unit 1, Unit 1 "cannot be designated as the frog's critical habitat." *Id.* at 142a. Second, the ESA's "text, drafting history, and precedent" require that the test for unoccupied critical habitat must be "more demanding" than the test for occupied critical habitat, not less demanding as the panel majority held. *Id.* at 142a-150a. Third, the panel's decision violated the constraints Congress imposed by leaving the Service's critical habitat designation power "virtually limitless." *Id.* at 155a. Finally, the dissenters explained that the panel's ruling that FWS's economic analysis is not judicially reviewable contradicts the presumption of reviewability of agency action and this Court's decision in *Bennett* v. *Spear*, *supra.* Pet. App. 156a-162a. These errors, the dissenters urged, underline "the importance of further review." *Id.* at 162a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit Misinterpreted The ESA's Critical Habitat Provisions.

As a matter of law, Unit 1 is not critical habitat of the dusky gopher frog. The frog does not live there, cannot live there, and will not live there in the future. The ESA prohibits designation of uninhabitable, unoccupied land as critical habitat.

A. The ESA Prohibits Designation Of Unit 1 As Critical Habitat.

1. The panel majority's interpretation of the critical habitat provisions contravened the plain language of the ESA. The panel held that "[t]here is no habitability requirement in the text of the ESA." Pet. App. 23a. But, properly interpreted, "the ESA contains a clear habitability requirement." *Id.* at 131a (Jones, J.).

ESA Section 4 requires FWS to "designate any *habitat* of [a listed] species which is then considered to be *critical habitat*." 16 U.S.C. § 1533(a)(3)(A)(i) (emphasis added). This phrasing means that "critical habitat" "must first be 'any habitat of such species.'" Pet. App. 132a (Jones, J.). The "irreducible minimum" of critical habitat "is that it *be habitat*." *Id.* at 137a.[5]

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[5] Weyerhaeuser preserved this argument. It told the district court that "there is no conceivable logic under which Unit 1 can be considered 'habitat.'" Weyerhaeuser Mem. in Support of Mot. for Summ. Judgment 14, D. Ct. Dkt 67-1 ((Dec. 9, 2013). Weyerhaeuser explained that for unoccupied areas, "the separate statutory * * * requirement that designated areas be 'habitat' in the first instance is not obviated": Congress "made clear in § 1533(a)(3)(A)(i) that the Secretary may only designate any 'habitat' as critical habitat." Weyerhaeuser Reply and Memo. in Opp. to Defs' Mot. for Summ. Judgment 12, D. Ct. Dkt 106 (May 2, 2014). The district court rejected a "habitat" requirement without addressing Section 1533(a). Pet. App. 106a-108a.

The Fifth Circuit likewise rejected Weyerhaeuser's argument that the FWS "'exceeded its statutory authority'" when it designated Unit 1 though it "is not currently habitable by the frog." Pet. App. 21a, 23a. The dissenters from the denial of en banc review, by contrast, would have held that "a species' critical habitat must be a subset of the species' habitat." *Id.* at 131a. Accordingly, the question whether the "habitat" requirement of Section 1533(a) must be satisfied before unoccupied critical habitat may be designated was presented and decided below and

That straightforward textual reading prohibits designation of Unit 1 as critical habitat for the dusky gopher frog. "Habitat" is "the place where a plant or animal species naturally lives and grows" or "the kind of site or region with respect to physical features * * * naturally or normally preferred by a biological species." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1961); see AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE (1981) ("habitat" is the "area or type of environment in which an organism or biological population normally lives or occurs"); RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. unabr. 1987) ("the kind of place that is natural for the life and growth of an organism").

Unit 1 is not "habitat" because it lacks at least two of the three features necessary for the frog's survival. This fact is "undisputed." Pet. App. 49a (Owen, J.); see *id.* at 131a (Jones, J.). FWS admitted that "loblolly" pine "plantations" with "a closed-canopy forest"—which describes Unit 1—are "unsuitable as habitat for dusky gopher frogs." 77 Fed. Reg. at 35129. FWS found that Unit 1's "uplands" "do not currently contain the essential physical or biological features of critical habitat." *Id.* at 35135. And FWS admitted that "manag[ing]" Unit 1 to *create* habitat and "translocat[ing]" the frog to Unit 1 "cannot be implemented without the cooperation and permission of the landowner," which is "voluntary." *Id.* at 35123.

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is preserved for this Court's review. See Pet. App. 139a ("Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented" and "anything but inadequate"); Stephen M. Shapiro, *et al.*, SUPREME COURT PRACTICE 466 (10th ed. 2013).

Given those undisputed facts, Unit 1 is not critical habitat as a matter of law. The panel "sanction[ed] the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute." Pet. App. 138a (Jones, J.).

2. The panel's ruling violated the ESA's definition of critical habitat for other reasons too. ESA Section 3 defines critical habitat to mean "occupied" land that contains "those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection," and unoccupied "areas" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A).

There is no dispute that, if the frog *occupied* Unit 1, Unit 1 *could not* be designated as critical habitat because it lacks the "physical or biological features" that are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(i). In ruling that FWS properly designated Unit 1 as unoccupied critical habitat, the Fifth Circuit made it *easier* to designate unoccupied, uninhabitable land as critical habitat than occupied land. A correct interpretation of the statute would have "confirm[ed] the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat." Pet. App. 142a (Jones, J.).

The statutory phrase "areas [that] are essential for the conservation of the species" cannot reasonably be read to extend to areas in which a species *cannot* survive, either now or in the foreseeable future. "Essential" means "[i]ndispensably necessary; important in the highest degree; requisite. That which is required for the continued existence of a thing." BLACK'S LAW DICTIONARY (5th ed. 1979); see WEBSTER'S

THIRD NEW INTERNATIONAL DICTIONARY, *supra* ("necessary or indispensable"); RANDOM HOUSE DICTIONARY, *supra* ("absolutely necessary; indispensable").

Those definitions do not cover Unit 1, which "plays no part in the conservation" of the frog (Pet. App. 48a (Owen, J.)), "will not support" the frog (*ibid.*), and is "distant" from where the frog actually lives. 77 Fed. Reg. at 35124. As 15 States explained in supporting the landowners' en banc petition, "the panel's decision strips the word 'essential' of all meaning, declaring habitat essential to conservation even if a species would immediately die if moved there. A desert could be critical habitat for a fish, a barren, rocky field critical habitat for an alligator." Am. Br. of Ala., *et al.*, in Support of Rh'g En Banc at 3. "The language of the [ESA] does not permit such an expansive interpretation and consequent overreach by the Government." Pet. App. 49a (Owen, J.). The Fifth Circuit erroneously upheld a designation that is not "based on a permissible construction of the statute." *Chevron, U.S.A., Inc.* v. *N.R.D.C.*, 467 U.S. 837, 843 (1984).

3. "It is a 'fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.'" *Nat'l Ass'n of Home Builders*, 551 U.S. at 666. But the Fifth Circuit's ruling is at odds with the "[s]urrounding provisions" and "structure" of the ESA. *Esquivel-Quintana* v. *Sessions*, 137 S. Ct. 1562, 1570 (2017).

ESA Section 7 requires federal agencies to consult with FWS to ensure that their actions will not "result in the destruction or adverse modification of *habitat* of [any listed] species which is determined by the Secretary" to be "*critical*." 15 U.S.C. § 1536(a)(2) (emphasis added). As with Section 4, Section 7 is

unambiguous that *critical* habitat must be *habitat*. The Fifth Circuit severed the link between those concepts, in violation of both ESA Section 4 and Section 7.

The Fifth Circuit's ruling also clashes with the remainder of ESA Section 3's definition of critical habitat. Section 3 provides that, generally, "critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." 16 U.S.C. § 1532(5)(C). That provision shows that Congress envisioned critical habitat to be *at most coextensive* with, and almost always *narrower* than, the area that "can be occupied" by the listed species. The Fifth Circuit's ruling allows FWS to designate critical habitat *beyond* the area "which can be occupied by" the listed species, as here, and thereby contradicts statutory text and Congress's intent.

Other provisions of the ESA confirm that Congress understood "critical habitat" to mean areas occupied by a listed species plus a narrow category of unoccupied areas that contain the habitat a species needs and that are "essential" to the species' survival. For example, ESA Section 4 requires that FWS periodically publish lists that identify "over what portion of its range" a listed species "is endangered or threatened, and specify any critical habitat *within such range*." 16 U.S.C. § 1533(c)(1) (emphasis added). But Unit 1 does not lie "within" the dusky gopher frog's "range." See RANDOM HOUSE DICTIONARY, *supra* ("range" is "the region over which a population or species is distributed"); AMERICAN HERITAGE DICTIONARY, *supra* ("[t]he geographical region in which a kind of plant or animal normally lives or grows"); 13 THE OXFORD ENGLISH DICTIONARY (2d ed. 1989) ("[t]he geographical area over which a certain plant or animal is distributed"). Indeed, FWS designates unoccupied land as critical habitat only when it determines that "a designation

limited to [a species'] range would be inadequate." 77 Fed. Reg. at 35128. FWS points to the "historical" range of species (*e.g.*, 76 Fed. Reg. at 59780), but that term appears nowhere in the ESA, which talks only about a species' "range." 16 U.S.C. §§ 1532(6), 1533(a)(1)(A), 1533(c)(1). FWS's position contradicts the plain language of the statute.[6]

Finally, ESA Section 5 authorizes the Secretary of the Interior to conserve listed species by acquiring "lands, waters, or interest therein." 16 U.S.C. § 1534. That power is not limited to "habitat" or lands "essential" to species survival. As this Court pointed out in *Sweet Home*, "the Section 5 authority" is well suited to address land "that is not yet but may in the future become habitat for an endangered or threatened species." 515 U.S. at 703. If FWS wants to turn non-habitat into habitat and translocate the frog there, Section 5 provides the appropriate mechanism—not a critical habitat designation that imposes all the costs for creating a new frog preserve on private landowners.

The Fifth Circuit failed to "account for both 'the specific context in which * * * language is used' and 'the broader context of the statute as a whole.'" *Util. Air Regulatory Grp.* v. *EPA*, 134 S. Ct. 2427, 2442 (2014). That context supports the dissent's approach.

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[6] Other provisions confirm that Congress did not envisage designation of unoccupied, uninhabitable areas. Section 4 instructs FWS to give notice of a proposed designation only to "the State agency" and "county" "in which the species is believed to occur." 16 U.S.C. § 1533(b)(5)(A)(ii). Section 6 permits FWS to form "cooperative agreements" with States that have a program which adequately protects "resident species." *Id.* § 1535(c)(1)(A)-(E). And Congress authorized FWS to allocate funds to States with cooperative agreements, based on "the number of endangered species and threatened species within a State." *Id.* § 1535(d)(1)(C).

4. The ESA's legislative history bolsters this conclusion. In the 1978 amendments that defined critical habitat for the first time, Congress sought to "narro[w] the scope of the term" because it was concerned that a broad definition could result in "designation of virtually all of the habitat of a listed species as its critical habitat." H.R. Rep. No. 95-1625, at 25, 1978 U.S.C.C.A.N. at 9475. Accordingly, Congress enacted an "extremely narrow definition" of critical habitat. LEG. HIST., *supra*, at 1221.

The Fifth Circuit's interpretation, however, is extremely broad. It allows FWS to designate land that lies *outside* "all of the habitat of a listed species." H.R. Rep. No. 95-1625, at 25. And it saddles landowners with the nearly insurmountable burden of proving that FWS's factual findings are "implausible." Pet. App. 24a. "[I]t is easy to predict that judges will, like the panel majority, almost always defer to the Service's [essentiality] decisions." Pet. App. 155a (Jones, J.). The Fifth Circuit's ruling "is the opposite of what Congress declared" when it enacted the critical habitat provisions. *Id.* at 149a; see also *id.* at 137a n.4 (the legislative history "indicates uniform awareness in Congress that a species' critical habitat was a subset of the species habitat").

5. "[S]tatutes should be interpreted to avoid constitutional doubts." *Clark* v. *Martinez*, 543 U.S. 371, 379 (2005). And courts "assum[e] that Congress does not casually authorize administrative agencies to interpret a statute to push the limit of congressional authority." *SWANCC*, 531 U.S. at 172-173. Yet FWS's designation does just that, "rais[ing] significant constitutional questions" in two ways. *Id.* at 173.

First, FWS's designation tests the boundaries of the Commerce Clause. "The Commerce Clause

empowers Congress to regulate 'commerce,' not habitat." *Nat'l Ass'n of Home Builders* v. *Babbitt*, 130 F.3d 1041, 1066 (D.C. Cir. 1997) (Sentelle, J., dissenting). There is no interstate commerce in the dusky gopher frog. These frogs live only in Mississippi and "spend most of their lives underground" except when traveling to and from ephemeral ponds to breed. 77 Fed. Reg. at 35129. FWS found no commercial value in the frogs or in the designation of the frogs' critical habitat. It found only unquantifiable, noneconomic "biological" benefits. 77 Fed. Reg. at 35127. "[T]his is a far cry, indeed, from" the regulation of interstate commerce. *SWANCC*, 531 U.S. at 173.

The lack of a commerce connection is exacerbated when it comes to Unit 1. Even if the frog had commercial value—or if the overall scheme of protecting rare species were enough to satisfy Commerce Clause requirements—there still would be no commerce element to designating Unit 1. The frog does not and cannot live there; hence the landowners' activities have no effect on the frog. See *National Federation of Independent Business* v. *Sebelius*, 567 U.S. 519, 550 (2012) ("The power to *regulate* commerce presupposes the existence of commercial activity to be regulated"). If the non-commercial frog's absence from a place it does not and cannot live is sufficient to satisfy the Commerce Clause, nothing at all lies beyond the power of federal regulators.

Second, FWS's designation "result[s] in a significant impingement of the States' traditional and primary power over land and water use." *SWANCC*, 531 U.S. at 174. "Regulation of land use" is "a quintessential state and local power." *Rapanos* v. *United States*, 547 U.S. 715, 738 (2006) (plurality). The Fifth Circuit's decision "signals a huge potential expansion of [FWS's] power effectively to regulate

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

privately- or State-owned land." Pet. App. 143a (Jones, J.). Here, FWS acknowledged, St. Tammany Parish has rezoned Unit 1 to accommodate residential, commercial, civic, and open space uses that will serve the needs of this fast-growing community into the future. *Final Econ. Analysis*, *supra*, at 4-2 to 4-3. But FWS's designation—through the CWA permitting process—would turn all or most of the land into a dusky gopher frog preserve, requiring the owners to "conduc[t] forestry management using prescribed burning," "maintain an open canopied forest with abundant herbaceous ground cover," and in numerous other ways create new habitat for imported frogs. 77 Fed. Reg. at 35132.

This Court "expect[s] a 'clear and manifest' statement from Congress to authorize an unprecedented intrusion into traditional state authority." *Rapanos*, 547 U.S. at 738 (plurality). But "[r]ather than expressing a desire to readjust the federal-state balance" (*SWANCC*, 531 U.S. at 174), the ESA declares that it is "the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species" (16 U.S.C. § 1531(c)(2))—precisely what is involved here because CWA protection of ponds and wetlands is the sole basis for FWS to require the landowners to manage Unit 1 to create frog habitat. That policy is the *exact opposite* of a clear and manifest statement directing FWS to usurp States' traditional authority to regulate land use.

The Fifth Circuit should have "read the statute as written to avoid the[se] significant constitutional and federalism questions," by rejecting FWS's extravagant claim that it may designate unoccupied, non-essential, non-habitat as "critical habitat." *SWANCC*, 531 U.S. at 174.

B. The Fifth Circuit's Ruling Conflicts With Decisions Of The Ninth Circuit.

The Fifth Circuit held that, while *occupied* critical habitat must "contai[n] 'those physical or biological features * * * essential to the conservation of the species,'" *unoccupied* critical habitat need not do so. Pet. App. 15a, 23a. The Fifth Circuit thus "ma[d]e it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species." Pet. App. 143a (Jones, J.). That "remarkable and counterintuitive reading" conflicts with decisions of the Ninth Circuit, which "has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat." *Id.* at 143a, 147a.

In *Arizona Cattle Growers' Association* v. *Salazar*, 606 F.3d 1160, 1163 (9th Cir. 2010), the Ninth Circuit held that the ESA "impos[es] a more onerous procedure on the designation of unoccupied areas." The plaintiff argued that, in designating critical habitat for the Mexican Spotted Owl, "FWS treated unoccupied areas as occupied to avoid this more onerous process." *Ibid.* After reviewing the administrative record, the Ninth Circuit concluded that FWS reasonably determined that the owl in fact occupied the designated areas. *Id.* at 1167-1171. That analysis would have been unnecessary under the Fifth Circuit's ruling, which imposes a *lower* standard on the designation of unoccupied critical habitat.

In *Home Builders Association of Northern California* v. *U.S. Fish & Wildlife Services*, 616 F.3d 983, 990 (9th Cir. 2010), plaintiff argued that FWS conflated occupied and unoccupied critical habitat when it designated vernal pool complexes as critical habitat for various species. The Ninth Circuit held that

the challenge failed because FWS's designation satisfied "the standard for unoccupied habitat," which is "more demanding" than the standard for "occupied critical habitat." *Ibid.* That holding leaves no doubt that the Ninth Circuit views the standard for unoccupied critical habitat as more stringent than the standard for occupied critical habitat.

The Fifth Circuit's ruling also conflicts with numerous district court decisions holding that the standard for unoccupied critical habitat is more demanding than that of occupied critical habitat. See, *e.g.*, *Am. Forest Res. Council* v. *Ashe*, 946 F.Supp.2d 1, 44 (D.D.C. 2013) ("more demanding standard for unoccupied habitat"), aff'd, 601 F. App'x 1 (D.C. Cir. 2015); *Cape Hatteras Access Pres. All.* v. *U.S. Dep't of Interior*, 344 F.Supp.2d 108, 125 (D.D.C. 2004) ("Designation of unoccupied land is a more extraordinary event that designation of occupied lands"); see also *Ctr. for Biological Diversity* v. *Kelly*, 93 F.Supp.3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied critical habitat"); *All. for Wild Rockies* v. *Lyder*, 728 F.Supp.2d 1126, 1138 (D. Mont. 2010) ("the ESA imposes 'a more onerous procedure on the designation of unoccupied areas'").

In short, the Fifth Circuit's ruling broke sharply from existing judicial interpretations of the ESA's critical habitat provisions. This Court should grant certiorari to restore uniformity among the lower courts.

II. The Meaning Of "Critical Habitat" Is Of Immense And Immediate Public Importance.

A. The Panel's Ruling Inflicts Significant Costs On Private Landowners, With No Benefits To Endangered Species.

1. This case puts into sharp relief the staggering "regulatory burdens and corresponding economic costs" imposed on landowners when FWS designates private land as "critical habitat." Andrew J. Turner and Kerry L. McGrath, *A Wider View of the Impacts of Critical Habitat Designation*, 43 ENVTL. L. REPORTER 10678, 10680 (2013). As the district court observed, FWS's designation of Unit 1 was "remarkably intrusive" and "insensitiv[e] to private property." Pet. App. 103a. FWS and the panel acknowledged that, upon designation, Unit 1's value "immediately" plummeted "given the 'stigma' attached to critical-habitat designations." *Id.* at 13a.

FWS explained that in a Section 7 consultation it might "recommen[d] that no [future] development occur" on Unit 1, and found that doing so would cost Unit 1's landowners $34 million in lost development opportunities. Pet. App. 75 n.84, 117a; 77 Fed. Reg. at 35141. If it allowed development at all, FWS said it could condition a CWA permit on the landowners creating and maintaining frog habitat on 60 per cent of Unit 1, at a cost of $20.4 million. 77 Fed. Reg. at 35141. These estimates ignored additional costs associated with controlled burns, the "negative impacts" of which FWS said it could not quantify. *Id.* at 35126. It excluded too the toll of the Section 7 consultation process, which "often takes months or years, significantly delaying projects and resulting in substantial additional project costs, if not destroying the projects' economic viability." Turner & McGrath,

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

supra, 43 ENVT'L L. REPORTER at 10681. The costs to the landowners of participating in the regulatory proceedings and in this litigation have been significant too. The economic, regulatory, and litigation burdens on Unit 1's landowners have been astounding.

Meanwhile, the designation provides *no benefits* to the frog. As FWS explained, "designation does not require property owners to undertake affirmative actions to promote the recovery of the listed species." 77 Fed. Reg. at 35123. It is "voluntary" for Unit 1's owners whether to create habitat for the frog, as "habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Ibid.* Any benefit to the frog thus hinges on FWS's "hope to work with the landowners." *Ibid.* But "there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur." Pet. App. 48a (Owen, J.). "[T]he land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that [FWS] concluded would be necessary" to create habitat for the frog. *Id.* at 52a.

The landowners thus face the Catch-22 that they can continue forestry operations on the frogless land largely unhindered by the designation. But if they try to develop the land consistent with their plans and current zoning, the designation may well stop the development in its tracks—which again would not help the frog. Either way, the designation destroys economic activity, leaves the land as unoccupied non-habitat, and does nothing to help the frog.

2. The disconnect between the burden on private landowners and the lack of benefit to the species is nothing new. FWS has long understood that critical habitat designation "provides little additional protection to most listed species," is "driven by litigation rather than biology," and "imposes huge social and economic costs." 68 Fed. Reg. 46684, 46684 (Aug. 6, 2003). FWS has "seriously question[ed]" the "utility" of designation and concluded that it "is not an efficient or effective means of securing the conservation of species." 62 Fed. Reg. 39129, 39131 (July 22, 1997).

Scholars likewise have found no evidence "that critical habitat designation promotes species' recoveries or prevents species' declines." Joe Kerkvliet and Christian Langpap, *Learning from Endangered and Threatened Species Recovery Programs: A Case Study Using U.S. Endangered Species Act Recovery Scores*, 63 ECOL. ECON. 499, 508 (2007). To the contrary, designation often perversely "induce[s] habitat destruction" because landowners preemptively destroy habitat to "avoid costly land-use restrictions." Dean Lueck and Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 51 (2003).

At the same time, critical habitat designation increases the costs and reduces the amount of development. See Jeffrey E. Zabel and Robert W. Paterson, *The Effects of Critical Habitat Designation on Housing Supply: An Analysis of California Housing Construction Activity*, 46 J. REG'L SCI. 67, 67 (2006) (designations decreased housing construction by 37 percent). Here, the unwarranted designation of Unit 1 threatens a substantial commercial and residential development for which local government rezoned the area to serve the needs of the fast-growing St. Tammany Parish population.

This imbalance of costs and benefits is characteristic of the critical habitat program, and made worse by FWS's expansionary zeal to reach unoccupied non-habitat. "The fact that the biologists themselves have found critical habitat of such little utility bespeaks the low tally on the benefits side, and the costs of the provisions are evinced in the delays and resource drain caused by both designation and the frequent litigation that follows." Sheila Baynes, *Cost Consideration and the Endangered Species Act*, N.Y.U. L. REV. 961, 998 (2015).

This widely acknowledged gulf between costs and benefits counsels interpreting ESA's unoccupied critical habitat provisions according to their plain language and Congress's intent—that is, narrowly. FWS's expansive construction inflicts severe costs on landowners and affected communities with no countervailing environmental benefit.

3. FWS's approach has no meaningful limit. As Judge Owen explained, "*the linchpin*" of the panel majority's ruling is that "uninhabitable land" may be designated as critical habitat if the land could "be transformed into habitat" and contains "at least one 'physical or biological featur[e] * * * essential to the conservation of the species.'" Pet. App. 63a-64a; see *id.* at 30a n.20 (majority) ("if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog"). Under the panel's ruling, "vast portions of the United States could be designated as 'critical habitat.'" Pet. App. 49a.

As Judge Jones understood, the panel's ruling bestows "virtually limitless" authority on FWS given the types of "physical and biological features that [FWS] has deemed essential to species' conservation"—including "'[i]ndividual trees with potential nesting

platforms,' 'forested areas within 0.5 mile'" of "'individual trees with potential nesting platforms,' 'aquatic breeding habitat,' 'upland areas,' and '[a] natural light regime within the coastal dune ecosystem.'" Pet. App. 155a (footnotes omitted). Judge Jones cautioned that, "[w]ith no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever 'forested areas' or 'a natural light regime' exist." *Id.* at 156a.

The panel's "'unprecedented and sweeping'" expansion of FWS power would "encourage aggressive, tenuously based interference with property rights" and with State authority over land use. *Id.* at 156a, 162a. This Court should overturn it now before more damage is done.

B. FWS's New Rule Formalizing Its Authority To Designate Unoccupied Non-Habitat Reinforces The Need For Immediate Review.

In 2016, FWS revised its regulations to conform to the approach it took in this case. Revised 50 C.F.R. § 424.12 provides that FWS may designate as critical habitat "specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species." 81 Fed. Reg. 7414, 7439 (Feb. 11, 2016). FWS explained that unoccupied areas "need not have the features essential to the conservation of the species" to be designated, even though those "physical or biological features" *are* necessary to designate occupied areas. *Id.* at 7420-7421, 7425, 7434. FWS acknowledged—citing the district court's ruling in this case—that this new rule "is not a change from the way we have been designating unoccupied critical habitat." *Id.* at 7427.

Twenty States challenged the 2016 rule, contending that it is inconsistent with the ESA and arbitrary and capricious. *Alabama* v. *National Marine Fisheries Service*, No. 1:16-cv-00593 (S.D. Ala.) (First Amended Complaint filed Feb. 2, 2017, Dkt. 30). No responsive pleadings have been filed and the case is stayed until September 11, 2017, at the government's request. Dkt. 46.

The pendency of that early-stage litigation does not reduce the need for review in this case. The new rule formalizes the same incorrect statutory interpretation with which FWS justified its designation of Unit 1 and which the Fifth Circuit upheld. And while resolution of the rule challenge would have no effect on the erroneous judgment for which review is sought here, this Court's reversal in this case *would* foreordain the result of the rule challenge, because FWS concedes that the rule is "not a change" from the basis on which it designated the landowners' property. 81 Fed. Reg. at 7427.

This case provides the Court with the opportunity to resolve the issues presented in a concrete, particularized context. The features of the designated tract are known and undisputed, which illuminates the dire consequences of FWS's mistaken reading of the ESA. Rather than delay resolution of important questions about a major federal environmental statute for years while the rule challenge proceeds, this Court should resolve them now.

III. The Panel's Erroneous Holding That FWS's Decision Not To Exclude Unit 1 From Designation Is Judicially Unreviewable "Play[s] Havoc With Administrative Law."

FWS must "tak[e] into consideration the economic impact" of a designation and "may exclude any area

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits" of designation. 16 U.S.C. § 1533(b)(2). FWS purported to take into account the economic impact of designating Unit 1—concluding that designation could cost the landowners up to $34 million but that unquantifiable "biological" benefits meant there were no "disproportionate costs" to justify excluding Unit 1 from designation. 77 Fed. Reg. at 35141. As the dissenters below observed, the "shocking fact" that designation may cost landowners $34 million is matched by the "shocking fact[s]" that "there is virtually nothing on the other side of the economic ledger" and that FWS "never performed a comparison of the relevant costs." Pet. App. 158a-159a.

Petitioner challenged FWS's refusal to exclude Unit 1 from designation on economic grounds as arbitrary and counter to the evidence before the agency. See Pet. App. 159a; *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983). The panel majority refused to consider that challenge on the ground that FWS's determination whether to exclude is discretionary and there are no judicially manageable standards for a reviewing court to apply. Pet. App. 33a.

But the dissenters pointed out that ruling "play[s] havoc with administrative law." Pet. App. 156a (Jones, J.). It flies in the face of the "strong presumption favoring judicial review of administrative action." *Mach Mining, LLC* v. *EEOC*, 135 S. Ct. 1645, 1653 (2015). It also flatly "contradict[s this] Court's statement in *Bennett* v. *Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is reviewable for abuse of discretion." Pet. App. 156a-157a; see 520 U.S. at 172. Such review is indispensible: *Bennett* recognized that a "primary" "objective" under the ESA "is to avoid needless economic dislocation produced by agency

officials zealously but unintelligently pursuing their environmental objectives." 520 U.S. at 176-177. If private landowners cannot challenge FWS's cost-benefit analysis, how would that objective ever be achieved?

Abuse of discretion is a familiar standard of review that is administrable by the judiciary. See Harry T. Edwards, *et al.*, FEDERAL STANDARDS OF REVIEW 78-81 (2d ed. 2013). Furthermore, the *State Farm* analysis guides review of FWS's weighing of economic benefits. See *Motor Vehicle Mfrs.*, 463 U.S. at 43 (reviewing whether an agency's explanation for its decision is "counter to the evidence" or thoroughly "implausible"). The clash between the panel decision and this Court's precedent on the availability of judicial review suffices to warrant certiorari on petitioner's second question presented.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted.

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JULY 2017

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

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

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

Weyerhaeuser Company, Plaintiff–Appellant

v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior, Defendants–Appellees

Center for Biological Diversity; Gulf Restoration Network, Intervenor Defendants–Appellees

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Cons w/ No. 14-31021

Filed June 30, 2016

Appeals from the United States District Court
for the Eastern District of Louisiana

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

STEPHEN A. HIGGINSON, *Circuit Judge*:

Opinion

This appeal requires us to consider the United States Fish and Wildlife Service's inclusion of private land in a critical-habitat designation under the Endangered Species Act. Misconceptions exist about how critical-habitat designations impact private property. Critical-habitat designations do not transform private land into wildlife refuges. A designation does not authorize the government or the public to access private lands. Following designation, the Fish and Wildlife Service cannot force private landowners to introduce endangered species onto their land or to make modifications to their land. In short, a critical-habitat designation alone does not require private landowners to participate in the conservation of an endangered species. In a thorough opinion, District Judge Martin L.C. Feldman held that the Fish and Wildlife Service properly applied the Endangered Species Act to private land in St. Tammany Parish, Louisiana. As we discuss below, we AFFIRM Judge Feldman's judgment upholding this critical-habitat designation.

FACTS AND PROCEEDINGS

This case is about a frog—the *Rana sevosa*—commonly known as the dusky gopher frog.[1] These frogs spend most of their lives underground in open-canopied pine forests.[2] They migrate to isolated, ephemeral ponds to breed. Final Designation, 77 Fed. Reg. at 35,129. Ephemeral ponds are only seasonally flooded, leaving them to dry out cyclically and making it impossible for predatory fish to survive. *See id.* at 35,129, 35,131. After the frogs are finished breeding, they return to their underground habitats, followed by their offspring. *Id.* at 35,129. When the dusky gopher frog was listed as an endangered species, there were only about 100 adult frogs known to exist in the wild.[3] Although, historically, the frog was found in parts of Louisiana, Mississippi, and Alabama, today, the frog exists only in Mississippi. Final Rule, 66 Fed. Reg. at 62,993–94; Final

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[1] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 76 Fed. Reg. 59,774, 59,775 (proposed Sept. 27, 2011) (to be codified at 50 C.F.R. pt. 17) [hereinafter Revised Proposal]. The frog was previously known as the Mississippi gopher frog, but further taxonomic research indicated that the dusky gopher frog is different from other gopher frogs, warranting acceptance as its own species: the *Rana sevosa* or the dusky gopher frog. *Id.* We will refer to the frog as the dusky gopher frog.

[2] Designation of Critical Habitat for Dusky Gopher Frog (Previously Mississippi Gopher Frog), 77 Fed. Reg. 35,118, 35,129 (June 12, 2012) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Designation]. It appears that the frogs are not accustomed to human interaction. If you pick up a gopher frog and hold it, the frog will play dead and even cover its eyes; if you hold the frog long enough, it will peak at you and then pretend to be dead again.

[3] *See* Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog as Endangered, 66 Fed. Reg. 62,993, 62,993, 62,995, 63,000 (Dec. 4, 2001) (to be codified at 50 C.F.R. pt. 17) [hereinafter Final Rule].

Designation, 77 Fed. Reg. at 35,132. The primary threat to the frog is habitat degradation. Final Rule, 66 Fed. Reg. at 62,994.

In 2010, under the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544, the United States Fish and Wildlife Service ("the Service")[4] published a proposed rule to designate 1,957 acres in Mississippi as "critical habitat" for the dusky gopher frog.[5] In response to concerns raised during the peer-review process about the sufficiency of this original proposal, the Service's final designation of critical habitat expanded the area to 6,477 acres in four counties in Mississippi and one parish in Louisiana. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,118–19. The designated area in Louisiana ("Unit 1") consists of 1,544 acres in St. Tammany Parish. Final Designation, 77 Fed. Reg. at 35,118. Although the dusky gopher frog has not occupied Unit 1 for decades, the land contains historic breeding sites and five closely clustered ephemeral ponds. *See* Revised Proposal, 76 Fed. Reg. at 59,783; Final Designation, 77 Fed. Reg. at 35,123–24, 35,133, 35,135. The final critical-habitat designation was the culmination of two proposed rules, economic analysis, two rounds of notice and comment, a scientific peer-review process including responses

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[4] The Secretary of the Department of the Interior and the Secretary of the Department of Commerce are jointly charged with administering the ESA. *See* 16 U.S.C. § 1532(15). The Secretary of the Interior administers the ESA through the Fish and Wildlife Service. We refer to both the Secretary and the agency as the "Service."

[5] *See* Designation of Critical Habitat for Mississippi Gopher Frog, 75 Fed. Reg. 31,387, 31,387 (proposed June 3, 2010) (to be codified at 50 C.F.R. pt. 17) [hereinafter Original Proposal].

from six experts, and a public hearing. *See* Final Designation, 77 Fed. Reg. at 35,119.

Together, Plaintiffs-Appellants Markle Interests, L.L.C., P&F Lumber Company 2000, L.L.C., PF Monroe Properties, L.L.C., and Weyerhaeuser Company (collectively, "the Landowners") own all of Unit 1. Weyerhaeuser Company holds a long-term timber lease on all of the land that does not expire until 2043. The Landowners intend to use the land for residential and commercial development and timber operations. Through consolidated suits, all of the Landowners filed actions for declaratory judgment and injunctive relief against the Service, its director, the Department of the Interior, and the Secretary of the Interior. The Landowners challenged only the Service's designation of Unit 1 as critical habitat, not the designation of land in Mississippi.

The district court allowed the Center for Biological Diversity and the Gulf Restoration Network (collectively, "the Intervenors") to intervene as defendants in support of the Service's final designation. All parties filed cross-motions for summary judgment. Although Judge Feldman granted summary judgment in favor of the Landowners on the issue of standing, he granted summary judgment in favor of the Service on the merits. *See Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 748, 769 (E.D. La. 2014). The Landowners timely appealed.

STANDARD OF REVIEW

We review a district court's grant of summary judgment de novo. *Nola Spice Designs, L.L.C. v. Haydel Enters., Inc.*, 783 F.3d 527, 536 (5th Cir. 2015); *see also Sabine River Auth. v. U.S. Dep't of In-*

terior, 951 F.2d 669, 679 (5th Cir. 1992) (noting that the court of appeals reviews the administrative record de novo when the district court reviewed an agency's decision by way of a motion for summary judgment). Our review of the Service's administration of the ESA is governed by the Administrative Procedure Act ("APA"). *See Bennett v. Spear*, 520 U.S. 154, 171–75 (1997) (holding that a claim challenging the Service's alleged "maladministration of the ESA" is not reviewable under the citizen-suit provisions of the ESA, but is reviewable under the APA); *see also* 5 U.S.C. §§ 702, 704. When reviewing agency action under the APA, this court must "set aside agency action, findings, and conclusions found to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; [or] (C) in excess of statutory jurisdiction, authority, or limitations." 5 U.S.C. § 706(2).

Review under the arbitrary-and-capricious standard is "extremely limited and highly deferential," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 243 (5th Cir. 2015) (internal quotation marks omitted), and "there is a presumption that the agency's decision is valid," *La. Pub. Serv. Comm'n v. F.E.R.C.*, 761 F.3d 540, 558 (5th Cir. 2014) (internal quotation marks omitted). The plaintiff has the burden of overcoming the presumption of validity. *La. Pub. Serv. Comm'n*, 761 F.3d at 558.

> Under the arbitrary-and-capricious standard,
>
> we will not vacate an agency's decision unless it has relied on factors which Congress had not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its deci-

> sion that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Nat'l Ass'n of Home Builders v. Defenders of Wildlife, 551 U.S. 644, 658 (2007) (internal quotation marks omitted). We must be mindful not to substitute our judgment for the agency's. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009). That said, we must still ensure that "[the] agency examine[d] the relevant data and articulate[d] a satisfactory explanation for its action." *Id.* (internal quotation marks omitted). "We will uphold an agency's action if its reasons and policy choices satisfy minimum standards of rationality." *10 Ring Precision, Inc. v. Jones*, 722 F.3d 711, 723 (5th Cir. 2013) (internal quotation marks omitted).

DISCUSSION

The Landowners raise three challenges to the Service's designation of Unit 1 as critical habitat for the dusky gopher frog. They argue that the designation (1) violates the ESA and the APA, (2) exceeds the Service's constitutional authority under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and (3) violates the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et. seq*. As we discuss below, each of their arguments fails.

I. Endangered Species Act

Congress enacted the ESA "to provide a means whereby the ecosystems upon which endangered species . . . depend may be conserved" and "to provide a program for the conservation of such endangered species." 16 U.S.C. § 1531(b). The ESA broadly de-

fines "conservation." It includes "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided [by the ESA] are no longer necessary." *Id.* § 1532(3). In other words, "the objective of the ESA is to enable [endangered] species not merely to survive, but to recover from their endangered or threatened status." *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 438 (5th Cir. 2001); *see also Tenn. Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, but in literally every section of the statute.").

To achieve this objective, the ESA requires the Service to first identify and list endangered and threatened species. *See* 16 U.S.C. § 1533(a)(1). Listing a species as endangered or threatened then triggers the Service's statutory duty to designate critical habitat "to the maximum extent prudent and determinable." *See id.* § 1533(a)(3)(A)(i).[6] "Critical habitat

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[6] The Service typically is required to designate critical habitat at the same time that it lists a species as endangered or threatened. 16 U.S.C. § 1533(a)(3)(A)(i). But if critical habitat is not "determinable" at the time of listing, the Service can extend the deadline for making a critical-habitat designation. *See id.* § 1533(b)(6)(A)(ii), (b)(6)(C)(ii). Although the Service listed the dusky gopher frog as endangered in 2001, it declined to designate critical habitat at that time because of budget limitations. *See* Final Rule, 66 Fed. Reg. at 63,000. Six years later, in 2007, the Service still had not designated critical habitat for the frog. The Center for Biological Diversity therefore sued the Service for failing to timely designate critical habitat. That lawsuit resulted in a court-approved settlement agreement that set deadlines for the Service to designate critical habitat for the dusky gopher frog. The Service's resulting designations under this

designation primarily benefits listed species through the ESA's [Section 7] consultation mechanism." *Sierra Club*, 245 F.3d at 439; *see* 16 U.S.C. § 1536 (describing the Section 7 consultation process). Under this section, once habitat is designated as critical, federal agencies are prohibited from authorizing, funding, or carrying out any action that is likely to result in "the destruction or adverse modification" of that critical habitat without receiving a special exemption.[7] 16 U.S.C. § 1536(a)(2). To satisfy the requirements of Section 7, federal agencies must consult with the Service before taking any action that might negatively affect critical habitat.[8] Only federal agencies—not private parties—must engage in this Section 7 consultation process. *See id.*; 50 C.F.R. § 402.14(a). Thus, as Judge Feldman explained, "absent a federal nexus, [the Service] cannot compel a private landowner to make changes to restore his designated property into optimal habitat." *Markle Interests*, 40 F. Supp. 3d at 750.

A. Standing

Before addressing the merits of the Service's critical-habitat designation, we first address whether

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agreement, including the designation of Unit 1, prompted the lawsuit that we are considering on appeal.

[7] Section 7 consultation is also required whenever any federal action will "jeopardize the continued existence" of an endangered species, regardless of whether the Service has designated critical habitat. 16 U.S.C. § 1536(a)(2); *see Sierra Club*, 245 F.3d at 439.

[8] If the Service determines that a contemplated action—the issuance of a permit, for example—is likely to adversely modify critical habitat, the Service must suggest "reasonable and prudent alternatives" that the consulting agency could take to avoid adverse modification. *See* 50 C.F.R. § 402.14(h)(3). These alternatives must be "economically and technologically feasible." *Id.* § 402.02.

the Landowners have standing to challenge the designation. "The question of standing involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise." *Bennett*, 520 U.S. at 162 (internal quotation marks omitted). In particular, to establish standing under the APA, in addition to Article III standing, a plaintiff must show that "the interest sought to be protected by the [plaintiff] is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 175 (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Although the district court correctly held that the APA provided the proper vehicle for the Landowners to challenge the Service's administration of the ESA, the district court did not address the APA's zone-of-interests test; instead, it held only that the Landowners have standing under Article III. On appeal, the Service did not brief the zone-of-interests issue or challenge the district court's conclusion that the Landowners have Article III standing.

Even though the Service did not appeal the district court's standing conclusion, we must independently assess the Landowners' Article III standing.[9] *See Hang On, Inc. v. City of Arlington*, 65 F.3d 1248, 1251 (5th Cir. 1995) ("The federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." (alterations and internal quotation marks omitted)). "Article III of the Constitution limits federal courts' juris-

[9] This Article III standing analysis applies to all of the Landowners' claims, not just the Landowners' claim under the ESA.

diction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1147 (2013). "To satisfy the 'case' or 'controversy' requirement of Article III, which is the 'irreducible constitutional minimum' of standing, a plaintiff must . . . demonstrate that he has suffered 'injury in fact,' that the injury is 'fairly traceable' to the actions of the defendant, and that the injury will likely be redressed by a favorable decision." *Bennett*, 520 U.S. at 162 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)). The injury must be concrete and particularized, as well as actual or imminent. *Lujan*, 504 U.S. at 560; *see also Crane v. Johnson*, 783 F.3d 244, 251 (5th Cir. 2015) ("Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending."). "The party invoking federal jurisdiction bears the burden of establishing these elements." *Lujan*, 504 U.S. at 561.

Here, the Landowners assert two alleged injuries: lost future development and lost property value. The first—loss of future development—is too speculative to support Article III standing. Although "[a]n increased regulatory burden typically satisfies the injury in fact requirement," *Contender Farms, L.L.P. v. U.S. Dep't of Agric.*, 779 F.3d 258, 266 (5th Cir. 2015), any regulatory burden on Unit 1 is purely speculative at this point. As the Service emphasized in the designation, if future development occurring on Unit 1 avoids impacting jurisdictional wetlands, no federal permit would be required and the ESA's Section 7 consultation process would not be triggered. *See* Final Designation, 77 Fed. Reg. at 35,126 (noting that the range of possible economic impact to

Unit 1 of $0 to $33.9 million "reflects uncertainty regarding future land use"); *id.* at 35,140 (observing that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]"); *see also* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Judge Feldman similarly stressed this point, explaining that, "if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation." *Markle Interests*, 40 F. Supp. 3d at 750.

Because the Landowners have not provided evidence that specific development projects are likely to be impacted by Section 7 consultation,[10] lost future development is too speculative to support standing. *See Lujan*, 504 U.S. at 564 ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."); *see also Clapper*, 133 S. Ct. at 1147–48 (holding that plaintiffs did not have standing to challenge the Foreign Intelligence Surveillance Act in part because they provided no evidence supporting their "highly speculative fear" that the government would imminently

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[10] To the contrary, the record reflects that, at the time Unit 1 was designated, development plans had already been delayed because of the recession and the mortgage crisis. This uncertainty about development not only underscores the absence of a concrete injury, but also highlights that any injury, however speculative, is not fairly traceable to the critical-habitat designation. Moreover, the long-term timber lease running on the land until 2043 also suggests that development may not occur on Unit 1 in the foreseeable future. Although the Landowners suggest that they could renegotiate the timber lease as conditions change, they have not demonstrated that they have concrete plans to do so.

target communications to which plaintiffs were parties); *Crane*, 783 F.3d at 252 (holding that Mississippi did not have standing to challenge the federal government's deferred-action policy because its injury was "purely speculative" and because it failed to "produce evidence of costs it would incur" because of the policy); *cf. Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (holding that the burdens of Section 7 consultation supported standing when the plaintiffs identified specific, ongoing development projects that would be delayed because of the consultation requirement).

The Landowners' assertion of lost property value, by contrast, is a concrete and particularized injury that supports standing. *See Sabine River Auth.*, 951 F.2d at 674 (recognizing that injury in fact includes economic injury). The Landowners assert that their land has already lost value as a result of the critical-habitat designation. Indeed, as the Service recognized in its Final Economic Analysis, given the "stigma" attached to critical-habitat designations, "[p]ublic attitudes about the limits or restrictions that critical habitat may impose can cause real economic effects to property owners, regardless of whether such limits are actually imposed." As a result, "a property that is designated as critical habitat may have a lower market value than an identical property that is not within the boundaries of critical habitat due to perceived limitations or restrictions." The Service further assumed that "any reduction in land value due to the designation of critical habitat will happen immediately at the time of the designation."

Causation and redressability flow naturally from this injury. If a plaintiff—or, here, the plaintiffs' land—is the object of government action, "there is ordinarily little question that the action . . . has caused him injury, and that a judgment preventing . . . the action will redress it." *Lujan*, 504 U.S. at 561–62. We conclude that the Landowners' decreased property value is fairly traceable to the Service's critical-habitat designation and that this injury would likely be redressed by a favorable decision. Thus, the Landowners have established Article III standing based on lost property value.

The question nevertheless remains whether the Landowners satisfy the APA's zone-of-interests requirement. *See Bennett*, 520 U.S. at 175–77. The Service, however, has not argued—either in the district court or this court—that the Landowners' interests fall outside the zone of interests that the ESA is designed to protect. "Unlike constitutional standing, prudential standing arguments may be waived." *Bd. of Miss. Levee Comm'rs v. EPA*, 674 F.3d 409, 417–18 (5th Cir. 2012).[11] Although we have previously considered the zone-of-interests issue *sua sponte*, *see Nat'l Solid Waste Mgmt. Ass'n v. Pine Belt Reg'l Solid Waste Mgmt. Auth.*, 389 F.3d 491, 498 (5th Cir. 2004), we decline to do so here. Because the Service failed to raise this argument, we hold that the Service has forfeited a challenge to the Landowners' standing under the zone-of-interests test. We thus

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[11] We are mindful that the Supreme Court has recently clarified that "'prudential standing' is a misnomer as applied to the zone-of-interests analysis," emphasizing instead that the analysis requires "using traditional tools of statutory interpretation." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1387 (2014) (citation and internal quotation marks omitted).

conclude that the Landowners have standing to challenge the Service's critical-habitat designation.

B. Critical–Habitat Designation

The ESA expressly envisions two types of critical habitat: areas occupied by the endangered species at the time it is listed as endangered and areas not occupied by the species at the time of listing. *See* 16 U.S.C. § 1532(5)(A)(i)–(ii). To designate an occupied area as critical habitat, the Service must demonstrate that the area contains "those physical or biological features . . . essential to the conservation of the species."[12] *Id.* § 1532(5)(A)(i). To designate unoccupied areas, the Service must determine that the designated areas are "essential for the conservation of the species." *Id.* § 1532(5)(A)(ii). As Judge Feldman noted below, "Congress did not define 'essential' but, rather, delegated to the Secretary the authority to make that determination." *Markle Interests*, 40 F. Supp. 3d at 760. Thus, when the Service promulgates, in a formal rule, a determination that an unoccupied area is "essential for the conservation" of an endangered species, *Chevron* deference is appropriate. *See id.* (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); *Knapp v. U.S. Dep't of Agric.*, 796 F.3d 445, 454 (5th Cir. 2015) ("[A]dministrative implementation of a

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[12] Under the regulations in place at the time of the critical-habitat designation at issue here, the Service referred to these "physical or biological features" as "primary constituent elements" or "PCEs." 50 C.F.R. § 424.12(b) (2012). The primary constituent elements that make up the dusky gopher frog's habitat are (1) ephemeral ponds used for breeding, (2) upland, open-canopy forests "adjacent to and accessible to and from breeding ponds," and (3) upland connectivity habitat to allow the frog to move between breeding and nonbreeding habitats. Final Designation, 77 Fed. Reg. at 35,131.

particular statutory provision qualifies for *Chevron* deference when it appears [(1)] that Congress delegated authority to the agency generally to make rules carrying the force of law, and [(2)] that the agency interpretation claiming deference was promulgated in the exercise of that authority." (alterations in original)).

The Service must designate critical habitat "on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat." *Id.* § 1533(b)(2). "When examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential." *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983); *Medina Cnty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings.").

In addition, under the regulations in place at the time of the critical-habitat designation at issue here, before the Service could designate unoccupied land as critical habitat, it first had to make a finding that "a designation limited to [a species'] present range would be *inadequate* to ensure the conservation of the species." 50 C.F.R. § 424.12(e) (2012) (emphasis added). Unit 1 is unoccupied. Thus, under its own regulations, the Service first had to make an inadequacy determination. The Service's first proposed designation included only land in Mississippi and did not include Unit 1. *See* Original Proposal, 75 Fed. Reg. at 31,395–99 (identifying eleven units in Mis-

sissippi). During the peer-review and comment process on this original proposal, the expert reviewers expressed that the designated habitat in the proposal was inadequate to ensure the conservation of the frog. The experts therefore urged the Service to expand the designation to Louisiana or Alabama, the two other states in the frog's historical range. *See* Revised Proposal, 76 Fed. Reg. at 59,776; Final Designation, 77 Fed. Reg. at 35,119, 35,121, 35,123–24.

The Service adopted this consensus expert conclusion, finding that designating the occupied land in Mississippi was "not sufficient to conserve the species." Final Designation, 77 Fed. Reg. at 35,123. The Service explained that "[r]ecovery of the dusky gopher frog will not be possible without the establishment of additional breeding populations of the species," and it emphasized that it was necessary to designate critical habitat outside of Mississippi to protect against potential local events, such as drought and other environmental disasters. *Id.* at 35,124–25. The Service therefore determined that "[a]dditional areas that were not known to be occupied at the time of listing are essential for the conservation of the species." *Id.* at 35,123. In sum, all of the experts agreed that designating occupied land alone would not be sufficient to conserve the dusky gopher frog. Thus, the Service's prerequisite inadequacy finding—a finding that the Landowners did not challenge[13]—was not arbitrary and capricious.

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[13] Amici supporting the Landowners do challenge this finding, and the Landowners asserted at oral argument that they would contest this finding. The Landowners, however, did not challenge this finding in either of their briefs on appeal. We therefore will not consider it. *See World Wide St. Preachers Fellowship v. Town of Columbia*, 591 F.3d 747, 752 n.3 (5th Cir. 2009) ("It is well-settled in this circuit that an amicus curiae

Having satisfied this preliminary requirement, the Service was next required to limit the critical-habitat designation to unoccupied areas that are "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The Service focused its resources on locating additional ephemeral ponds. It explained that it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially. *See* Final Designation, 77 Fed. Reg. at 35,123–24. The Service further explained that additional breeding populations are necessary for the frog's recovery and to prevent excessive inbreeding. *See id.* at 35,121, 35,123–24. Although the Service has created one artificial ephemeral pond in the DeSoto National Forest in Mississippi, this artificial pond took ten years to construct, and it is still unclear whether it will be successful as a breeding site. *See id.* at 35,123. In contrast, as an expert explained at the public hearing on the Revised Proposal, it is "much easier to restore a terrestrial habitat for the gopher frog than to restore or build breeding ponds." *See also id.* at 35123 ("Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in dusky gopher frog recovery."). As the Service explained in the Final Designation, "[a]lthough [DeSoto] is crucial to the survival of the frog because the majority of the remaining frogs occur there, recovery of the species will require populations of dusky gopher frog distributed across a broader por-

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generally cannot expand the scope of an appeal to implicate issues that have not been presented by the parties to the appeal." (citation and internal quotation marks omitted)); *see also Crane*, 783 F.3d at 252 n.34 (explaining that a party waives an argument by failing to make it in the party's opening brief).

tion of the species' historic distribution." *Id.* at 35, 125.

The Service therefore searched for isolated, ephemeral ponds within the historical range of the frog in Alabama and Louisiana. *See* Final Designation, 77 Fed. Reg. at 35, 124. The area in Alabama where the frog once lived has since been replaced by a residential development. *See id.* The Service noted that it was unable to find any breeding sites that the frog might use in the future in Alabama. *See id.* In contrast, the Service explained that Unit 1's five ephemeral ponds are "intact and of remarkable quality." *Id.* at 35, 133. It noted that the ponds in Unit 1 "are in close proximity to each other, which would allow movement of adult gopher frogs between them" and would "provide metapopulation structure that supports long-term survival and population resiliency." *Id.* "Based on the best scientific information available to the Service," the Service concluded that "the five ponds in Unit 1 provide breeding habitat that in its totality is not known to be present elsewhere within the historic range of the dusky gopher frog." *Id.* at 35, 124.

Finally, in addition to ephemeral ponds, dusky gopher frogs also require upland forested habitat and connected corridors that allow them to move between their breeding and nonbreeding habitats. *See id.* at 35, 131–32. Looking to the upland terrestrial habitat surrounding Unit 1's ephemeral ponds, the Service relied on scientific measurements and data to draw a boundary around Unit 1. The Service used digital aerial photography to map the ponds and then to delineate critical-habitat units by demarcating a buffer zone around the ponds by a radius of 621 meters (or 2,037 feet). *Id.* at 35, 134. This value, which was

based on data collected during multiple gopher frog studies, represented the median farthest distance that frogs had traveled from breeding sites (571 meters or 1,873 feet) plus an extra 50 meters (or 164 feet) "to minimize the edge effects of the surrounding land use." *Id.* The Service finally used aerial imagery to connect critical-habitat areas that were within 1,000 meters (or 3,281 feet) of each other "to create routes for gene flow between breeding sites and metapopulation structure." *Id.*

Altogether, the Service concluded:

> Unit 1 is essential to the conservation of the dusky gopher frog because it provides: (1) Breeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the dusky gopher frog; and (3) geographic distance from extant dusky gopher frog populations, which likely provides protection from environmental stochasticity.

Id. As Judge Feldman reasoned below, "[the Service's] finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA." *Markle Interests*, 40 F. Supp. 3d at 761 (applying *Chevron* deference).

On appeal, the Landowners do not dispute the scientific or factual support for the Service's deter-

mination that Unit 1 is essential.[14] Instead, they argue that the Service "exceeded its statutory authority" under the ESA and acted arbitrarily and capriciously when it designated Unit 1 as critical habitat because Unit 1 is not currently habitable, nor "currently supporting the conservation of the species in any way," nor reasonably likely to support the conservation of the species in the "foreseeable future." They contend that such land cannot rationally be called "essential for the conservation of the species," because if it can be, then the Service would have "nearly limitless authority to burden private lands with a critical habitat designation."

As Judge Feldman noted, Congress has not defined the word "essential" in the ESA. Hence the Service has the authority to interpret the term. *See Sierra Club*, 245 F.3d at 438 ("Once a species has been listed as endangered . . . the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'" (quoting 16 U.S.C. § 1533(h))). To issue a formal rule designating critical habitat for the frog, the Service necessarily had to interpret and apply the applicable ESA provisions, including the word "essential." *See Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 420 (1992) ("[W]e defer to an interpretation which was a necessary presupposition of the [agency]'s decision."); *cf. S.D. ex rel. Dickson v. Hood*, 391 F.3d 581, 596 & n.13 (5th Cir. 2004) (explaining that,

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[14] Amici do challenge the scope of the Unit 1 designation, but we will not consider this argument because the Landowners did not raise it on appeal. *See World Wide St. Preachers Fellowship*, 591 F.3d at 752 n.3.

when the Centers for Medicare and Medicaid Services are charged with reviewing and approving state Medicaid plans to ensure that the plans conform to the Act, the agency implicitly interprets the Act when granting approvals). The Service issued the designation as a formal agency rule after two rounds of notice and comment. Thus, the Service's interpretation of the term "essential" is entitled to *Chevron* deference. *See Home Builders*, 551 U.S. at 665 (applying *Chevron* deference in the context of the ESA); *Chevron*, 467 U.S. at 842–44.

When, as here, "an agency's decision qualifies for *Chevron* deference, we will accept the agency's reasonable construction of an ambiguous statute that the agency is charged with administering." *Knapp*, 796 F.3d at 455. The question presented, then, is whether the Landowners have demonstrated that the Service interpreted the ESA unreasonably when it deemed Unit 1 "essential" for the conservation of the dusky gopher frog. Although the Landowners acknowledge that "the Service undoubtedly has some discretion in interpreting the statutory language of the ESA," they contend that the Service "does not have the authority to apply the term 'essential' in a way that is contrary to its plain meaning." The Landowners do not explain what they think the "plain meaning" of essential is, however, save to argue, circularly, that we must "insist[ ]" that "'essential' must truly mean *essential*."[15]

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[15] The dissent instead introduces two alternative definitions of "essential" from *Black's Law Dictionary*: "2. Of the utmost importance; basic and necessary. 3. Having real existence, actual." Dissent at 5. The dissent then goes on to cite *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 229 (1994), for the proposition that "an agency's interpretation of a statute is not entitled to deference when it goes beyond the

We consider first their argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 is not currently habitable by the frog. The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate "essential" areas, without further defining "essential" to mean "habitable." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015) (upholding the designation of unoccupied critical habitat, even though the area was not habitable by the endangered species). The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land. *See Dep't of Homeland Sec. v. MacLean*, 135 S. Ct. 913, 919 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). As Judge Feldman insightfully observed, "[their position] is . . . contrary to the ESA; [the Landowners] equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant [physical or biological features]." *Markle Interests*, 40 F.

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meaning that the statute can bear." Dissent at 7. The dissent's own alternative definitions distinguish *MCI* from this case. In *MCI*, the agency advanced an interpretation of the word "modify" that flatly contradicted the definition provided by "[v]irtually every dictionary [the Court] was aware of." *Id.* at 225. Here, in contrast, one of the dissent's own definitions of essential—"of the utmost importance; basic and necessary"—describes well a close system of ephemeral ponds, per the scientific consensus that the Service relied upon. *See infra note 20*.

Supp. 3d at 761. Thus, the plain text of the ESA does not require Unit 1 to be habitable. "[R]ather," as Judge Feldman elaborated, "[the Service] is tasked with designating as critical *unoccupied* habitat so long as it determines it is 'essential for the conservation of the species' and 'only when a designation limited to its present range would be inadequate to ensure the conservation of the species.'" *Id.* at 762 (quoting 50 C.F.R. § 424.12(e)). Here, the Service provided scientific data to support its finding that Unit 1 is essential, and as Judge Feldman held, "[the Landowners] have not demonstrated that [the Service's] findings are implausible." *Id.* Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that the currently uninhabitable Unit 1 was essential for the conservation of the dusky gopher frog and designated the land as critical habitat.

We consider next the argument that it is an unreasonable interpretation of the ESA to describe Unit 1 as essential for the conservation of the dusky gopher frog when Unit 1 "is not *currently* supporting the conservation of the species in any way and the Service has no reasonable basis to believe that it will do so at any point in the *foreseeable future*." Like their proposed habitability requirement, the Landowners' proposed temporal requirement—considering whether the frog can live on the land "currently" or in the "foreseeable future"—also lacks legal support and is undermined by the ESA's text. The ESA's critical-habitat provisions do not require the Service to know when a protected species will be conserved as a result of the designation. The Service is required to designate unoccupied areas as critical habit at if these areas are "essential for the conservation of these species." 16 U.S.C. § 1532(5)(A)(ii). The statute de-

fines "conservation" as "the use of all methods and procedures which are necessary to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3); *cf. Alaska Oil & Gas Ass'n v. Jewell*, 815 F.3d 544, 555 (9th Cir. 2016) ("The Act is concerned with protecting the future of the species[.]"). Neither of these provisions sets a deadline for achieving this ultimate conservation goal. *See Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, 616 F.3d 983, 989 (9th Cir. 2010) (holding that the Service need not determine "exactly when conservation will be complete" before making a critical-habitat designation). And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved. *See id.* ("A seller of sporting goods should be able to identify which rod and reel are essential to catching a largemouth bass, but is not expected to predict when the customer will catch one."). As Judge Feldman concluded, "[the Service's] failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation." *Markle Interests*, 40 F. Supp. 3d at 762–63. We also note that, in contrast to the habitat-designation provision at issue here, the ESA's recovery-plan provisions do require the Service to estimate when a species will be conserved. *See* 16 U.S.C. § 1533(f)(1)(B)(iii). Congress's inclusion of a conservation-timeline requirement for recovery plans, but omission of it for critical-habitat designa-

tions, further underscores the weakness of the Landowners' argument. *See MacLean*, 135 S. Ct. at 919.[16]

Moreover, we observe that the Landowners' proposed temporal requirement could effectively exclude all private land not currently occupied by the species from critical-habitat designations. By the Landowners' logic, private landowners could trump the Service's scientific determination that unoccupied habitat is essential for the conservation of a species so long as they declare that they are not currently willing to modify habitat to make it habitable and that they will not be willing to make modifications in the foreseeable future. Their logic would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land. The Landowners' focus on private-party cooperation as part of the definition of "essential" finds no support in the text of the ESA. Nothing in the ESA requires that private landowners be willing to participate in species conservation.[17] Summing up the Landowners'

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[16] We further note that it was logical for Congress to require the Service to estimate a timeline for achieving its conservation goals in a recovery plan but not to impose that requirement for critical-habitat designations because there is no deadline for creating a recovery plan, but there is a one-year deadline for designating critical habitat. *See* 16 U.S.C. § 1533(b)(6)(A)(ii), (b)(6)(C)(ii); *see also Home Builders Ass'n of N. Cal.*, 616 F.3d at 990.

[17] The statute requires the Service to base its decision on "the best scientific data available." 16 U.S.C. § 1533(b)(2). Here, the Service followed that command and made an *objective* feasibility determination that the uplands surrounding the ephemeral ponds, although currently lacking "the essential physical or biological features of critical habitat," are "restorable with reasonable effort." Final Designation, 77 Fed. Reg. at 35,135. We find no basis in the text of the statute for the "reasonable

arguments on this point, Judge Feldman observed that the Landowners "effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical-habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy." *Markle Interests*, 40 F. Supp. 3d at 769 n.40. We agree. Thus, the Landowners have not shown that the Service employed an unreasonable interpretation of the ESA when it found that Unit 1 was essential for the conservation of the dusky gopher frog without first establishing that Unit 1 currently supports, or in the "foreseeable future" will support, the conservation of the dusky gopher frog.

We next consider the argument that that the Service has interpreted the word "essential" unreasonably because its interpretation fails to place "meaningful limits" on the Service's power under the ESA. Thus, we consider whether, in designating Unit 1, the Service abided the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat. Under the regulations in ef-

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probability" test introduced by the dissent, which looks to "many factors" including "whether a reasonable landowner would be likely to undertake the necessary modifications." Dissent at 13. Although a "reasonable landowner" test has the sound of an objective test, the dissent does not make clear how such a test would be applied in practice, nor how it would avoid taking into account the subjective intentions of specific landowners. For example, the dissent says that in a scenario in which a "landowner . . . enter[s] into an agreement to modify land so that it might be used as habitat, there would be nothing 'subjective' in concluding that it is reasonably probable that the land will actually be used at habitat." Dissent at 13. A test that can come out differently depending on the actual plans of specific landowners is, by definition, subjective.

fect at the time that Unit 1 was designated, the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical. 50 C.F.R. § 424.12(e). In part, this preliminary determination provided a limit to the term "essential" as it relates to unoccupied areas. Unoccupied areas could be essential only if occupied areas were found to be inadequate for conserving the species. *See Bear Valley Mut. Water Co.*, 790 F.3d at 994 (recognizing that the inadequacy and essentiality requirements overlap). Here, the Service made that threshold inadequacy determination—a determination that the Landowners do not challenge.

Next, under the ESA itself, the Service can designate unoccupied land only if it is "essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). "Conservation" is defined as "the use of all methods and procedures which are *necessary* to bring any endangered species . . . to the point at which the measures provided . . . are no longer necessary." *Id.* § 1532(3) (emphasis added). In light of this definition, we find implausible the Landowners' parade of horribles in which they suggest that, if the Service can designate an area like Unit 1 as critical habitat, it could designate "much of the land in the United States" as well. They contend that "[b]ecause any land may conceivably be turned into suitable habitat with enough time, effort, and resources, th[e] [Service's] interpretation gives the Service nearly limitless authority to burden private lands with a critical habitat designation." But we find it hard to see how the Service would be able to satisfactorily explain why randomly chosen land—whether an empty field or, as the Landowners suggest, land covered in "buildings" and "pavement"—would be any

more "necessary" to a given species' recovery than any other arbitrarily chosen empty field or paved lot.[18] Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[19]

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[18] Nor do we see how the Service could justify designating land that *objectively*—that is, for scientific reasons—could never contribute to the conservation of a species—say, for example, if the ephemeral ponds were located within a toxic spill zone that scientists concluded could not be remediated. Where we differ critically from the dissent is on the question whether the ESA provides any basis for taking into account *subjective* third-party intentions when determining whether land could contribute to the conservation of a species. We hold that it does not. Under our approach, it would still be arbitrary and capricious for the Service to label as essential land that is *objectively* impossible to use for conservation. *See Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (finding the National Highway Traffic Safety Administration's rescission of a rule requiring passive restraints in automobiles arbitrary and capricious because the agency did not provide a "rational connection between the facts found and the choice made"); *see also Arizona Cattle Growers' Ass'n v. U.S. Fish & Wildlife, Bureau of Land Mgmt.*, 273 F.3d 1229, 1243–44 (9th Cir. 2001) (finding the Fish and Wildlife Service's issuance of an incidental-take statement arbitrary and capricious because the evidence linking cattle grazing to an effect on the razorback sucker was too speculative and "woefully insufficient"); *Chem. Mfrs. Ass'n v. E.P.A.*, 28 F.3d 1259, 1265–66 (D.C. Cir. 1994) (finding the Environmental Protection Agency's final rule designating a pollutant as high risk arbitrary and capricious because "there [was] simply no rational relationship between the model [used in making the determination] and the known behavior of the hazardous air pollutant to which it [was] applied").

[19] We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceiva-

In addition, the ESA requires the Service to base its finding of essentiality on "the best scientific data available." *Id.* § 1533(b)(2). This requirement further cabins the Service's power to make critical-habitat designations. Here, the Final Designation was based on the scientific expertise of the agency's biologists and outside gopher frog specialists. If this scientific support were not in the record, the designation could not stand.[20] But that is not the situation here, and

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ble that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Dissent at 13-14. Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it." Dissent at 6 (emphasis added).

[20] The dissent also takes aim at our acceptance of the Service's scientifically grounded essentiality finding in this case, contending that, under our decision, the Service can designate any land as critical habitat whenever it contains a single one of the "physical or biological features" essential to the conservation of the species at issue. 16 U.S.C. § 1532(5)(A)(i). Dissent at 14-15. We create no such generalized rule. We hold only that *in this case*, substantial, consensus, scientific evidence in the record supports the Service's conclusion that the ephemeral ponds present on Unit 1 are essential for the conservation of the dusky gopher frog. *See, e.g.*, Final Designation, 77 Fed. Reg. at 35123 (summarizing the scientific consensus that the rarity of isolated, ephemeral ponds "is a limiting factor in dusky gopher frog recovery"). The ponds cannot be separated from the land that contains them. Thus, if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky

the Landowners do not challenge the consensus scientific data on which the Service relied. The Landowners have not shown that the Service employed an interpretation of the ESA that is inconsistent with the meaningful limits that the ESA and the agency's implementing regulations set on the Service's authority to designate unoccupied areas as critical habitat.[21]

In sum, the Landowners have not established that the Service interpreted the ESA unreasonably—and was thus undeserving of *Chevron* deference—when it found that Unit 1 was essential for the conservation of the dusky gopher frog. Likewise, the Landowners have not shown that the Service's essentiality finding failed to "satisfy minimum standards of rationality," *10 Ring Precision*, 722 F.3d at 723, which means that they have not shown that the Service acted arbitrarily or capriciously, either.

Finally, the Landowners contend that it is improper to protect Unit 1 with a critical-habitat desig-

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gopher frog. In general, the dissent seeks to decouple the Service's "essentiality" finding from its scientific determination process, turning it into a purely legal standard. We decline to do so, with the good reason that the ESA specifically requires that critical habitat determinations be based on "scientific data." *See* 16 U.S.C. § 1533(b)(2).

[21] In response to the dissent's policy concerns about ever-expanding designations, we also note that the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation. *See, e.g.*, Removal of the Louisiana Black Bear From the Federal List of Endangered and Threatened Wildlife and Removal of Similarity–of–Appearance Protections for the American Black Bear, 81 Fed. Reg. 13,124, 13,171 (March 11, 2016) (to be codified at 50 C.F.R. pt. 17) (final rule removing Louisiana black bear from endangered species list and, accordingly, "removing the designated critical habitat for the Louisiana black bear").

nation when there are other ways to ensure that Unit 1 will assist with the conservation of the gopher frog. It is true that the Service could manage Unit 1 by purchasing the land. *See* 16 U.S.C. § 1534(a). But the legal availability of other statutory conservation mechanisms, some arguably more intrusive of private property interests, does not undercut the Service's separate statutory duty to designate as critical habitat unoccupied areas that are essential for the conservation of the species. *See id.* § 1533(a)(3)(A)(i) ("The Secretary . . . to the maximum extent prudent and determinable . . . *shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat . . .." (emphasis added)).

In sum, the designation of Unit 1 as critical habitat was not arbitrary and capricious nor based upon an unreasonable interpretation of the ESA. The Service reasonably determined (1) that designating occupied habitat alone would be inadequate to ensure the conservation of the dusky gopher frog and (2) that Unit 1 is essential for the conservation of the frog. We thus agree with Judge Feldman: "the law authorizes such action and . . . the government has acted within the law." *Markle Interests*, 40 F. Supp. 3d at 759–60.

C. Decision Not to Exclude Unit 1

In addition to attacking the Service's conclusion that Unit 1 is essential for the conservation of the dusky gopher frog, the Landowners also challenge the Service's conclusion that the economic impacts on Unit 1 are not disproportionate. *See* Final Designation, 77 Fed. Reg. at 35,141. The Landowners argue that because the benefits of excluding Unit 1 from the designation clearly outweigh the benefits of including it in the designation, the Service's decision is

arbitrary and capricious. The Landowners contend that because Unit 1 is not currently habitable by the dusky gopher frog, the land provides no biological benefit to the frog. They emphasize that Unit 1, by contrast, bears a potential loss of development value of up to $33.9 million over twenty years.

The ESA mandates that the Service "tak[e] into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). After it takes this impact into consideration, the Service

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

Id. (emphasis added). The Service argues that once it has fulfilled its statutory obligation to consider economic impacts, a decision to *not* exclude an area is discretionary and thus not reviewable in court. The Service is correct. Under the APA, decisions "committed to agency discretion by law" are not reviewable in federal court. 5 U.S.C. § 701(a)(2). An action is committed to agency discretion when there is "no meaningful standard against which to judge the agency's exercise of discretion." *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). "[I]f no judicially manageable standards are available for judging how and when an agency should exercise its discretion, then it

is impossible to evaluate agency action for 'abuse of discretion.'" *Id.*

The only other circuit court that has confronted this issue has recognized that there are no manageable standards for reviewing the Service's decision not to exercise its discretionary authority to exclude an area from a critical-habitat designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989–90. It therefore held that the decision not to exclude is unreviewable. *Id.*; *see also Bldg. Indus. Ass'n of Bay Area v. U.S. Dep't of Commerce*, No. 13-15132, 2015 WL 4080761, (9th Cir. July 7, 2015), *aff'g* No. C 11-4118, 2012 WL 6002511 (N.D. Cal. Nov. 30, 2012). Similarly, every district court that has addressed this issue has also held that the decision not to exclude is not subject to judicial review. *See Aina Nui Corp. v. Jewell*, 52 F. Supp. 3d 1110, 1132 n.4 (D. Haw. 2014) ("The Court does not review the Service's ultimate decision not to exclude . . ., which is committed to the agency's discretion."); *Cape Hatteras Access Pres. Alliance v. U.S. Dep't of Interior*, 731 F. Supp. 2d 15, 29 (D.D.C. 2010) ("The plain reading of the statute fails to provide a standard by which to judge the Service's decision not to exclude an area from critical habitat."); *Home Builders Ass'n of N. Cal. v. U.S. Fish & Wildlife Serv.*, No. CIV. S-05-0629, 2006 WL 3190518, at *20 (E.D. Cal. Nov. 2, 2006) ("[T]he court has no substantive standards by which to review the [agency's] decisions not to exclude certain tracts based on economic or other considerations, and those decisions are therefore committed to agency discretion.").

We see no reason to chart a new path on this issue in concluding that we cannot review the Service's decision not to exercise its discretion to exclude Unit

1 from the critical-habitat designation. Section 1533(b)(2) articulates a standard for reviewing the Service's decision to exclude an area. But the statute is silent on a standard for reviewing the Service's decision to *not* exclude an area. Put another way, the section establishes a discretionary process by which the Service *may* exclude areas from designation, but it does not articulate any standard governing when the Service *must* exclude an area from designation. *See Bear Valley Mut. Water Co.*, 790 F.3d at 989 ("[W]here a statute is written in the permissive, an agency's decision not to act is considered presumptively unreviewable because courts lack 'a focus for judicial review . . . to determine whether the agency exceeded its statutory powers.'" (quoting *Heckler*, 470 U.S. at 832). Thus, even were we to assume that the Landowners are correct that the economic benefits of exclusion outweigh the conservation benefits of designation, the Service is still not obligated to exclude Unit 1. That decision is committed to the agency's discretion and is not reviewable.

The Supreme Court's recent decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), does not compel a contrary conclusion. In *Michigan*, the Environmental Protection Agency ("EPA") had interpreted a provision of the Clean Air Act to not require the consideration of costs when deciding whether to regulate hazardous emissions from power plants. *Id.* at 2706. Although the Supreme Court held that the EPA misinterpreted the statute, the Court emphasized that it was not requiring the agency "to conduct a formal cost-benefit analysis in which each advantage and disadvantage is assigned a monetary value." *Id.* at 2711. The Court further explained that "[i]t will be up to the Agency to decide (as always, within the lim-

its of reasonable interpretation) how to account for cost." *Id.*

Unlike the provision of the Clean Air Act at issue in *Michigan*, the ESA explicitly mandates "consideration" of "economic impact." 16 U.S.C. § 1533(b)(2); *see Bennett*, 520 U.S. at 172. The Service fulfilled this requirement by commissioning an economic report by Industrial Economics, Inc. That analysis estimated the economic impact on Unit 1, and to further refine that analysis, it included three impact scenarios. The report noted that Unit 1 bears a potential loss of development value ranging from $0 to $33.9 million over twenty years. *See* Final Designation, 77 Fed. Reg. at 35,140–41; This potential loss depends on a number of contingencies that may or may not arise, including future development projects, the nature of federal agency approval that is required for those projects, and possible limits that are imposed after any consultation that accompanies federal agency action. As has been recently recognized, the statute does not require a particular methodology for considering economic impact. *See Bldg. Indus. Ass'n of Bay Area*, 792 F.3d at 1032–34. And here on appeal, the Landowners do not challenge the methodology that the Service used when analyzing the economic impact on Unit 1; instead, the Landowners challenge the Service's bottom-line conclusion not to exclude Unit 1 on the basis of that economic impact. That conclusion is not reviewable.

II. Commerce Clause

Having concluded that the Service's designation of Unit 1 as critical habitat was not arbitrary and capricious, we must next consider the Landowners' alternative argument that the ESA exceeds Congress's powers under the Commerce Clause. The

Commerce Clause gives Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. In *United States v. Lopez*, the Supreme Court defined three broad categories of federal legislation that are consistent with this power. 514 U.S. 549, 558 (1995). This case concerns the third *Lopez* category—that is, whether the federal action "substantially affect[s] interstate commerce." *Id.* at 558–59 (citations omitted).

The Landowners concede that, "properly limited and confined to the statutory definition," the critical-habitat provision of the ESA is a constitutional exercise of Congress's Commerce Clause authority. They maintain, however, that the designation of Unit 1 as critical habitat for the dusky gopher frog exceeds the scope of an otherwise constitutional power. Viewed this narrowly, the designation of Unit 1 is *intra*state (not *inter*state) activity. The Landowners further argue that "[t]here is simply no rational basis to conclude that the use of Unit 1 will substantially affect interstate commerce." In support of this narrow framing of the issue, the Landowners imply that it is inappropriate to aggregate the effect of designating Unit 1 with the effect of all other critical-habitat designations nationwide. Instead, the Landowners argue that we should analyze the commercial impact of the Unit 1 designation independent of all other designations. But as Judge Feldman explained, "each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce Clause." *Markle Interests*, 40 F. Supp. 3d at 758. We agree with Judge Feldman that "the [Landowners'] constitutional claim is foreclosed by binding precedent." *Id.*

The Supreme Court has outlined four considerations that are relevant when analyzing whether Congress can regulate purely intrastate activities under the third *Lopez* prong. *See United States v. Morrison*, 529 U.S. 598, 609–12 (2000). First, courts should consider whether the intrastate activity "in question has been some sort of economic endeavor." *Id.* at 611. Second, courts should consider whether there is an "express jurisdictional element" in the statute that might limit its application to instances that "have an explicit connection with or effect on interstate commerce." *Id.* at 611–12. The next consideration that should inform the analysis is legislative history and congressional findings on the effect that the subject of the legislation has on interstate commerce. *Id.* at 612. Finally, courts should evaluate whether the link between the intrastate activity and its effect on interstate commerce is attenuated. *Id.* The Landowners' constitutional challenge can be distilled to the question of whether we can properly analyze the Unit 1 designation aggregated with all other critical-habitat designations nationwide. This question falls under the first consideration articulated in *Morrison*. Because the Landowners concede that the critical-habitat provision of the ESA is "within the legitimate powers of Congress," we need focus on only the first consideration if we find that aggregation is appropriate.

The first consideration is whether the regulated intrastate activity is economic or commercial in nature. *Id.* at 611. The question thus arises: what is the regulated activity that we must analyze? *See GDF Realty Invs., Ltd. v. Norton*, 326 F.3d 622, 633 (5th Cir. 2003). In *GDF Realty*, where we examined the

"take" provision[22] of the ESA, we emphasized that we had to analyze the regulation of endangered species takes, not the commercial motivations of the plaintiff—developers who were challenging the statute. *Id.* at 636. Applying *GDF Realty* here, the regulated activity in question is the designation of Unit 1 as critical habitat, not the Landowners' long-term development plans.

The next issue is whether the designation of Unit 1 as critical habitat is economic or commercial in nature. "[W]hether an activity is economic or commercial is to be given a broad reading in this context." *Id.* at 638. In certain cases, an intrastate activity may have a direct relationship to commerce and therefore the intrastate activity alone may substantially affect interstate commerce. Alternatively, "the regulation can reach intrastate commercial activity that by itself is too trivial to have a substantial effect on interstate commerce but which, when aggregated with similar and related activity, can substantially affect interstate commerce." *United States v. Ho*, 311 F.3d 589, 599 (5th Cir. 2002).

The designation of Unit 1 alone may not have a direct relationship to commerce, but under the aggregation principle, the designation of Unit 1 survives constitutional muster. Under this principle, the intrastate activity can be regulated if it is "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Gon-*

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[22] *See* 16 U.S.C. § 1532(19) ("The term 'take' means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."); *id.* § 1538(a)(1)(B) (making it unlawful to "take" an endangered species).

zales v. Raich, 545 U.S. 1, 36 (2005) (quoting *Lopez*, 514 U.S. at 561). Thus, there are two factors we must consider: (1) whether the provision mandating the designation of critical habitat is part of an economic regulatory scheme, and (2) whether designation is essential to that scheme.

We have already concluded that the ESA is an economic regulatory scheme. *See GDF Realty*, 326 F.3d at 639 ("ESA's protection of endangered species is economic in nature."); *id.* at 640 ("ESA is an economic regulatory scheme . . .."). Congress enacted the ESA to curb species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. § 1531(a)(1). Because the ESA's drafters sought to protect the "incalculable" value of biodiversity, the ESA prohibits interstate and foreign commerce in endangered species. *See id.* § 1538(a)(1)(E)–(F); *GDF Realty*, 326 F.3d at 639 (citation omitted). Finally, habitat protection and management—which often intersect with commercial development—underscore the economic nature of the ESA and its critical-habitat provision. *See* 16 U.S.C. § 1533(f)(1)(A) (requiring that the Secretary prioritize implementing recovery plans for "those species that are, or may be, in conflict with construction or other development projects or other forms of economic activity"); *see also id.* § 1533(a)(1)(B) (listing the "overutilization [of a species] for commercial . . . purposes" as one of the factors endangering or threatening species).

But it is not sufficient that the ESA is an economic regulatory scheme. The critical-habitat provision must also be an essential component of the ESA. If the process of designating critical habitat is "an essential part of a larger regulation of economic ac-

tivity," then whether that process—designation—"ensnares some purely intrastate activity is of no moment." *Raich*, 545 U.S. at 22. "[T]he *de minimis* character of individual instances arising under that statute is of no consequence." *Id.* at 17 (citations and internal quotation marks omitted). When Congress has regulated a class of activities, we "have no power to excise, as trivial, individual instances of the class." *Id.* at 23 (citation and internal quotation marks omitted). We conclude that designating critical habitat is an essential part of the ESA's economic regulatory scheme.

This conclusion is consistent with our analysis of the ESA's "take" provision in *GDF Realty*. There, we held that "takes" of an endangered species that lived only in Texas could be aggregated with takes of other endangered species nationwide to survive a Commerce Clause challenge. *GDF Realty*, 326 F.3d at 640–41. That case concerned the Service's regulation of takes of six subterranean endangered species ("the Cave Species") located solely in two counties in Texas. *Id.* at 625. Similar to the Landowners here, the owners of some of the land under which these species lived wanted to develop the land into a commercial and residential area; they sued the government, claiming that the take provision of the ESA, as applied to the Cave Species, exceeded the boundaries of the Commerce Clause. *Id.* at 624, 626. Addressing this claim, we upheld the take provision. We explained that, in the aggregate, takes of all endangered species have a substantial effect on interstate commerce. *See id.* at 638–40. Because of the "interdependence of [all] species," we held that regulating the takes of the Cave Species was an essential part of the larger regulatory scheme of the ESA, in that, without this regulation, the regulatory scheme could

be undercut by piecemeal extinctions. *Id.* at 639–40. Every other circuit court that has addressed similar challenges has also upheld the ESA as a valid exercise of Congress's Commerce Clause power. *See Gibbs v. Babbitt*, 214 F.3d 483, 497–98 (4th Cir. 2000); *San Luis & Delta–Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1177 (9th Cir. 2011); *Wyoming v. U.S. Dep't of Interior*, 442 F.3d 1262, 1264 (10th Cir. 2006) (per curiam), *aff'g* 360 F. Supp. 2d 1214, 1240 (D. Wyo. 2005); *Ala.–Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1274 (11th Cir. 2007); *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1080 (D.C. Cir. 2003); *Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049–57 (D.C. Cir. 1997). The Landowners have not identified any federal court of appeals that has held otherwise.

This caselaw compels the same conclusion here. For one, we see no basis to distinguish the ESA's prohibition on "takes" from the ESA's mandate to designate critical habitat. As Congress recognized, one of the primary factors causing a species to become endangered is "the present or threatened destruction, modification, or curtailment of its habitat or range." 16 U.S.C. § 1533(a)(1)(A). Because of the link between species survival and habitat preservation, the statute imposes a mandatory duty on the Service to designate critical habitat for endangered species "to the maximum extent prudent and determinable." *Id.* § 1533(a)(3)(A). Indeed, the ESA includes an express purpose of conserving "the ecosystems upon which endangered species . . . depend." *Id.* § 1531(b); *see also GDF Realty*, 326 F.3d at 640 ("In fact, according to Congress, the 'essential purpose' of the ESA is 'to protect the ecosystems upon which we and other species depend.'" (quoting H.R. Rep. No. 93–412, at 10)). Allowing a particular critical habi-

tat—one that the Service has already found to be essential for the conservation of the species—to escape designation would undercut the ESA's scheme by leading to piecemeal destruction of critical habitat. We therefore conclude that the critical-habitat provision is an essential part of the ESA, without which the ESA's regulatory scheme would be undercut. *Cf. Ala.–Tombigbee Rivers Coal.*, 477 F.3d at 1274 (holding that "the 'comprehensive scheme' of species protection contained in the Endangered Species Act has a substantial effect on interstate commerce" and that the process of listing species as endangered or threatened is "an essential part of that larger regulation of economic activity" (citation and internal quotation marks omitted)).

Given this conclusion, the designation of Unit 1 may be aggregated with all other critical-habitat designations. As Judge Feldman correctly observed, "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power to excise, as trivial, individual instances of the class." *Markle Interests*, 40 F. Supp. 3d at 759 (alteration in original) (quoting *Raich*, 545 U.S. at 23) (internal quotation marks omitted). "[W]hen a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." *Raich*, 545 U.S. at 17 (citations and internal quotation marks omitted). We therefore will not look at the designation of Unit 1 in isolation, but instead we consider it aggregated with all other critical-habitat designations. Judge Feldman reached the same conclusion, explaining that, "[a]ggregating the regulation of activities that adversely modify the frog's critical habitat"—including the isolated designation of Unit 1—"with the regula-

tion of activities that affect other listed species' habitat, the designation of critical habitat by the [Service] is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme." *Markle Interests*, 40 F. Supp. 3d at 759. Because the Landowners concede that the critical-habitat provision of the ESA is a valid exercise of Congress's Commerce Clause authority, we can likewise conclude that the application of the ESA's critical-habitat provision to Unit 1 is a constitutional exercise of the Commerce Clause power.[23]

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[23] Although the Landowners' concession truncates our analysis, we observe that the other three considerations articulated in *Morrison* also weigh in favor of concluding that the critical-habitat provision of the ESA is constitutional as applied to the dusky gopher frog. Although there is no jurisdictional element in the statute limiting its application to instances affecting interstate commerce, the "interdependence of species" underscores that critical-habitat designations affect interstate commerce. *GDF Realty*, 326 F.3d at 640. In this sense, the ESA's critical-habitat provision "*is limited* to instances which 'have an explicit connection with or effect on interstate commerce.'" *Id.* (quoting *Morrison*, 529 U.S. at 611–12).

Next, the congressional findings, legislative history, and statutory provisions indicate that the regulated activity has an effect on interstate commerce. *See* 16 U.S.C. § 1531(a)(1) ("The Congress finds and declares that . . . various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation . . .."); *id.* § 1533(a)(1)(A)–(B) (acknowledging "the present or threatened destruction, modification, or curtailment of [a species's] habitat or its range" and the "overutilization [of species] for commercial . . . purposes" as factors leading to species endangerment); *Tenn. Valley Auth.*, 437 U.S. at 177–78 (summarizing the legislative history of the ESA); *Gibbs*, 214 F.3d at 495 (discussing the legislative history of the ESA and the possibility of renewing a commercial market in a species once it is no longer endangered or threatened (citing S. Rep. No. 91-526, at 3 (1969))); *see also San Luis & Delta–Mendota Water Auth.*, 638 F.3d at 1176.

Finally, the link between critical-habitat designation and its effect on interstate commerce is not too attenuated. The ESA is economic in na-

III. National Environmental Policy Act

Finally, the Landowners contend that the Service violated NEPA by failing to prepare an environmental impact statement before designating Unit 1 as critical habitat. If proposed federal action will "significantly affect [ ] the quality of the human environment," NEPA requires the relevant federal agency to provide an environmental impact statement for the proposed action. 42 U.S.C. § 4332(2)(C). In *Sabine River Authority*, we explained that an environmental impact statement "is not required for *non* major action or a major action which does not have *significant* impact on the environment." 951 F.2d at 677 (citation and internal quotation marks omitted). This standard necessarily means that if federal action will not result in *any* change to the environment, then the action does not trigger NEPA's impact-statement requirement. *See id.* at 679 (noting that federal action "did not effectuate *any* change to the environment which would otherwise trigger the need to prepare an [environmental impact statement]"); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) (explaining that no

ture, and Congress has made critical-habitat designation a mandatory component of the regime. *See* 16 U.S.C. § 1533(a)(3)(A)(i) (stating that the Service "*shall* . . . designate any habitat of [an endangered] species which is then considered to be critical habitat" (emphasis added)). Moreover, as this case highlights, any future regulation of Unit 1 or other critical habitat would occur if the Landowners' commercial development plans triggered Section 7 consultation. Thus, the link to interstate commerce is not too attenuated for purposes of Commerce Clause analysis. *See Morrison*, 529 U.S. at 611 (explaining that the statutes challenged in *Lopez* and *Morrison* fell outside Congress's Commerce Clause authority because "neither the actors nor their conduct ha[d] a commercial character, and neither the purposes nor the design of the statute ha[d] an evident commercial nexus" (citation and internal quotation marks omitted)). For these additional reasons, the application of the ESA's critical-habitat provision is constitutional as applied to the dusky gopher frog.

environmental impact statement is required if health damage stemming from federal action "would not be proximately related to a change in the physical environment"); *City of Dallas, Tex. v. Hall*, 562 F.3d 712, 723 (5th Cir. 2009) (holding that an environmental impact statement was not required when the federal action "[did] not effect a change in the use or character of land or in the physical environment").

Judge Feldman correctly held that the designation of Unit 1 does not trigger NEPA's impact-statement requirement because the designation "does not effect changes to the physical environment." *Markle Interests*, 40 F. Supp. 3d at 768. The designation also does not require the Landowners to take action as a result of the designation. As Judge Feldman correctly observed, "the ESA statutory scheme makes clear that [the Service] has no authority to force private landowners to maintain or improve the habitat existing on their land." *Id.* (footnote and citation omitted). We agree that the Service was not required to complete an environmental impact statement before designating Unit 1 as critical habitat for the dusky gopher frog.

Alternatively, this claim is resolved on the threshold issue of the Landowners' standing to raise this NEPA claim. A plaintiff bringing a claim under NEPA must not only have Article III standing to pursue the claim, but also fall within the zone of interests sought to be protected under the statute. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); *Sabine River Auth.*, 951 F.2d at 675 (recognizing that the zone-of-interests test applies to challenges under NEPA). Other circuit courts have held that "a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action

under NEPA." *Nev. Land Action Ass'n v. U.S. Forest Serv.*, 8 F.3d 713, 716 (9th Cir. 1993) (citing cases from the Fourth, Eighth, Ninth, and D.C. Circuits). Consistent with this conclusion, we have observed in dicta that a "disappointed contractor" who was injured by an easement that prevented development opportunities would not have standing under the zone-of-interests test because "NEPA was not designed to protect contractors' rights: it was designed to protect the environment." *Sabine River Auth.*, 951 F.2d at 676. The Landowners' asserted injuries here are similarly economic, not environmental: lost future development and lost property value. These economic injuries do not fall within the zone of interests protected by NEPA, and the Landowners therefore lack standing to sue to enforce NEPA's impact-statement requirement.

CONCLUSION

For the reasons stated above, we AFFIRM the judgment of the district court.

PRISCILLA R. OWEN, *Circuit Judge*, dissenting:

There is a gap in the reasoning of the majority opinion that cannot be bridged. The area at issue is not presently "essential for the conservation of the [endangered] species"[1] because it plays no part in the conservation of that species. Its biological and physical characteristics will not support a dusky gopher frog population. There is no evidence of a reasonable probability (or any probability for that matter) that it will become "essential" to the conservation of the species because there is no evidence that the substantial alterations and maintenance necessary to transform the area into habitat suitable for the endangered species will, or are likely to, occur. Land that is not "essential" for conservation does not meet the statutory criteria for "critical habitat."[2]

The majority opinion interprets the Endangered Species Act[3] to allow the Government to impose restrictions on private land use even though the land: is not occupied by the endangered species and has not been for more than fifty years; is not near areas inhabited by the species; cannot sustain the species without substantial alterations and future annual maintenance, neither of which the Government has the authority to effectuate, as it concedes; and does not play any supporting role in the existence of cur-

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[1] 16 U.S.C. § 1532(5)(A)(ii) ("The term 'critical habitat' for a threatened species means . . . specific areas outside the geographical area occupied by the species at the time it is listed [as endangered], upon a determination by the Secretary that such areas are essential for the conservation of the species.").

[2] *Id.*

[3] *Id.* § 1531 *et seq.*

rent habitat for the species. If the Endangered Species Act permitted the actions taken by the Government in this case, then vast portions of the United States could be designated as "critical habitat" because it is theoretically possible, even if not probable, that land could be modified to sustain the introduction or reintroduction of an endangered species.

The majority opinion upholds the governmental action here on nothing more than the Government's *hope* or speculation that the landowners and lessors of the 1,544 acres at issue will pay for removal of the currently existing pine trees used in commercial timber operations and replace them with another tree variety suitable for dusky gopher frog habitat, and perform other modifications as well as future annual maintenance, that might then support the species if, with the landowners' cooperation, it is reintroduced to the area. The language of the Endangered Species Act does not permit such an expansive interpretation and consequent overreach by the Government.

Undoubtedly, the ephemeral ponds on the property at issue are somewhat rare. But it is undisputed that the ponds cannot themselves sustain a dusky gopher frog population. It is only with significant transformation and then, annual maintenance, each dependent on the assent and financial contribution of private landowners, that the area, including the ponds, might play a role in conservation. The Endangered Species Act does not permit the Government to designate an area as "critical habitat," and therefore use that designation as leverage against the landowners, based on one feature of an area when that one feature cannot support the existence

of the species and significant alterations to the area as a whole would be required.

The majority opinion's holding is unprecedented and sweeping.

I

A Final Rule[4] of the United States Fish and Wildlife Service (the "Service") designated 12 units of land encompassing 6,477 acres as "critical habitat"[5] for the dusky gopher frog. Eleven of those units, totaling 4,933 acres, are in four counties in Mississippi,[6] and they are not at issue in this appeal. It is only the owners and lessors of the twelfth unit, comprised of 1,544 acres in Louisiana and denominated Unit 1 by the Service,[7] that have appealed the designation. The dusky gopher frog species was last seen in Louisiana in 1965 in one small pond located on Unit 1.[8]

The Service specifically found in its Final Rule that Unit 1 contains only one of the physical or biological features and habitat characteristics required to sustain the species' life-history processes.[9] That characteristic is the existence of five ephemeral ponds on the Louisiana property. The Service acknowledged that the other necessary characteristics were lacking, finding, among its other conclusions, that "the surrounding uplands are poor-quality

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[4] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012).

[5] 16 U.S.C. § 1532(5)(A).

[6] 77 Fed. Reg. at 35,118.

[7] *Id.* at 35,118, 35,135.

[8] *Id.* at 35,135.

[9] *Id.* at 35,131.

terrestrial habitat for dusky gopher frogs."[10] While the Service was of the opinion that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort"[11] to permit habitation, the Service candidly recognized in the Final Rule that it could not undertake any efforts to change the current features of the land or to move frogs onto the land without the permission and cooperation of the owners of the land.[12] It cited no evidence, and there is none, that "reasonable efforts" would in fact be made to restore "the essential physical or biological features of critical habitat" on Unit 1. The Service cited only its "hope" that such alterations would be taken by the landowners.[13]

In particular, the Service found that an open-canopied longleaf pine ecosystem is necessary for the habitat of this species of frog.[14] Approximately ninety percent of the property is currently covered with closed-canopy loblolly pine plantations. These trees would have to be removed or burned and then re-

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[10] *Id.* at 35,133.

[11] *Id.* at 35,135.

[12] *Id.* at 35,123 ("Although we have no existing agreements with the private landowners of Unit 1 to manage this site to improve habitat for the dusky gopher frog, or to move the species there, we hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property . . .. However, these tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner.").

[13] *Id.* (noting "we hope to work with the landowners").

[14] *Id.* at 35,129.

placed with another tree variety to allow the establishment of the habitat that the Service has concluded is necessary for the breeding and sustaining of a dusky gopher frog population. It is undisputed that the land is subject to a timber lease until 2043, timber operations are ongoing, and neither the owner of the property nor the timber lessee is willing to permit the substantial alterations that the Service concluded would be necessary to restore the potentiality of the ponds and surrounding area as habitat for this species of frog.

II

Review of the Service's decisions under the Endangered Species Act is governed by the Administrative Procedure Act (APA).[15] The Service's designation of the land at issue as "critical habitat" was "not in accordance with law" and was "in excess of statutory . . . authority" within the meaning of the APA.[16]

The Endangered Species Act defines "critical habitat" as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I)

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[15] 5 U.S.C. §§ 702, 704, 706; *see Bennett v. Spear*, 520 U.S. 154, 171–75, (1997) (holding that a claim of the Service's "maladministration of the ESA" is not reviewable under 16 U.S.C. § 1540(g)(1)(A) or (C) (citizen-suit provisions of the ESA) but is reviewable under the APA); 5 U.S.C. § 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.").

[16] 5 U.S.C. § 706(2)(A), (C).

> essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.[17]

The Final Rule reflects that "Unit 1 is not currently occupied nor was it occupied at the time the dusky gopher frog was listed [as an endangered species]."[18] Accordingly, the authority of the Service to designate this area as "critical habitat" is governed by subsection (ii). The statute requires that Unit 1 must be "essential for the conservation of the species" or else it cannot be designated as "critical habitat."

The word "essential" means more than desirable. Black's Law Dictionary defines "essential" as "**2.** Of the utmost importance; basic and necessary. **3.** Having real existence, actual."[19] The Service's conclusion that Unit 1 is "essential" for the conservation of the dusky gopher frog contravenes these definitions. Unit 1 is not "actual[ly]" playing any part in the conservation of the endangered frog species. Nor is land "basic and necessary" for the conservation of a species when it cannot support the existence of the en-

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[17] 16 U.S.C. 1532(5)(A)(ii).

[18] Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,123 (June 12, 2012).

[19] BLACK'S LAW DICTIONARY (10th ed. 2014) (emphasis in original).

dangered species unless the physical characteristics of the land are significantly modified. This is particularly the case when the Government is powerless to effectuate the desired transformation unless it takes (condemns) the property and funds these efforts. There is no evidence that the modifications and maintenance necessary to transform Unit 1 into habitat will be undertaken by anyone.

The Government's, and the majority opinion's, interpretation of "essential" means that virtually any part of the United States could be designated as "critical habitat" for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it. This is not a reasonable construction of § 1532(5)(A)(2).

We are not presented with a case in which land, though unoccupied by an endangered species, provides elements to neighboring or downstream property that are essential to the survival of the species in the areas that it does occupy. For example, the Ninth Circuit concluded that certain areas, though unoccupied, were "essential" to an endangered species (the Santa Ana sucker, a small fish) because the designated areas were "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and that "coarse sediment was essential to the sucker because [it] provided a spawning ground as well as a feeding ground from which the sucker obtained algae, insects, and detritus."[20] In the present case, Unit 1 does not support, in any way, the existence of the

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[20] *Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 994 (9th Cir. 2015).

dusky gopher frog or its habitat. Our analysis therefore concerns only whether the property is "essential for the conservation of the species" as an area that *might* be capable of occupation by the dusky gopher frog if the area were physically altered.

The majority opinion cites the Ninth Circuit's decision regarding the Santa Ana sucker as support for the majority opinion's assertion that "[t]here is no habitability requirement in the text of the ESA or the implementing regulations. The statute requires the Service to designate 'essential' areas, without further defining 'essential' to mean 'habitable.'"[21] I agree with that statement—up to a point. Land can be "essential" even though uninhabitable if it provides elements to the species' habitat that are essential to sustain it, as was the case regarding the Santa Ana sucker. The majority opinion says instead that land can be designated as "critical habitat" even if it is not habitable and does not play any role in sustaining the species. The Ninth Circuit did not announce such a sweeping interpretation of the Endangered Species Act. That court held only that land not occupied by the species could constitute critical habitat because of the "essential" role it played in the survival of species as the primary source of sediment necessary for the spawning of the species.[22] The majority opinion has not cited any decision from the Supreme Court or a Court of Appeals which has construed the Endangered Species Act to allow designation of land that is unoccupied by the species, cannot be occupied by the species unless the land is signifi-

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[21] *Ante* at 19.

[22] *Bear Valley*, 790 F.3d at 994.

cantly altered, and does not play any supporting role in sustaining habitat for the species.

The meaning of the word "essential" undoubtedly vests the Service with significant discretion in determining if an area is "essential" to the conservation of a species, but there are limits to a word's meaning and hence the Service's discretion. The Service's interpretation of "essential for the conservation of the species"[23] in the present case goes beyond the boundaries of what "essential" can reasonably be interpreted to mean. As the Supreme Court has explained, "an agency's interpretation of a statute is not entitled to deference when it goes beyond the meaning that the statute can bear."[24]

In *MCI Telecommunications Corp. v. AT&T Co.*, 23 U.S.C. § 203(a) required long-distance communications common carriers to file tariffs with the Federal Communications Commission (FCC).[25] The FCC was authorized under 23 U.S.C. § 203(b)(2) to "'modify any requirement made by or under the authority of this section either in particular instances or by general order applicable to special circumstances or conditions.'"[26] In a rulemaking proceeding, the FCC made rate tariff filings optional for all non-dominant long-distance carriers.[27] In subsequent proceedings, AT&T challenged the FCC's statutory authority to do so, and the FCC took the position that its authority

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[23] 16 U.S.C. § 1532(5)(A)(ii).

[24] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994) (citing *Pittston Coal Grp. v. Sebben*, 488 U.S. 105, 113 (1988)).

[25] *Id.* at 220.

[26] *Id.* at 224 (quoting 47 U.S.C. § 203(b)(2)).

[27] *Id.* at 220.

was derived from the "modify any requirement" provision in § 203(b). The Supreme Court determined that "modify" "connotes moderate change,"[28] and examined extensively other provisions of the Communications Act.[29] The Supreme Court concluded that eliminating tariff rate filings for a segment of the industry was "much too extensive to be considered a 'modification.'"[30] The Court observed, "[w]hat we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common-carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934."[31] The same can be said of the Service's, and the majority opinion's, construction of the Endangered Species Act in the present case. It may be a good idea to permit the Service to designate any land as "critical habitat" if it is theoretically possible to transform land that is uninhabitable into an area that could become habitat. But that is not what Congress did.

The District of Columbia Circuit Court held in *Southwestern Bell Corp. v. FCC* that an agency's interpretation of a statute is not entitled to deference when that interpretation " 'goes beyond the meaning that the statute can bear.'"[32] That court was fully

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[28] *Id.* at 228.

[29] *Id.* at 229–31.

[30] *Id.* at 231.

[31] *Id.* at 231–32.

[32] 43 F.3d 1515, 1521 (D.C. Cir. 1995).

cognizant of *Chevron*'s[33] teaching that "'if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.'"[34] In *Southwestern Bell*, the FCC contended that because the term "schedules" was not defined in the Federal Communications Act, the FCC could permit carriers to file ranges of rates rather than specific rates.[35] The District of Columbia Circuit disagreed, concluding that "[s]ection 203(a) . . . lays out what kind of filing the statute requires: 'schedules showing all charges.' This language connotes a specific list of discernable rates; it does not admit the concept of ranges."[36]

The majority opinion says that *MCI Telecommunications Corp.* is distinguishable because in that case, the agency's interpretation of "modify" "flatly contradicted the definition provided by 'virtually every dictionary [the Court] was aware of.'"[37] The majority opinion then observes that one definition of "essential" is "of the utmost importance; basic and necessary," and concludes that this definition "describes well a close system of ephemeral ponds, per the sci-

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[33] *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

[34] *Sw. Bell Corp.*, 43 F.3d at 1521 (quoting *Nat'l R.R. Passenger Corp. v. Boston & Maine Corp.*, 503 U.S. 407, 417 (1992)).

[35] *Id.*

[36] *Id.*; *see also id.* ("Section 203(a) requires the filing of 'schedules showing all charges,' which clearly suggests something more definite and specific than rate ranges.").

[37] *Ante* at 19 n.15 (alteration in original) (quoting *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229 (1994)).

entific consensus that the Service relied upon."[38] This highlights the opinion's misdirected focus and frames the question that is at the heart of this case. That question is whether the Endangered Species Act permits the Service to designate land as critical habitat when the land has only one physical or biological feature that would be necessary to support a population of the endangered species but lacks the other primary physical or biological features that are also necessary for habitat. It is undisputed that ephemeral ponds alone cannot support a dusky gopher frog population. All likewise agree that Unit 1 lacks the other two primary constituent elements, which are upland forested nonbreeding habitat dominated by longleaf pine maintained by fires, and upland habitat between breeding and nonbreeding habitat with specific characteristics including an open canopy, native herbaceous species, and subservice structures. Unit 1 is not "essential [i.e., of the utmost importance; basic and necessary] for the conservation of the species"[39] because it cannot serve as habitat unless the forests in the areas upland from the ponds are destroyed and the requisite vegetation (including a new forest) is planted and maintained. Because there is no reasonable probability that Unit 1 will be altered in this way, it is not "essential."

The Service's implicit construction of the meaning of "essential for the conservation of the species" is not entitled to deference because it exceeds the boundaries of the latitude given to an agency in construing a statute to which *Chevron* deference is applicable. The term "essential" cannot reasonably be

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[38] *Id.*

[39] 16 U.S.C. § 1532(5)(A)(ii).

construed to encompass land that is not in fact "essential for the conservation of the species." When the only possible basis for designating an area as "critical habitat" is its potential use as actual habitat, an area cannot be "essential for the conservation of the species" if it is uninhabitable by the species and there is no reasonable probability that it will become habitable by the species. Even if scientists agree that an area *could* be modified to sustain a species, there must be some basis for concluding that it is likely that the area will be so modified. Otherwise, the area could not and will not be used for conservation of the species and therefore cannot be "essential" to the conservation of the species.

With great respect, at other junctures, the majority opinion misdirects the inquiry as to the proper meaning of "essential for the conservation of the species." The opinion examines an irrelevant question in arguing that there is no "temporal requirement" in the text of the Endangered Species Act. For example, the opinion states that the Service is not required "to know when a protected species will be conserved as a result of a designation."[40] Similarly, the majority opinion observes that the Act does not "set[ ] a deadline for achieving this ultimate conservation goal."[41] I agree. The Act does not require the Service to speculate whether or when an endangered species will no longer require conservation efforts at the time the Service designates "critical habitat." But in designating an area as "critical habitat," the question is not

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[40] *Ante* at 21.

[41] *Id*; *see also id.* ("And the Landowners do not explain why it is impossible to make an essentiality determination without determining when (or whether) the conservation goal will be achieved.").

when the species will be conserved, which is the question that the majority opinion raises and then dismisses. Nor is it a question of *when* the area will be essential. Rather, the pertinent inquiry is *whether* the area is *essential for conservation*. An area cannot be essential for use as habitat if it is uninhabitable and there is no reasonable probability that it could actually be used for conservation.

The majority opinion fails to discern the meaningful boundary that the term "essential" places on the Service in designating "critical habitat." The opinion fails to appreciate the distinction between land that, because of its physical and biological features, cannot be used for conservation without significant alteration and land that is actually habitable but not occupied by the species.[42] The majority opinion posits that "[the Landowners' logic] would also seem to allow landowners whose land is immediately habitable to block a critical-habitat designation merely by declaring that they will not—now or ever—permit the reintroduction of the species to their land."[43] The fact that a landowner is unwilling to permit the reintroduction of a species does not have a bearing on whether the physical and biological features of the land make it suitable as habitat. Land that is habitable but unoccupied by the species may be "essential" if the areas that a species currently occupies are inadequate for its survival. Even if the landowner asserts that it will not allow introduction of the species, the Service may designate the land as "critical habitat" because it is in fact habitable, and the consultation and permitting provisions of the Act

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[42] *See ante* at 22.

[43] *Id.*

may be used to attempt to persuade the owner to not destroy the features that make the area habitable and to allow the species to be reintroduced. However, when land would have to be significantly modified to either serve as habitat or to serve as a source of something necessary to another area that is habitat (such as the sediment in the Santa Ana sucker case), then whether there is a probability that the land will be so modified must be part of the equation of whether the area is "essential." Unless the land is modified, it is useless to the species and therefore cannot be "essential." Under such circumstances, the Service cannot designate land as "critical habitat" unless there is an objective basis for concluding that modifications will occur because otherwise, the land cannot play a role in the species' survival.

The majority opinion rejects the logical limits of the word "essential" in concluding that requiring either actual use for conservation or a reasonable probability of use for conservation to satisfy the "essential for the conservation of the species" requirement in the statute would be reliant on the subjective intentions of landowners.[44] Whether there is a reasonable probability that land will be modified so that it is suitable as habitat is an objective inquiry that would consider many factors. Those factors might well (and in most instances probably would) include economic considerations such as the values of various uses of the land. The inquiry would be whether a reasonable landowner would be likely to undertake the necessary modifications. In some cases, a landowner might have entered into an agreement to modify land so that it may be used as habi-

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[44] *See ante* at 22 n.17; 24 n.18.

tat, and in such a case, there would be nothing "subjective" in concluding that it is reasonably probable that the land will actually be used as habitat and therefore "essential" for the conservation of the species.

The majority opinion's interpretation of the Endangered Species Act is illogical, inconsistent, and depends entirely on adding words to the Act that are not there. Those words are "a critical feature."[45] On one hand, the majority opinion says that "we find it hard to see how the Service would be able to satisfactorily explain" the designation of an empty field as habitat."[46] Yet, in the next paragraph, the opinion says that because the designation in this case "was based on the scientific expertise of the agency's biologists and outside gopher frog specialists," this court is required to affirm the "critical habitat" designation.[47] It is easily conceivable that "the best scientific data available"[48] would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species.

Apparently recognizing that unless cabined in some way, the majority opinion's holding would give the Service unfettered discretion to designate land as "critical habitat" so long as scientists agree that un-

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[45] *Ante* at 24-25 ("Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justified its finding that Unit 1 was essential for the conservation of the dusky gopher frog.").

[46] *Ante* at 24.

[47] *Ante* at 25.

[48] 16 U.S.C. § 1533(b)(2).

inhabitable land can be transformed into habitat, the majority opinion asserts that at least one "physical or biological feature[ ] . . . essential to the conservation of the species"[49] must be present to permit the Service to declare land that is uninhabitable by the species to be "critical habitat." It must be emphasized that this is *the linchpin* to the majority's holding. When the only potential use of an area for conservation is use as habitat, the Service cannot designate uninhabitable land as "critical habitat," the majority opinion concedes, even if scientists agree that the land could be altered to become habitat.[50] But, the opinion says, if, as in the present case, there is at least one physical or biological feature essential to the conservation of the species (also denominated by the Service as a primary constituent element, as explained in footnote 12 of the majority opinion), the presence of one, *and only one*, of three indispensable physical or biological features required for habitat is sufficient to allow the Service to designate uninhabitable land as "critical habitat." The opinion says:

> Here, the Service confirmed through peer review and two rounds of notice and comment a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—which justi-

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[49] *Id.* § 1532(5)(A)(i).

[50] *Ante* at 25 n.19 ("Even assuming that [the best scientific data available would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species], it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species.").

> fied its finding that Unit 1 was essential for the conservation of the dusky gopher frog.[51]

This re-writes the Endangered Species Act. It permits the Service to designate an area as "critical habitat" if it has "*a critical feature*" even though the area is uninhabitable and does not play a supporting role to an area that is habitat. Neither the words "a critical feature" nor such a concept appear in the Act. The touchstone chosen by Congress was "essential." The existence of a single, even if rare, physical characteristic does not render an area "essential" when the area cannot support the species because of the lack of other necessary physical characteristics.

The majority opinion's reasoning also suffers from internal inconsistency. The opinion asserts that, unlike land that is occupied by the species, there is no requirement under the Endangered Species Act that *unoccupied* land "must contain all of the relevant [physical or biological features]"[52] that are "essential to the conservation of the species"[53] before the Secretary may designate it as critical habitat.[54] This clearly implies, if not states, that the Secretary can designate unoccupied land as critical habitat even if the land has no primary constituent physical or biological element (to use the Service's vernacular) essential to the conservation of the species.[55] If land

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[51] *Ante* at 24–25.

[52] *Ante* at 20 (alteration in original) (quoting *Markle Interests, LLC v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)).

[53] 16 U.S.C. § 1532(5)(A)(ii).

[54] *See also ante* at 20.

[55] *See also id.* ("[T]he plain text of the ESA does not require Unit 1 to be habitable.").

can be "essential for the conservation of the species" even when it has no physical or biological features essential to the conservation of the species, then what, exactly, is it about the land that permits the Service to find it "essential"? The majority opinion does not answer this question. Instead, a few pages after making the assertion that unoccupied land can be designated even when it has no features essential to the conservation of the species, the opinion rejects this proposition.[56] The majority opinion says (in attempting to counter the argument that its holding would permit the Service to designate an empty field as critical habitat even though not habitable) that it would be arbitrary and capricious for the Service to find an empty field "essential" if there were other similar fields.[57] The opinion concludes that if land that is uninhabitable could be modified to become habitat, the Service could not deem the land "essential" if there were other parcels of land similar to it that could also be modified:

> We fail to see how the Service would be able to similarly justify as rational an essentiality finding as to arbitrarily chosen land. In contrast, the dissent, similar to the Landowners, contends that "[i]t is easily conceivable that 'the best scientific data available' would lead scientists to conclude that an empty field that is not currently habitable could be altered to become habitat for an endangered species." Even assuming that to be true, it does not follow that scientists or the Service would or could then reasonably call an empty field *essential* for the conservation of a species. If the field in question were no different than

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[56] *See ante* at 25 n.19.

[57] *Id.*

any other empty field, what would make it essential? Presumably, if the field could be modified into suitable habitat, so could any of the one hundred or one thousand other similar fields. If the fields are fungible, it would be arbitrary for the Service to label any single one "essential" to the conservation of a species. It is only by overlooking this point that the dissent can maintain that our approval of the Service's reading of "essential" will "mean[ ] that virtually *any* part of the United States could be designated as 'critical habitat' for any given endangered species so long as the property could be modified in a way that would support introduction and subsequent conservation of the species on it."[58]

I have difficulty with this reasoning. There is undeniably a textual difference in the Endangered Species Act between the sections dealing with an area occupied by the species and an area unoccupied by that species. If Congress did in fact intend to authorize the Service to designate unoccupied land as "critical habitat" even if it had no "physical or biological features . . . essential to the conservation of the species" but could be modified to become habitat, then it would not seem to be arbitrary or capricious for the Service to designate any particular parcel of land as critical habitat, even if there were other similar lands. The intent of Congress would be that land can be designated if the survival of the species depends on creating habitat for it. If this were in fact the intent of Congress, it would not be reasonable to say that because there is an abundance of land that could be modified to save the species, none of it can be designated. But the majority opinion is unwilling

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[58] *Id.* (citation omitted).

to construe the Act in such a manner, because, as the opinion explains, Congress used the word "essential" as a meaningful limit on the authority of the Service to designate "critical habitat." The opinion reasons, "[i]f the fields [that could be modified] are fungible, it would be arbitrary for the Service to label any single one 'essential' to the conservation of the species."[59] Acknowledging that land lacking any features necessary for habitat cannot be "essential" to the conservation of the species, the opinion finds it necessary to construct a tortured interpretation of the Act to affirm what the Service has done in this case. That interpretation is as follows: land with *no* physical or biological features essential to the conservation of the species that is not occupied by the species but could be modified to become habitable can be deemed "essential" and designated as critical habitat, but only if there are virtually no other tracts similar to it, *or* land that is uninhabitable by the species but that has *at least one* physical or biological feature can be designated as critical habitat if the land can be modified to create all the other physical or biological features necessary to transform it into habitat for the species. I do not think that the word "essential" can bear the weight that the majority opinion places upon it in arriving at its interpretation of the Act.

The majority opinion strenuously denies that its holding allows the Service to "designate any land as critical habitat whenever it contains a single one of the 'physical or biological features' essential to the conservation of the species at issue."[60] But the opinion's ensuing explanation illustrates that is precisely

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[59] *Id.*

[60] *Ante* at 25 n.20 (quoting 16 U.S.C. § 1532(5)(A)(i)).

the import of its holding: "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[61] The Service itself found, based on scientific data, that the ponds are only one of three "primary constituent elements" that are "essential to the conservation of the species."[62] The other two primary constituent elements are not present on Unit 1 and would require substantial modification of Unit 1 to create them.[63]

The Service's construction of the Endangered Species Act is not entitled to any deference because it goes beyond what the meaning of "essential" can encompass. The Service's construction of the Act is impermissible, and the Service exceeded its statutory authority.

III

The majority opinion quotes a Supreme Court decision, which says: "[w]hen examining this kind of scientific determination, as opposed to simple findings of fact, a reviewing court must generally be at its most deferential."[64] However, the panel's majority opinion does not identify any finding by the Service as being "this kind of scientific determination." Instead, the opinion appears to address the proper interpretation of "essential for the conservation of the

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[61] *Id.*

[62] *See* Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for Dusty Gopher Frog, 77 Fed. Reg. 35,118, 35,131 (June 12, 2012).

[63] *Id.* (acknowledging that Unit 1 contains only one of the primary constituent elements necessary to sustain a dusky gopher frog population).

[64] *Ante* at 13–14 (quoting *Baltimore Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)).

species," as applied to the point of contention in this case, as a question of law based on the words Congress chose.

The fact that scientific evidence was a part of the proceedings leading to the Final Rule[65] does not mean that all determinations in the Final Rule are subject to deference by a reviewing court. No one disputes that reputable scientists made valid determinations in the administrative proceedings undertaken by the Service. However, the scientific evidence and conclusions have no bearing on the issue of statutory construction about which the parties in this case disagree: Did Congress intend to permit the designation of land as "critical habitat" when the land is not occupied by an endangered species and would have to be substantially modified then periodically maintained in order to be used as habitat, and when there is no indication that the land will in fact be modified or maintained in such a manner?

IV

The phrase "essential for the conservation of the species" requires more than a theoretical possibility that an area designated as "critical habitat" will be transformed such that its physical characteristics are essential to the conservation of the species. There is no evidence that it is probable that Unit 1 will be physically modified in the manner that the scientists uniformly agree would be necessary to sustain a dusky gopher frog population. The conclusion by the Service that Unit 1 is "essential for the conservation

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[65] *See* 16 U.S.C. § 1533(b)(2) ("The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available . . ..").

of the species" is therefore not supported by substantial evidence, and the designation of Unit 1 as "critical habitat" should be vacated under the APA.

The Service recognized in the Final Rule that under the Endangered Species Act and regulations implementing it, the Service is "required to identify the physical or biological features essential to the conservation of the dusky gopher frog in areas occupied at the time of listing, focusing on the features' primary constituent elements."[66] The Service explained that "[w]e consider primary constituent elements to be the elements of physical or biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species."[67] The Service identified three primary constituent elements, briefly summarized as ephemeral wetland habitat with an open canopy (with certain specific characteristics), upland forested nonbreeding habitat dominated by longleaf pine maintained by fires frequent enough to support an open canopy and abundant herbaceous ground cover, and upland habitat between breeding and nonbreeding habitat that is characterized by an open canopy, abundant native herbaceous species, and a subsurface structure that provides shelter for dusky gopher frogs during seasonal movements.[68]

The other eleven units designated in the Final Rule had all three constituent elements.[69] However,

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[66] 77 Fed. Reg. at 35,131.

[67] *Id.*

[68] *Id.*

[69] *Id.*

the Service found that Unit 1 has only one of the three primary constituent elements detailed in the Final Rule—the ephemeral ponds.[70] Isolated wetlands, like the ephemeral ponds that exist on Unit 1, are necessary to sustain a population of the species as a breeding ground.[71] But frogs do not spend most of their lives breeding in ponds, and the existence of the ponds will not alone provide the necessary habitat. "Both forested uplands and isolated wetlands . . . are needed to provide space for individual and population growth and for normal behavior."[72] The Service found that dusky gopher frogs "spend most of their lives underground in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine."[73] Unit 1 is covered with a closed-canopy forest of loblolly pines.

The Service also identified the alterations and special management that would be required within the areas designated as critical habit, including Unit 1, to sustain a dusky gopher frog population.[74] The

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[70] *Id.*

[71] *Id.*

[72] *Id.* at 35,129.

[73] *Id.*; *see also id.* at 35,130 ("Both adult and juvenile dusky gopher frogs spend most of their lives underground in forested uplands.")

[74] *Id.* at 35,131-32. The Service concluded Special management considerations or protection are required within critical habitat areas to address the threats identified above. Management activities that could ameliorate these threats include (but are not limited to): (1) Maintaining critical habitat areas as forested pine habitat (preferably longleaf pine); (2) conducting forestry management using prescribed burning, avoiding the use of beds when planting trees, and reducing planting densities to create or maintain an open canopied forest with abundant herbaceous ground cover; (3) maintaining forest underground structure such as gopher tortoise

17-01174_020168;17-01174_020168;17-01174_020169;17-01174_020170;17-01174_020171;17-01174_020172;1...

Service found with regard to Unit 1 that "[a]lthough the uplands associated with the ponds do not currently contain the essential physical or biological features of critical habitat, we believe them to be restorable with reasonable effort."[75] This finding is insufficient to sustain the conclusion that Unit 1 is "essential for the conservation of the species" for at least two reasons. First, finding that the uplands are "restorable" is not a finding that the areas will be "restored." Unless the uplands are restored, they cannot be and are not essential for the conservation of the frog. Second, the Service does not explain who will expend the "reasonable effort" necessary to restore the uplands. In sum, the designation of Unit 1 as critical habitat is not supported by substantial evidence because there is no evidence that Unit 1 will be modified in such a way that it can serve as habitat for the frog.

In fact, the Service itself concluded that it is entirely speculative as to whether Unit 1 will be transformed from its current use for commercial timber operations into dusky gopher frog habitat by removing the loblolly pines and replacing them with longleaf pines, and by the other activities necessary to create frog habitat. The Service was required by the Endangered Species Act to assess the economic impact of designating critical habitat.[76] The Service recognized that as to Unit 1, the economic impact depended on the extent to which it might be devel-

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burrows, small mammal burrows, and stump holes; (4) and protecting ephemeral wetland breeding sites from chemical and physical changes to the site that could occur by presence or construction of ditches or roads. *Id.* at 35,132.

[75] *Id.* at 35,135.

[76] *Id.* at 35,140.

oped,[77] and accordingly, whether section 7 consultation would be required because of a federal nexus.[78] Section 7 consultation would provide at least some potential that the owners of the land would be required to take measures to create habitat for the dusky gopher frog in order to obtain federal permits that would allow development. But the Service specifically found that "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities" on Unit 1,[79] and that only the "*potential* exists for the Service to recommend conservation measures *if consultation were to occur*."[80] This does not constitute substantial, or even any, evidence that Unit 1 is now or will become suitable habitat for the dusky gopher frog, which is the only basis on which the Service has ever posited that Unit 1 is "essential for the conservation of the species."[81] (As discussed above, the Service has never contended that Unit 1 is essential because of support that it provides to another area that is occupied by the frog.)

The Service described three different scenarios to assess the potential economic impact of the Final Rule.[82] In the first scenario, "*no conservation measures are implemented for the species*."[83] The

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[77] *Id.*

[78] *Id.*

[79] *Id.*

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

[81] 16 U.S.C. § 1532(5)(A)(ii).

[82] 77 Fed. Reg. at 35,140-41.

[83] *Id.* at 35,140 (emphasis added). The Service explained: Under scenario 1, development occurring in Unit 1 avoids impacts to jurisdictional wetlands and as such, there is no Federal nexus (no Federal permit is required) triggering section 7 consultation regarding dusky gopher frog crit-

Service reasoned that development on Unit 1 might avoid any federal nexus and therefore no consultation would be required, and no conservation of the species would occur. The Service therefore expressly recognized that Unit 1 may never play any role in the "conservation of the species."

In the Service's second scenario, the Service assumes that development is sought by the owners,[84] section 7 consultation occurs that results in devel-

ical habitat. Absent consultation, no conservation measures are implemented for the species, and critical habitat designation of Unit 1 does not result in any incremental economic impact. *Id.*

[84] *Id.* at 35,140-41:According to scenarios 2 and 3, the vast majority of the incremental impacts would stem from the lost development value of land in Unit 1. Under scenarios 2 and 3, less than one percent of the incremental impacts stem from the administrative costs of future section 7 consultations. Under scenario 2, the analysis assumes the proposed development of Unit 1 requires a Section 404 permit from the Corps due to the presence of jurisdictional wetlands. The development would therefore be subject to section 7 consultation considering critical habitat for the dusky gopher frog. This scenario further assumes that the Service works with the landowner to establish conservation areas for the dusky gopher frog within the unit. The Service anticipates that approximately 40 percent of the unit may be developed and 60 percent is managed for dusky gopher frog conservation and recovery. According to this scenario, present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million. Total present value incremental impacts of critical habitat designation across all units are therefore $20.5 million ($1.93 million in annualized impacts), applying a 7 percent discount rate. Scenario 3 again assumes that the proposed development of Unit 1 requires a Section 404 permit and therefore is subject to section 7 consultation. This scenario further assumes that, due to the importance of the unit in the conservation and recovery of the species, the Service recommends that no development occur within the unit. According to this scenario, present value impacts of the lost option for development in 100 percent of the unit are $33.9 million. Total present value incremental impacts of critical habitat designation across all units are therefore $34.0 million ($3.21 million in annualized impacts), applying a 7 percent discount rate.

opment on 40% of Unit 1, and the remaining 60% is managed as dusky gopher frog habitat.[85] (The Service estimates that the landowners would suffer a loss of $20.4 million due to the loss of the option to develop 60% of the area.)[86] This is the *only scenario*, in the entirety of the Final Rule, that explains how, at least theoretically, Unit 1's landscape would be altered so that it could be used as dusky gopher frog habitat. But the Service made no findings that this scenario was likely or probable.

Under Scenario 3, the Service assumes that the owners desire to develop Unit 1, section 7 consultation occurs, but no development is permitted on Unit 1 by the Government "due to the importance of the unit in the conservation and recovery of the species.[87] (The Service estimates that the loss of the option to develop 100% of Unit 1 would result in a loss of $33.9 million to the owners.)[88] Significantly, the Service does not posit that *any* of Unit 1 would actually be used as dusky gopher frog habitat under Scenario 3, in spite of its alleged "importance" to conservation. Undoubtedly, that is because if the federal government would not permit the landowners to develop any part of Unit 1, why would the owners undertake to modify Unit 1 so that it could be used as frog habitat? The Government has no plans to pay for the creation of habitat on Unit 1. Habitat will only be created, and therefore conservation will only occur, if the owners decide to modify their property. The only evidence in the record is that the owners do not plan to

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[85] *See id.*

[86] *Id.* at 35,141.

[87] *Id.*

[88] *Id.*

do so and there is no evidence that the economic or other considerations would lead a reasonable landowner to create frog habitat on Unit 1.

Scenario 3 shows, in the starkest of terms, why the Service's position that Unit 1 is "essential for the conservation of the species" is illogical on its face. Even if the Government does not allow any development on Unit 1 because of the existence of the ephemeral ponds, the Government is aware that Unit 1 cannot be used for the conservation of the dusky gopher frog because someone or some entity would have to significantly modify Unit 1 to make it suitable for frog habitat. Unsuitable habitat is not essential for the conservation of the species.

* * *

I would vacate the Final Rule's designation of Unit 1 as critical habitat, and I therefore dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MARKLE INTERESTS, LLC

v.

UNITED STATES FISH AND WILDLIFE SERVICE, et al.

Civil Action Nos. 13–234, 13–362, 13–413.

[Aug. 22, 2014]

ORDER AND REASONS

MARTIN L. C. FELDMAN, *District Judge*:

These consolidated proceedings ask whether a federal government agency's inclusion of a privately-owned tree farm in its final designation of critical habitat for the dusky gopher frog, pursuant to the Endangered Species Act, was arbitrary or capricious. Before the Court are 11 motions, including nine cross-motions for summary judgment:

> (1) Weyerhaeuser Company's motion for summary judgment, (2) the federal defendants' cross-motion, and (3) the intervenor defendants' cross-motion; (4) Markle Interests LLC's motion for summary judgment, (5) the

federal defendants' cross-motion, and (6) the intervenor defendants' cross-motion; (7) the Poitevent Landowners' motion for summary judgment; (8) the federal defendants' cross-motion, and (9) the intervenor defendants' cross-motion.

Additionally before the Court are two motions to strike extra-record evidence submitted by Poitevent Landowners, one filed by federal defendants and one by intervenor defendants. For the reasons the follow, the federal and intervenor defendants' motions to strike extra-record evidence are GRANTED; the plaintiffs' motions for summary judgment are GRANTED in part (insofar as they have standing) and DENIED in part; and, finally, the defendants' motions are DENIED in part (insofar as defendants challenge plaintiffs' standing) and GRANTED in part.

Background

Plaintiffs in these consolidated cases—landowners and a lessee of a tree farm in Louisiana—challenge the United States Fish and Wildlife Service's (FWS) final rule designating 1,544 acres of a privately–owned timber farm in St. Tammany Parish as critical habitat that is essential for the conservation of the dusky gopher frog, an endangered species.

Only about 100 adult dusky gopher frogs remain in the wild. The frog, listed as endangered in 2001, is now located only in Mississippi; it does not presently occupy the plaintiffs' tree farm and was last sighted there in the 1960s. Nevertheless, FWS included certain acreage of the plaintiffs' tree farm in its rule

designating critical habitat for the frog, finding this land essential to conserving the dusky gopher frog. A determination plaintiffs insist is arbitrary. To better understand the factual and procedural background of this challenge to federal agency action, it is helpful first to consider the context of the administrative framework germane to the present controversy.

The Endangered Species Act

Due to the alarming trend toward species extinction "as a consequence of economic growth and development untempered by adequate concern and conservation," Congress enacted the Endangered Species Act, 16 U.S.C. § 1531, et. seq., (ESA) to conserve endangered and threatened species and the ecosystems on which they depend. 16 U.S.C. § 1531(a), (b). By defining "conservation" as "the use of all methods and procedures which are necessary to bring any endangered or threatened species to the point at which the measures provided [by the ESA] are no longer necessary," (16 U.S.C. § 1532(3)), the Act illuminates that its objective is not only "to enable listed species . . . to survive, but [also] to recover from their endangered or threatened status." *Sierra Club v. FWS,* 245 F.3d 434, 438 (5th Cir. 2001); *Tenn. Valley Authority v. Hill,* 437 U.S. 153, 184 (1978) ("The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost.").

The U.S. Secretary of the Department of Interior is charged with administering the Act; the Secretary delegates authority to the U.S. Fish and Wildlife Service.[1] To achieve the Act's survival and recovery

[1] Technically, administration responsibilities are divided between the Department of Interior and the Department of Com-

objectives, FWS is obligated to utilize enumerated criteria to promulgate regulations that list species that are "threatened" or "endangered". 16 U.S.C. § 1533 (stating, in mandatory terms, the requirement to determine threatened or endangered species status: "The Secretary *shall* determine. . .."). A species is listed as "endangered" if it is "in danger of extinction throughout all or a significant portion of its range." 16 U.S.C. § 1532(6). Listing triggers statutory protections for the species. *See, e.g.,* 16 U.S.C. § 1538(a) (setting forth prohibited acts, such as "taking" (§ 1532(19)) listed animals).

Listing also triggers FWS's statutory duty to designate critical habitat; such designation being another tool in FWS's arsenal to accomplish the Act's species survival and recovery objectives. *See* 16 U.S.C. § 1533(a)(3)(A) ("The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable . . . (i) shall concurrently with making a [listing] determination . . . designate any habitat of such species. . .."). Like its listing duty, FWS's habitat designation duty is mandatory;[2] the designation

merce. 16 U.S.C. § 1533(a)(2). The Secretaries of these agencies then delegated their authority to the FWS or National Marine Fisheries Service.

[2] *Sierra Club v. FWS*, 245 F.3d 434, 438 (5th Cir. 2001) ("Once a species has been listed as endangered or threatened, the ESA states that the Secretary 'shall' designate a critical habitat 'to the maximum extent prudent or determinable.' The ESA leaves to the Secretary the task of defining 'prudent' and 'determinable.'").

It is incumbent on the Secretary—"to the maximum extent prudent and determinable"—to designate critical habitat concurrently with listing a species as endangered, 16 U.S.C. § 1533(a)(3)(A)(i), but the Secretary's failure to make a concurrent designation, for whatever reason, does not preclude later

must be based on "the best scientific data available . . . after taking into consideration the economic impact, the impact on national security, and any other relevant impact." 16 U.S.C. § 1533(b)(2). After weighing the impacts of designation, FWS may, however, exclude an area from critical habitat unless it "determines . . . that the failure to designate such area as critical habitat will result in the extinction of the species concerned." *Id.*

Notably, in defining "critical habitat" for an endangered species, the ESA differentiates between habitat that is "occupied" and habitat that is "unoccupied" at the time of listing:

> (5)(A) The term "critical habitat" for a threatened or endangered species means—
>
> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determi-

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designation. *See* 16 U.S.C. § 1532(a)(3)(B) ("Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established . . . ."); *see also* 16 U.S.C. § 1533(b)(6)(C)(ii) (if "critical habitat of [listed] species is not . . . determinable [at the time of listing], the Secretary . . . may extend the one-year period specified in paragraph (A) by not more than one additional year . . . .") and 50 C.F.R. § 424.17(b)(2).

> nation by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A). Thus, in so differentiating, by its express terms, the Act contemplates the designation of both "occupied" and "unoccupied" critical habitat. FWS may designate as critical *occupied* habitat that contains certain physical or biological features called "primary constituent elements", or "PCEs".[3] 50 C.F.R. § 424.12(b). FWS may designate as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and "only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e).

Once designated, critical habitat is protected from harm if and when the ESA's federal agency consultation mechanism is triggered: federal agencies must consult with FWS on any actions "authorized, funded, or carried out by" the agency to ensure that their actions do "not result in the destruction or adverse modification of habitat . . ." 16 U.S.C. § 1536(a)(2).[4] If FWS or the consulting federal agency

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[3] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. 35118, 35131 (2012).

[4] Destruction or modification of critical habitat is defined, by regulation, as "a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species." 50 C.F.R. § 402.02. However, the U.S. Court of Appeal for the Fifth Circuit struck down, as facially invalid, this regulatory definition of the destruction/adverse modification standard. *Sierra Club,* 245 F.3d at 442–43 (observing that the ESA distinguishes between "conservation" and "survival" and "[r]equiring consultation only where

determines that a contemplated action "may affect . . . critical habitat", the agency and FWS must engage in "formal" consultation. 50 C.F.R. § 402.14(a). If FWS finds that a contemplated agency action, such as the issuance of a permit, is likely to adversely modify critical habitat, FWS must suggest reasonable and prudent alternatives that the consulting agency could take to avoid adverse modification. 50 C.F.R. § 402.14(h)(3). "Reasonable and prudent alternatives" must be "economically and technologically feasible." 50 C.F.R. § 402.02. Thus, if a private party's action has no federal nexus (if it is not authorized, funded, or carried out by a federal agency), no affirmative obligations are triggered by the critical habitat designation. In other words, absent a federal nexus, FWS cannot compel a private landowner to make changes to restore his designated property into optimal habitat.

The Dusky Gopher Frog

The dusky gopher frog (*Rana Sevosa*) is a darkly-colored, moderately-sized frog with warts covering its back and dusky spots on its belly. It is a terrestrial amphibian endemic to the longleaf pine ecosystem. The frogs "spend most of their lives underground[5] in forested habitat consisting of fire-maintained, open-canopied, pine woodlands historically dominated by longleaf pine." 77 Fed. Reg. at 35129–35131. They

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an action affects the value of critical habitat to both the recovery *and* survival of a species imposes a higher threshold than the statutory language permits.") (emphasis in original).

[5] "Underground retreats include gopher tortoise burrows, small mammal burrows, stump holes, and root mounds of fallen trees." 77 Fed. Reg. at 35130.

travel to small, isolated ephemeral ponds[6] to breed, then return to their subterranean forested environment, followed by their offspring that survive to metamorphose into frogs. Amphibians like the dusky gopher frog need to maintain moist skin for respiration and osmoregulation. To this end, the areas connecting their wetland and terrestrial habitats must be protected to provide cover and moisture during migration.[7]

The risk for its extinction is high. Only about 100 adult dusky gopher frogs are left in the wild. They are located in three sites in Harrison and Jackson Counties in southern Mississippi; only one of these sites regularly shows reproduction. The frog is primarily threatened by habitat loss and disease. Due to its small numbers, it is also highly susceptible to genetic isolation, inbreeding, and random demographic or human related events.

Listing and Proposed Critical Habitat Designation

In December 2001, in response to litigation commenced by the Center for Biological Diversity, FWS listed the dusky gopher frog[8] as an endangered species. FWS determined that the frog was endangered

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[6] Ephemeral ponds are isolated wetlands that dry periodically and flood seasonally; because they are short-lived, predatory fish are lacking.

[7] "Optimal habitat is created when management includes frequent fires, which support a diverse ground cover of herbaceous plants, both in the uplands and in the breeding ponds." *Id.* at 35129. Frequent fires are also critical to maintaining the prey base for the carnivorous juvenile and adult dusky gopher frogs. *Id.* at 35130.

[8] At that time, and until 2012, the dusky gopher frog was known as the Mississippi gopher frog.

due to its low population size combined with ongoing threats such as habitat destruction, degradation resulting from urbanization, and associated vulnerability to environmental stressors such as drought. No critical habitat was designated at that time. Nearly six years later, litigation again prompted FWS to action: in resolving, through settlement, the litigation to compel designation, in 2011 FWS published a proposed rule to designate critical habitat; the proposed rule included unoccupied and occupied areas in Mississippi only.[9]

An independent peer review of the proposed rule followed. Every peer reviewer[10] concluded that the amount of habitat already proposed, which included occupied and unoccupied areas in Mississippi, was insufficient for conservation of the species. Several peer reviewers suggested that FWS consider other locations within the frog's historical range. One peer reviewer in particular suggested the area of dispute here, identified as Unit 1 by the final rule: although the dusky gopher frog does not presently occupy this land and had not been seen on the land since the 1960s, Unit 1 contained at least two historical breeding sites for the frog. Based on the comments, FWS

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[9] FWS determined that the frog's optimal habitat includes three primary constituent elements (PCEs): (1) small, isolated, ephemeral ponds for breeding; (2) upland pine forested habitat that has an open canopy; and (3) upland connectivity habitat. FWS determined that this habitat contains the "physical and biological features necessary to accommodate breeding, growth, and other normal behaviors of the [frog] and to promote genetic flow within the species."

[10] These six individuals had scientific expertise and were familiar with the species and the geographical region, as well as conservation biology principles.

re-analyzed the "current and historic data for the species, including data from Alabama and Louisiana." FWS identified additional critical habitat in Mississippi and Louisiana,[11] and included those areas within the revised proposed rule published for comment on September 27, 2011.

Before finalizing the rule, FWS considered the potential economic impacts of the designation. The final economic analysis (EA) quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS, and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 million"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 mil-

[11] FWS was not able to identify critical habitat in Alabama.

lion").[12] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts."

The 6/12/12 Final Rule Designating Critical Habitat

On June 12, 2012 FWS issued its final rule designating critical habitat for the dusky gopher frog. 77 Fed. Reg. 25118 (June 12, 2012). The habitat designation covers 6,477 acres in two states, Mississippi and Louisiana, including approximately 1,544 acres of forested land in St. Tammany Parish, Louisiana, known as Critical Habitat Unit 1. FWS determined that the ephemeral wetlands in Unit 1 contain all of the physical or biological features that make up PCE 1. Unit 1 was included in the designation notwithstanding the fact that the dusky gopher frog has not occupied the lands for decades.

Procedural History of Consolidated Litigation

The plaintiffs in these consolidated proceedings own all of the forested property identified in the Rule as Unit 1. P&F Lumber Company (2000), L.L.C., St. Tammany Land Co., L.L.C., and PF Monroe Properties, L.L.C. (the Poitevent Landowners), as well as Markle Interests, L.L.C. own undivided interests in 95% of the 1,544 acres of land comprising Unit 1; and the remaining 5% (approximately 152 acres) of the land in Unit 1 is owned by Weyerhaeuser Company,

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[12] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

which also holds a timber lease on the balance of the 1,544 acres comprising Unit 1; that lease is up in 2043.

Seeking to invalidate the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog, Markle Interests filed suit and, shortly thereafter, Poitevent Landowners and later Weyerhaeuser Company followed suit.[13] Each of the plaintiffs allege that the Rule designating Unit 1 exceeds constitutional authority under the Commerce Clause, U.S. Const. art. 1 § 8, cl. 3, and that it violates the Endangered Species Act, 16 U.S.C. § 1531 et. seq.,[14] the Administrative Procedure Act, 5 U.S.C. § 551 et. seq., and the National Environmental Policy Act, 42 U.S.C. § 4321 et. seq.; they seek identical declaratory and injunctive relief. Named as defendants are the U.S. Fish & Wildlife Service; Daniel M. Ashe, in his official capacity as Director of U.S. Fish & Wildlife Service; the U.S. Department of the Interior; and Sally Jewell, in her official capacity as Secretary of the Department of the Interior. On June 25, 2013 the Center for Biological Diversity and Gulf Restoration Network were granted leave to intervene, as of right, as defendants. On August 19, 2013 the federal defendants lodged the certified administrative record with the Court.[15] Federal and intervenor defendants now request that the Court strike certain extra-

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[13] In May 2013 the Court granted motions to consolidated these three lawsuits.

[14] Plaintiffs invoke the ESA's citizen suit provision, 16 U.S.C. § 1540(g).

[15] This Court imposed an October 2013 deadline for supplementing, or challenging, the administrative record; no party requested to supplement the record.

record evidence submitted by the Poitevent Landowners. And plaintiffs, federal defendants, and intervenor defendants now seek summary judgment.

I. Standards of Review

A. Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 586 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "[i]f the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249–50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett,* 477 U.S. 317, 322–23 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.,* 974 F.2d 646, 649 (5th Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents that cannot be presented in a form that would be admissible

in evidence at trial do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987); Fed. R. Civ. P. 56(c)(2). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson,* 477 U.S. at 255.

B. Administrative Procedure Act

Where plaintiffs challenge the Secretary's administration of the ESA—in particular, a final rule designating critical habitat—the Administrative Procedure Act is the appropriate vehicle for judicial review. *See Bennett v. Spear,* 520 U.S. 154, 174–75 (1997).

The APA entitles any "person adversely affected or aggrieved by agency action" to judicial review of "agency action made reviewable by statute and final agency action for which there is no other adequate remedy[.]" 5 U.S.C. § 702 (right of review); 5 U.S.C. § 704 (actions reviewable). A reviewing court must "set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law [or] contrary to constitutional right, power, privilege, or immunity[.]" 5 U.S.C. § 706(2). This standard is "highly deferential" and the agency's decision is afforded a strong presumption of validity. *Hayward v. U.S. Dep't of Labor,* 536 F.3d 376, 379 (5th Cir. 2008); *Miss. River Basin Alliance v. Westphal,* 230 F.3d 170, 175 (5th Cir. 2000) (Courts must be particularly deferential to agency determinations made within the scope of the agency's expertise). The reviewing court must decide whether the agency acted within the scope of its authority, "whether the decision was based on a consideration of the relevant fac-

tors and whether there has been a clear error of judgment." *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415–16, (1971) ("inquiry into the facts is to be searching and careful, [but] the ultimate standard of review is a narrow one"), *overruled on other grounds by Califano v. Sanders,* 430 U.S. 99 (1977). The Court may not "reweigh the evidence or substitute its judgment for that of the administrative fact finder." *Cook v. Heckler,* 750 F.2d 391, 392 (5th Cir. 1985). "Nevertheless, the agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983).

II. Scope of the Record

With the exception of the Poitevent Landowners, all parties agree that, in assessing the lawfulness of FWS's designation Rule, this Court is confined to reviewing only the administrative record assembled by FWS. Indeed, "[r]eview of agency action under § 706(2)'s 'arbitrary or capricious' standard is limited to the record before the agency at the time of its decision." *See Luminant Generation Co., LLC v. EPA,* 675 F.3d 917, 925 (5th Cir. 2012). Notwithstanding this core administrative law principle, the Poitevent Landowners insist that the Court may consider certain extra-record materials. The Court disagrees; because the Poitevent Landowners have failed to demonstrate unusual circumstances justifying a departure from the record, the Court finds that granting the federal and intervenor defendants' motions to strike extra-record evidence is warranted for the following reasons.

In reviewing agency action, the APA instructs a reviewing court to "review the whole record or those parts of it cited by a party[.]" 5 U.S.C. § 706. "[T]he general presumption [is] that review [of agency action] is limited to the record compiled by the agency." *Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 706 (5th Cir. 2010); *Goonsuwan v. Ashcroft,* 252 F.3d 383, 391 n.15 (5th Cir. 2001) (citing *Florida Power & Light Co. v. Lorion,* 470 U.S. 729, 743–44 (1985)) ("It is a bedrock principle of judicial review that a court reviewing an agency decision should not go outside of the administrative record."). Mindful that the Court's task in reviewing agency action is not one of fact-finding but, rather, to determine whether or not the administrative record supports agency action, "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts,* 411 U.S. 138, 142 (1973). That is an immensely cramped standard of review for courts.

In support of their motion for summary judgment the Poitevent Landowners submit the following extra-record evidence: (1) Declaration of Edward B. Poitevent signed on December 9, 2013; (2) Wall Street Journal newspaper article dated March 11, 2013, entitled "Fishing for Wildlife Lawsuits"; (3) Washington Times newspaper article dated February 8, 2013, entitled "Vitter: Endangered Species Act's hidden costs"; (4) Poitevent's 60-day notice of intent to sue letter dated October 19, 2012.[16] The federal

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[16] The Poitevent Landowners advance a litany of arguments urging the Court to consider the proffered evidence: (1) judicial review under the ESA's citizen suit provision and under the Commerce Clause is not limited to the administrative record;

and intervenor defendants move to strike these materials, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure; they invoke the administrative record review principle that limits the scope of judicial review of agency action to the record compiled by the agency.

The Court is unpersuaded to depart from the strict record review presumption. First, the Poitevent Landowners had ample opportunity to request permission to supplement the administrative record; the deadline to do so expired October 7, 2013. They simply did not do so.[17] Second, the Poitevent Landowners fall short of demonstrating "unusual circumstances justifying a departure" from the rule that judicial review is limited to the administrative record. *See Medina County,* 602 F.3d at 706. The Fifth Circuit instructs that supplementing the administrative record may be permitted when:

> (1) the agency deliberately or negligently excluded documents that may have been adverse to its decision, . . .
> (2) the district court needed to supplement the record with "background information" in

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(2) Rule 56 permits submission of such evidence; (3) the contested evidence is in fact part of the administrative record or otherwise the Court may take judicial notice of such evidence; (4) exceptions to APA record review principles apply to warrant the Court's review of this extra-record evidence; or (5) the FWS' trespass on their lands require judicial review of the proffered evidence.

[17] In fact, the Poitevent Landowners have never requested permission to submit the materials they submit with their summary judgment papers; they simply respond to the defendants' motions to strike.

> order to determine whether the agency considered all of the relevant factors, or
> (3) the agency failed to explain administrative action so as to frustrate judicial review.

Id. None of these factors are implicated here. Accordingly, the Court must confine the scope of its review to the administrative record compiled by the agency and lodged with the Court. The federal and intervenor defendants' motions to strike the extra-record, post-decisional materials are granted.[18]

III. Standing

The Court turns to consider the threshold issue of standing. To resolve this issue, the Court must be satisfied that the plaintiffs have standing to challenge the Rule designating their land as critical habitat. The Court finds that they do.

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA,*—— U.S.——, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement" commands that a litigant must have standing to invoke the power of a federal court. *See id.* (citation omitted); *see also National Federation of the Blind of Texas, Inc. v. Abbott,* 647 F.3d 202, 208 (5th Cir. 2011). The plaintiffs bear the burden of establishing standing under Article III. *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 342 (2006); *Miss. State Democratic Party v. Barbour,* 529 F.3d 538, 545 (5th Cir. 2008).

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[18] The administrative record review principle is not applicable to the standing assessment; the Court will consider Mr. Poitevent's Declaration for the purposes of assessing the Poitevent Landowners' standing.

The doctrine of standing requires that the Court satisfy itself that "the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction." *See Summers v. Earth Island Institute,* 555 U.S. 488, 493 (2009); *see also Doe v. Beaumont Independent School Dist.,* 240 F.3d 462, 466 (5th Cir. 2001) (citing *Warth v. Seldin,* 422 U.S. 490, 498 (1975)). "Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy and to confine the courts' rulings within our proper judicial sphere." *Doe v. Tangipahoa Parish School Bd.,* 494 F.3d 494, 499 (5th Cir. 2007).

The plaintiffs must demonstrate the "irreducible constitutional minimum of standing", which is informed by three elements: (1) that they personally suffered some actual or threatened "injury in fact" (2) that is "fairly traceable" to the challenged action of the defendants; (3) that likely "would be redressed" by a favorable decision in Court. *See Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–61 (1992).[19] The federal and intervenor defendants challenge the plaintiffs' standing to contest the Secretary's designation of their land as critical habitat; in particular, the defendants contend that the plaintiffs have failed to establish an actual or imminent injury.[20] The Court disagrees.

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[19] The actual injury requirement ensures that issues will be resolved "not in the rarified atmosphere of a debating society, but in a concrete factual context." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.,* 454 U.S. 464, 472 (1982).

[20] The defendants do not challenge whether the injury is fairly traceable to their critical habitat designation; nor do they chal-

"'Injury in fact [includes] economic injury, [as well as] injuries to aesthetics and well-being.'" *See Sabine River Auth. v. U.S. Dept. of Interior,* 951 F.2d 669, 674 (5th Cir. 1992) (quoting *Save Our Wetlands, Inc. v. Sands,* 711 F.2d 634, 640 (5th Cir. 1983)). Notably, when the plaintiff is an object of the government action at issue, "there is ordinarily little question that the action" has caused him injury. *Lujan,* 504 U.S. at 561–62. In fact, when the plaintiff challenging agency action is a regulated party or an organization representing regulated parties, courts have found that the standing inquiry is "self-evident." *See South Coast Air Quality Management Dist. v. EPA,* 472 F.3d 882, 895–96 (D.C. Cir. 2006) (an association of oil refineries had standing to challenge an EPA regulation establishing air pollution standards because it was "inconceivable" that the regulation "would fail to affect . . . even a single" member of the association); *see also Am. Petroleum Institute v. Johnson,* 541 F. Supp. 2d 165, 176 (D.D.C. 2008) ("Regulatory influences on a firm's business decisions may confer standing when, as here, they give rise to cognizable economic injuries or even a 'sufficient likelihood' of such injuries.") (citing *Clinton v. City of New York,* 524 U.S. 417, 432–33 (1998) and *Sabre, Inc. v. Dept. of Transp.,* 429 F.3d 1113, 1119 (D.C. Cir. 2005) (firm established standing to challenge regulation where it was "reasonably certain that [the firm's] business decisions [would] be affected" by the regulation)). This is so because regulated parties are generally able to demonstrate that they suffer some economic harm or other coercive ef-

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lenge whether the injury is likely to be redressed by a favorable ruling.

fect by virtue of direct regulation of their activities or property.

These actual injuries are present here. When the Rule became final, the plaintiffs (each of whom are identically factually situated as Unit 1 landowners) became regulated parties who are subject to regulatory burdens flowing from federal substantive law, the ESA. The plaintiffs' sworn declarations are sufficient to establish constitutional standing.[21] Now that their land is an object of agency action, plaintiffs submit that they are economically harmed in that the value of their land has decreased as a result of the agency designation; their business decisions relative to their land are negatively impacted.[22] Plaintiffs have a personal stake in this controversy and have identified a concrete injury that is actual, not hypothetical. As a consequence of the Rule's designation of Unit 1 as critical habitat, the plaintiffs' pursuit of any development potential for the land clearly has been impacted by the agency action. Defendants' attack on standing grounds seems utterly frivolous. The defendants downplay these economic harms and

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[21] At summary judgment, the plaintiff cannot rely on simply "mere allegations," but must "'set forth' by affidavit or other evidence 'specific facts.'" Lujan, 504 U.S. at 561, 112 S. Ct. 2130 (quoting Fed. R. Civ. P. 56(e)).

[22] Weyerhaeuser submits that the land it leases and owns has been devalued; the "critical habitat designation . . . has immediately devalued the land within Unit 1 for commercial purposes by bringing increased . . . regulatory scrutiny under the Endangered Species Act, thereby making it more difficult to sell, exchange, or develop such lands." Markle and the Poitevent Landowners likewise attribute to the Rule "negative economic impact[s]" and "a drastic reduction in value [of the land]"; they submit that the designation "limits the usability and saleability of the property" to their detriment.

regulatory burdens as speculative,[23] but the Court finds that the plaintiffs have demonstrated actual, concrete injuries. *See The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 344 F. Supp. 2d 108, 117–18 (D.D.C. 2004) (business association that owned land within critical habitat designated for watering piping plover had standing to challenge designation due to its economic and recreational harms).

IV. Constitutional Challenge

The plaintiffs contend that federal regulation of Unit 1 under the ESA constitutes an unconstitutional exercise of congressional authority under the Commerce Clause. The defendants counter that the ESA is consistently upheld as a constitutional exercise of the Commerce Clause power and that each application of the ESA is not itself subject to the same tests for determining whether the underlying statute is a constitutional exercise of the Commerce

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[23] Defendants regard Weyerhaeuser's long-term timber lease as precluding this Court from finding a concrete injury, arguing that the land is essentially "locked up" for many years. But Weyerhaeuser's submission undermines the defendants' position. Putting aside that Weyerhaeuser in fact owns part of the land in addition to leasing the remainder, "Weyerhaeuser . . . periodically evaluate[s] its land portfolio to identify properties that have greater value if placed in non-timber uses[; it] routinely leases or sub-leases its forest lands for oil, gas and wind energy development[; and it] frequently renegotiate[s] long-term timber leases as conditions change." Moreover, defendants' charge of speculative injury is further undermined by the administrative record and the Rule itself, which acknowledges that, due to the presence of wetlands on Unit 1 (indeed, the reason underlying its designation), development of this land is likely to trigger the consultation process.

Clause. The Court agrees; the plaintiffs' constitutional claim is foreclosed by binding precedent.[24]

Article I, § 8 of the Constitution delegates to Congress the power "[t]o make all laws which shall be necessary and proper for carrying into execution" its authority to "regulate commerce . . . among the several states." Supreme Court cases have identified three general categories of regulation in which Congress is authorized to engage under its commerce power: (1) the channels of interstate commerce; (2) the instrumentalities of interstate commerce and persons or things in interstate commerce; and (3) activities that substantially affect interstate commerce. *See Gonzales v. Raich,* 545 U.S. 1, 16–17 (2005) (summarizing the evolution of the commerce clause power). The ESA, whose provisions and applications fall under the category of activities that substantially affect interstate commerce, has consistently been upheld as a constitutional exercise of congressional authority under the Commerce Clause. Six Circuits, including the Fifth Circuit, have rejected post-*Lopez*

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[24] On a separate constitutional note, the plaintiffs do not allege in their complaint that the Rule constitutes an unconstitutional taking under the Fifth Amendment. But the Poitevent Landowners argue in their papers that the critical habitat designation is an unlawful "extortionate demand" that constitutes "grand theft real estate." Assuming this is an attempt to assert a Fifth Amendment takings claim, the defendants point out that a takings claim must be brought in the Court of Federal Claims. To be sure, this Court would lack jurisdiction over any properly asserted takings claim under the circumstances. *See Chichakli v. Szubin,* 546 F.3d 315, 317 (5th Cir. 2008) (vacating district court's judgment as it related to takings claim and observing that "Tucker Act grants Court of Federal Claims exclusive jurisdiction over takings claims against the United States that seek monetary damages in excess of $10,000").

Commerce Clause challenges to applications of the ESA. *See San Luis & Delta-Mendota Water Auth. v. Salazar,* 638 F.3d 1163 (9th Cir. 2011); *Alabama-Tombigbee Rivers Coal. v. Kempthorne,* 477 F.3d 1250 (11th Cir. 2007); *Wyoming v. U.S. Dep't of Interior,* 442 F.3d 1262 (10th Cir. 2006); *GDF Realty Investments, Ltd. v. Norton,* 326 F.3d 622 (5th Cir. 2003); *Rancho Viejo, LLC v. Norton,* 323 F.3d 1062 (D.C. Cir. 2003); *Gibbs v. Babbitt,* 214 F.3d 483 (4th Cir. 2000). Plaintiffs mistakenly rely on an earlier Supreme Court decision.

Invoking *United States v. Lopez,* 514 U.S. 549, 558–59 (1995), the plaintiffs argue that, because the ESA is an exercise of Congress's commerce power, actions under the ESA are "therefore limited to the regulation of channels of interstate commerce, things in interstate commerce, or economic activities that substantially affect interstate commerce." Put plainly, they insist that there is no frog on their Louisiana land and the Rule exceeds the commerce power. The Court is tempted to agree, but for the state of the law. By focusing on their individual circumstance, plaintiffs misapprehend *Lopez,* which dealt with a challenge to an underlying statute, not a challenge to an individual application of a valid statutory scheme. Rejecting a similar argument, the Supreme Court reiterated in *Gonzales* that "[w]here the class of activities is regulated and that class is within the reach of federal power, the courts have no power 'to excise, as trivial, individual instances' of the class.'" 545 U.S. at 23 (quoting *Perez v. United States,* 402 U.S. 146, 154 (1971)) (citations and internal quotation marks omitted). As odd as the Court views the agency action, this Court is also without power. Congress would have to act.

The Fifth Circuit has observed that the ESA is a constitutionally valid statutory scheme, whose "'essential purpose,'" according to Congress, "is 'to protect the ecosystems upon which we and other species depend.'" *GDF,* 326 F.3d at 640 (citation omitted). Courts including the Fifth Circuit endorse the proposition that, in the aggregate, the extinction of a species and the resulting decline in biodiversity will have a predictable and significant effect on interstate commerce. *See, e.g., National Ass'n of Home Builders v. Babbitt,* 130 F.3d 1041, 1053–54 (D.C. Cir. 1997). Thus, "when 'a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence.'" *Gonzales,* 545 U.S. at 17 (quoting *Lopez,* 514 U.S. at 558). Aggregating the regulation of activities that adversely modify the frog's critical habitat with the regulation of activities that affect other listed species' habitat, the designation of critical habitat by the Secretary is a constitutionally valid application of a constitutionally valid Commerce Clause regulatory scheme. *See GDF,* 326 F.3d at 640–41.

V. Merits of the Rule

The defendants urge the Court to sustain the Rule. The plaintiffs contend that the Secretary's designation of Unit 1 as critical habitat for the dusky gopher frog was arbitrary and in violation of the ESA and the National Environmental Policy Act; they urge the Court to set aside the Rule. They advance a litany of arguments challenging the merits of the Rule insofar as it designates Unit 1 as critical habitat for the dusky gopher frog: Unit 1 does not meet the statutory definition of "critical habitat"; FWS unreasonably determined that Unit 1 is "essential" for

conservation of the frog; FWS arbitrarily failed to identify a recovery plan for the species; FWS failed to consider all economic impacts, and the method used in analyzing economic impacts was flawed; and FWS acted unreasonably (and violated NEPA) in failing to prepare an environmental impact statement. In addition to these challenges, the Poitevent plaintiffs advance additional grounds for condemning the Rule: the dusky gopher frog is not on the endangered species list and FWS's unlawful trespass on its lands to view the ponds invalidates the Rule.

The Court first addresses those arguments concerning whether the designation of Unit 1 satisfies the ESA's requirements, then moves on to consider whether the FWS properly considered the economic impacts of the designation; and, finally, considers whether FWS acted unreasonably in failing to prepare an environmental impact statement.

The Court has little doubt that what the government has done is remarkably intrusive and has all the hallmarks of governmental insensitivity to private property. The troubling question is whether the law authorizes such action and whether the government has acted within the law. Reluctantly, the Court answers yes to both questions.

A.

The Court first considers whether FWS's designation of Unit 1 satisfies the ESA's substantive requirements. The federal defendants submit that FWS considered the best available science, including the input of six experts, and the importance of ephemeral ponds to the recovery of the frog, and thus reasonably determined that Unit 1 is essential for the conservation for the species.

1. Did FWS reasonably determine that Unit 1 is "essential for the conservation of" the dusky gopher frog?

The ESA expressly provides that unoccupied areas may be designated as "critical habitat" if FWS determines that those areas are "essential to the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). Congress did not define "essential" but, rather, delegated to the Secretary the authority to make that determination. Plaintiffs take issue with FWS's failure to define "essential", but they do not dispute that FWS explained its considerations for assessing what areas are essential. The Court finds that FWS's determination seems reasonable and, therefore, entitled to *Chevron* deference. *See Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n.9 (1984) ("[T]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent."). The Court turns to consider the process that preceded FWS's finding that Unit 1 is essential.

FWS determined that Unit 1 is essential for the conservation of the dusky gopher frog. It came to this conclusion after its initial June 2010 proposed rule was criticized by all of the peer reviewers as being inadequate to ensure conservation of the frog. Given the alleged high risk of extinction due to localized threats, like droughts, disease, and pollution, FWS agreed that the proposed habitat was inadequate and began considering sites throughout the frog's historical range. FWS considered this specific criteria:

> (1) The historical distribution of the species; (2) presence of open-canopied, isolated wetlands; (3) presence of open-canopied, upland

> pine forest in sufficient quantity around each wetland location to allow for sufficient survival and recruitment to maintain a breeding population over the long term; (4) open-canopied, forested connectivity habitat between wetland and upland breeding sites; and (5) multiple isolated wetlands in upland habitat that would allow for the development of metapopulations.

Using scientific information on sites throughout the frog's range, FWS could not identify any locations outside Mississippi that contained all of these elements or even all three PCEs. Determining that it is easier to restore terrestrial habitat than it is to restore or create breeding ponds, FWS focused on identifying more ponds in potential sites throughout the species' range. FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species. Isolated, ephemeral ponds that can be used as the focal point for establishing these populations are rare, and this is a limiting factor in" the frog's recovery. 77 Fed. Reg. at 35124.

After a peer reviewer suggested Unit 1 as a potential site, that peer reviewer and a FWS biologist "assessed the habitat quality of ephemeral wetlands in [Unit 1] and found that a series of five ponds contained the habitat requirements for PCE 1." 77 Fed. Reg. at 35123; AR2320. The five ponds' close proximity to each other meant that a metapopulation structure existed, which increases long-term survival and recovery of the frog; FWS determined that these ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range." 77 Fed. Reg. at 35124. Based on

this scientific information, FWS determined that Unit 1 is essential for the conservation of the frog

> because it provides: (1) Breeding habitat for the [frog] in a landscape where the rarity of that habitat is a primary threat to the species; (2) a framework of breeding ponds that supports metapopulation structure important to the long-term survival of the [frog]; and (3) geographic distance from extant [frog] populations, which likely provides protection from environmental stochasticity.

Id.

Notably, the plaintiffs do not meaningfully dispute the scientific and factual bases of FWS's "essential" determination. Instead, the plaintiffs insist that Unit 1 can not be "essential" for the conservation of the frog because the frog does not even live there. Indeed it hasn't been sighted there since the 1960s. But the plaintiffs ignore the clear mandate of the ESA, which tasks FWS with designating unoccupied areas as critical habitat. 16 U.S.C. § 1532(5)(A)(ii). FWS's finding that the unique ponds located on Unit 1 are essential for the frog's recovery is supported by the ESA and by the record; it therefore must be upheld in law as a permissible interpretation of the ESA, a statutory scheme focused not only on conservation but also on *recovery* of an endangered species.

2. Must unoccupied areas contain PCEs to be designated critical habitat?

Plaintiffs similarly argue that FWS acted unreasonably in designating Unit 1 as critical habitat be-

cause Unit 1 does not contain all of the PCEs[25] as required by the ESA. Their position is, again, contrary to the ESA; plaintiffs equate what Congress plainly differentiates: the ESA defines two distinct types of critical habitat, occupied and unoccupied; only occupied habitat must contain all of the relevant PCEs. *See* 16 U.S.C. § 1532(5)(A).[26] Wise or unwise, that is for Congress to decide.

Unit 1 is unoccupied. Unlike occupied habitat, on which FWS must find all of the physical or biological features called PCEs (50 C.F.R. § 424.12(b)),[27] Congress does not define unoccupied habitat by reference to PCEs; rather, FWS is tasked with designating as critical *unoccupied* habitat so long as it determines it is "essential for the conservation of the species" and

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[25] PCEs are those "physical and biological features that, when laid out in the appropriate quantity and spatial arrangement to provide for a species' life-history processes, are essential to the conservation of the species." 77 Fed. Reg. at 35131.

[26] (5)(A) The term "critical habitat" for a threatened or endangered species means–

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

16 U.S.C. § 1532(5)(A).

[27] The cases invoked by plaintiffs in support of their argument are distinguishable in that they relate to designations of occupied habitat.

"only when a designation limited to its present range would be inadequate to ensure the conservation of the species." 50 C.F.R. § 424.12(e). As previously explained, FWS determined that the recovery of the frog "will not be possible without the establishment of additional breeding populations of the species" and it found that the ponds in Unit 1 "provide breeding habitat that in its totality is not known to be present elsewhere within the historic range."[28] The plaintiffs have not demonstrated that FWS's findings are implausible.

3. Did FWS act unreasonably in failing to identify the point at which ESA protections will no longer be required for the dusky gopher frog?

Before determining what is "essential" to the conservation of the dusky gopher frog, the plaintiffs contend that FWS first must identify the point at which the protections of the ESA will no longer be required. The defendants respond that the plaintiffs improperly seek to import the recovery planning criteria into the critical habitat designation process. The Court agrees.

The plaintiffs' argument runs counter to the plain language and structure of the ESA, which provides that the requirement for designating critical

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[28] Federal defendants explain "[i]f the biggest threat to a critically endangered species is the destruction of habitat, as is the case with the frog, it does not make sense to hamstring FWS' efforts to conserve the species by limiting the designation of habitat to only those areas that contain optimal conditions for the species. If such habitat was readily available, the frog would not be reduced to 100 individuals." Again, if this administrative structure is to be changed, it is for Congress to do so.

habitat (16 U.S.C. § 1533(a)(3)) is separate from the requirement for preparing a recovery plan (16 U.S.C. § 1533(f)). The ESA recognizes that FWS must designate critical habitat, habitat that is "essential for the conservation of the species", even if it does not know precisely how or when recovery of a viable population will be achieved. *See Home Builders Ass'n of Northern California v. U.S. Fish and Wildlife Service,* 616 F.3d 983, 989 (9th Cir. 2010) (rejecting argument that FWS must first identify the point at which the endangered species is considered conserved before it designates critical habitat "because it lacks legal support and is undermined by the ESA's text."); *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1025 (D. Ariz. 2008) ("While tempting in its logical simplicity . . . the language of the ESA requires a point of conservation to be determined in the recovery plan, not at the time of critical habitat designation."), *aff'd, Arizona Cattle Growers' Ass'n v. Salazar,* 606 F.3d 1160 (2010), *cert. denied,* 131 S. Ct. 1371 (2011). Moreover, in directing FWS to assess what would be "essential for the conservation" of a species, it did not explicitly require that FWS identify specific recovery criteria at that time. Notably, Congress imposed specific deadlines for the designation of critical habitat, but included no such deadlines for the preparation of a recovery plan. FWS's failure (as yet) to identify how or when a viable population of dusky gopher frogs will be achieved, as indifferent and overreaching by the government as it appears, does not serve to invalidate its finding that Unit 1 was part of the minimum required habitat for the frog's conservation.[29]

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[29] Plaintiffs advance additional arguments that are clearly re-

butted by defendants and, most critically, by the ESA's mandate. For example, plaintiffs contend that, to uphold the Rule as valid, it can only apply to the general geographic area in which the frog was found at the time the listing decision for it was made in 2001. This is the same sort of argument already considered and foreclosed by the ESA's clear text. Plaintiffs seek to conflate listing duties with critical habitat designation duties and, again, ignore the plain statutory distinction between occupied and unoccupied habitat. The plaintiffs also argue that the designation is arbitrary because the agency should have exercised its discretion to exclude Unit 1. But this failure to exclude argument—to the extent it is reviewable (*see The Cape Hatteras Access Preservation Alliance v. U.S. Dep't of Interior,* 731 F. Supp. 2d 15, 29 (D.D.C. 2010) (Service's decision not to exclude areas from critical habitat designation is not reviewable pursuant to the ESA)) seems better directed to plaintiffs' challenge to FWS's consideration of the economic impacts of designation.

Finally, to the extent the plaintiffs suggest that the Rule is overbroad, they fail to support their argument. The defendants submit that all of Unit 1 meets statutory and regulatory criteria for critical habitat; they base their decision on survey methodologies, historical data, and the need for corridors between breeding sites to maintain connectivity and gene flow. To put a finer point on it, the methodology used for delineating the critical habitat unit boundaries starts by using "digital aerial photography using ArcMap 9.3.1 to map. . .[t]hose locations of breeding sites outside the geographic area occupied by the species at the time it was listed . . . that were determined to be essential for the conservation of the species. . .." 77 Fed. Reg. 35134. FWS looked to breeding sites deemed essential for conservation, the ephemeral ponds. From these points, FWS created a buffer by using "a radius of 621 m (2,037 ft)." *Id.* FWS "chose the value of 621 m. . .by using the median farthest distance movement (571 m (1,873 ft)) from data collected during multiple studies of the gopher frog . . . and adding 50 m (164 ft) to this distance to minimize the edge effects of the surrounding land use. . .." *Id.* FWS then "used aerial imagery and ArcMap to connect critical habitat areas within 1,000 m (3,281 ft) of each other to create routes for gene flow between breeding sites and metapopulation structure." *Id.* With respect to Unit 1, FWS ex-

4. Did FWS designate critical habitat for a species that is not listed as endangered?

The Poitevent Landowners argue that the "Mississippi" gopher frog, not the dusky gopher frog, is the frog on the endangered species list. For this reason, they insist that the Rule is invalid. The defendants counter that plaintiffs willfully ignore FWS's taxonomic explanation in the Rule; its mere change of the common and scientific name of the frog does not alter the fact that the listed entity remains the same. A review of the listing leading up to the designation supports FWS's position.

Recall that in 2001 FWS listed a distinct population segment of the gopher frog subspecies and provided a scientific definition of the listed frog. During that listing process, FWS explained that the population segment was so distinct that some biologists believed it should be recognized as its own species, rather than just a distinct population segment. Because there was still some dispute, FWS concluded that "[t]he scientific name, *Rana capito sevosa,* will

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plained that "the last observation of a dusky gopher frog in Louisiana was in 1965 in one of the ponds within [Unit 1]," and that at least two of the ponds in this immediate area were former breeding sites, and that the five ponds close to each other could create a metapopulation. *Id.* at 35123–25. It was from these ephemeral ponds that FWS applied its methodology (621 m buffer and routes for gene flow) to create Unit 1's boundaries that resulted in the designation of 1,544 acres in Unit 1. Scientific findings that are not credibly called into question by plaintiffs' hopeful argument. *See Medina County Environmental Action Ass'n v. Surface Transp. Bd.,* 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). The Court defers, as it must under the law, to FWS's methodology for delineating Unit 1's boundaries.

be used to represent this distribution of frogs [but] if the name *Rana sevosa* is ultimately accepted by the herpetological scientific community, we will revise our List . . . to reflect this change in nomenclature (scientific name)." 66 Fed. Reg. 62993. Indeed, the scientific community recently did conclude that the species it listed as a distinct population segment of the Mississippi gopher frog in 2001 "is different from other gopher frogs and warrants acceptance as its own species . . . and the scientific name for the species was changed to *Rana sevosa*." 77 Fed. Reg. 35118. FWS also changed the common name of this distinct population segment of the gopher frog from Mississippi gopher frog to Dusky gopher frog.

Contrary to the plaintiffs' argument, FWS did not simply arbitrarily "change its mind" about the name of the frog; rather, it adapted changes accepted in the scientific community. Plaintiffs elevate form over substance; they fail to persuade that the listed entity, this distinct population of gopher frogs, has changed, or that FWS's taxonomic finding is unsupported.[30] And, the Court finds that FWS, acting in its expertise, considered the best scientific evidence in effecting a change in the taxonomic and common name of the frog.[31]

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[30] And the record belies the plaintiffs' charge that they were denied the opportunity to publicly comment on the name change. In fact, the plaintiffs submitted comments on the revised proposed rule, in which FWS asked for comments on the proposed name change. 76 Fed. Reg. 59774, 59775.

[31] *Cf. Alabama-Tombigbee Rivers Coalition v. Kempthorne,* 477 F.3d 1250, 1260 (11th Cir. 2007) ("The Service's finding that the Alabama sturgeon is a separate species is consistent with the [scientists'] position. . .on the question and is supported by. . . peer review[,] and by the opinion of the Service's own experts.").

5. Does FWS's alleged "trespass" on Unit 1 invalidate the Rule?

The Poitevent Landowners charge that FWS and a scientist trespassed on its lands in March 2011; they took photos and, as a result of the ponds discovered there, included Unit 1 in the Rule. Although the Poitevent Landowners concede that Weyerhaeuser, a co-owner and lessee, granted permission to the FWS agent and scientist to enter the land, plaintiffs insist that such permission was invalid. Plaintiffs insist that invalidation of the Rule is the proper way to indemnify them for their trespass damages. Alternatively, the Poitevent Landowners suggest that the Court apply the "civil equivalent" of the fruit-of-the-poisonous-tree doctrine and exclude the evidence as illegally obtained.

This argument was raised for the first time in their reply papers, and the Poitevent plaintiffs fail to plead a trespass claim. They likewise fail to suggest how any such claim would be timely, or why—(assuming for the sake of argument) their fictitious civil fruit-of-the-poisonous-tree doctrine applies—FWS's reliance on Weyerhaeuser's good faith consent (again borrowing from exclusionary rule principles in the criminal context) would not validate the "trespass." The Court declines to address the merits of this argument, which is not properly before it, has not been properly or timely raised, and seems an afterthought.

B.

The Court now turns to address what, in its view, is the most compelling issue advanced by plaintiffs in challenging the validity of the Rule: FWS's economic analysis and, perhaps most troubling, its

conclusion that the economic impacts on Unit 1 are not disproportionate.

Plaintiffs contend that designating Unit 1 as critical habitat is irrational. Unit 1, they submit, provides no benefit to the dusky gopher frog and the designation's estimated potential price tag for the landowners' damage is somewhere between $20.4 million and $33.9 million. Defendants answer that FWS fulfilled its statutory obligation and applied the proper approach to consider all potential economic impacts to Unit 1. Once again the Court is restrained by a confining standard of review. The Court, therefore, is not persuaded that FWS engaged a flawed economic analysis or otherwise failed to consider all potential economic impacts the designation would have on Unit 1.

The decision to list a species as endangered is made without reference to the economic effects of the listing decision. Not so with critical habitat designations. The ESA directs that the "Secretary shall designate critical habitat . . . on the basis of the best scientific data available and after taking into consideration the economic impact . . . of specifying any particular area as critical habitat." 16 U.S.C. § 1533(b)(2). Informed by these considerations, FWS exercises its wide discretion in determining whether to exclude particular areas. *See* 16 U.S.C. § 1533(b)(2) (the Service "may exclude any area from critical habitat if [it] determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat"); *see also The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 731 F. Supp. 2d 15, 29–30 (D.D.C. 2010) (citing *Arizona Cattle Growers' Ass'n v. Kempthorne,* 534 F. Supp. 2d 1013, 1032 (D. Ariz.

2008)). But the Service is precluded from excluding areas from a designation if it determines that "failure to designate such area as critical habitat will result in extinction of the species." 16 U.S.C. § 1533(b)(2).

The plaintiffs contend that FWS failed to consider all economic impacts of the critical habitat designation. But, in fact, the record establishes that FWS considered several potential economic impacts. The record shows that FWS endeavored to consider any economic impacts that could be attributable to the designation, and that plaintiffs were given (and indeed availed themselves of) the opportunity to participate in the process for evaluating economic impacts. The Court finds that FWS fulfilled its statutory obligation. The outcome seems harsh, but it is not unlawful under the present administrative process and this Court's confined standard of review.

Nevertheless, the plaintiffs object to FWS's methods and findings on the issue of the designations's economic impact. Plaintiffs challenge FWS's utilization of the baseline method for considering potential economic impacts, and argue that, no matter what method is used, FWS arbitrarily concluded that "[o]ur economic analysis did not identify any disproportionate costs that are likely to result from the designation." Although the plaintiffs' dispute as to the appropriate method for considering economic impacts is unfounded, their challenge to FWS's ultimate conclusion invites rigorous scrutiny.

As an initial matter, FWS permissibly used the baseline approach in conducting the economic analysis (EA). Under this approach, the impacts of protecting the dusky gopher frog that will occur regardless of the critical habitat designation (i.e., the burdens

imposed by simply listing the frog) are treated as part of the regulatory baseline and are not factored into the economic analysis of the effects of the critical habitat designation; the approach calls for a comparison of "the world with the designation . . . to the world without it." *See The Cape Hatteras Access Preservation Alliance v. U.S. Dept. of Interior,* 344 F. Supp. 2d 108, 127 (D.D.C. 2004); *see also Cape Hatteras II,* 731 F. Supp. 2d 15, 30 (D.D.C. 2010).[32]

Consideration of economic impacts is all that is required. FWS fulfilled this statutory mandate by identifying baseline economic impacts. And the final EA quantified impacts that may occur in the 20 years following designation, analyzing such economic impacts of designating Unit 1 based on the following three hypothetical scenarios: (1) development occurring in Unit 1 would avoid impacts to jurisdictional wetlands and, thus, would not trigger ESA Section 7 consultation requirements; (2) development occurring in Unit 1 would require a permit from the Army Corps of Engineers due to potential impacts to jurisdictional wetlands, which would trigger ESA Section 7 consultation between the Corps and FWS; and FWS would work with landowners to keep 40% of the unit for development and 60% managed for the frog's conservation ("present value incremental impacts of critical habitat designation due to the lost option for developing 60 percent of Unit 1 lands are $20.4 mil-

[32] To the extent the plaintiffs object to the baseline approach and instead advocate for the co-extensive approach to assessing economic impacts, the plaintiffs fail to explain how such an approach changes the economic analysis. The defendants contend, and the Court agrees, that the baseline and co-extensive methods of analyzing potential economic impacts yield the same results.

lion"); and (3) development occurring would require a federal permit, triggering ESA Section 7 consultation, and FWS determines that no development can occur in the unit ("present value impacts of the lost option for development in 100 percent of the unit are $33.9 million").[33] Because the EA "did not identify any disproportionate costs that are likely to result from the designation[,] the Secretary [did] not exercis[e] his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." 77 Fed. Reg. 35141.

The plaintiffs do not take issue with these projected costs but, rather, insist that FWS's conclusion—its decision not to exclude Unit 1 from the designation in light of what the potential economic impacts in the event Section 7 consultation is triggered—is arbitrary. This is so, plaintiffs contend, because their land is the only land designated that faces millions of dollars in lost development opportunity if the consultation process is triggered. How can FWS say that the economic impacts are not disproportionate?

FWS defends its determination in the Rule: "considerable uncertainty exists regarding the likelihood of a Federal nexus for development activities [in Unit 1]." The record confirms that FWS considered potential economic impacts and exercised its discretion, considered potential costs associated with Section 7 consultation, and determined that these economic

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[33] In preparing the final version of the EA, FWS considered Unit 1's landowners' comments, as well as the landowners' submissions regarding the value of Unit 1 land.

impacts to Unit 1 were not disproportionate.[34] All that the ESA requires. The Court, with its somewhat paralyzing standard of review, defers to the agency's expertise in its methods for cost projections and its refusal to except Unit 1 from the designation.[35] Only Congress can change the regime of which plaintiffs understandably complain.

C.

Finally, the Court considers whether the Secretary acted arbitrarily in failing to prepare an environmental impact statement.

The plaintiffs submit that the defendants' failure to complete an Environmental Impact Statement concerning the critical habitat designation of Unit 1 violates the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et. seq., a statute that serves the dual purposes of informing agency decisions as to the significant environmental effects of proposed major federal actions and ensuring that relevant information is made available to the public. *See Robertson v. Methow Valley Citizens Council,* 490 U.S. 332, 349 (1989). The defendants counter that, pursuant to

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[34] The alleged arbitrariness of the "not disproportionate" determination is undermined by the uncertain potential for development. The ESA only requires that the Service consider all potential costs, which it has done. Although this "not disproportionate" conclusion is discomforting it, again, is harsh but not invalid as the law exists.

[35] As always, the Court is mindful of its scope of its constrained review. "If the agency's reasons and policy choices conform to minimal standards of rationality, then its actions are reasonable and must be upheld." *Luminant Generation Co. LLC v. U.S. E.P.A.,* 714 F.3d 841, 850 (5th Cir. 2013) (quoting *Tex. Oil & Gas Ass'n v. U.S. E.P.A.,* 161 F.3d 923, 933 (5th Cir. 1998)).

long-standing FWS policy, an EIS is simply not required when designating critical habitat.[36] They are correct.

In passing NEPA, Congress declared that it is the continuing policy of the federal government to "create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4331. Specifically listed as having a "profound influence" on this natural environment that Congress sought to protect are population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances. *Id.* To accomplish these objectives, NEPA requires that an agency prepare a comprehensive environmental impact statement (EIS) for "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(c). "Notably, the NEPA statutory framework provides no substantive guarantees; it prescribes adherence to a particular process, not the production of a particu-

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[36] The defendants also argue that the plaintiffs lack prudential standing to bring a NEPA claim because their claims of economic harm fall outside the zone of environmental interests protected by NEPA. Indeed, the Court agrees that prudential standing for NEPA claims is doubtful, given the economic nature of the harm asserted by the plaintiffs and the environmental interests protected by NEPA. *See Nevada Land Action Ass'n v. U.S. Forest Serv.,* 8 F.3d 713, 716 (9th Cir. 1993) ("The purpose of NEPA is to protect the environment, not the economic interests of those adversely affected by agency decisions. Therefore a plaintiff who asserts purely economic injuries does not have standing to challenge an agency action under NEPA") (citations omitted). Nevertheless, the Court considers whether an EIS is required.

lar result." *Spiller v. White,* 352 F.3d 235, 238 (5th Cir. 2003) (NEPA "does not prohibit the undertaking of federal projects patently destructive of the environment" but, rather, requires "only that [an agency] make its decision to proceed with the action after taking a 'hard look at environmental consequences.'").

Congress does not expressly mandate preparation of an EIS for critical habitat designations. Nevertheless, through tortured reasoning, the plaintiffs assert that an EIS was required because NEPA demands an EIS for "major Federal actions significantly affecting the quality of the human environment" and the critical habitat designation here involves a change to the physical environment. 42 U.S.C. § 4332(C). Tossing aside the conservation objectives achieved by critical habitat designations, plaintiffs go on to detail the modifications to Unit 1 that would make it optimal habit for the frog, namely regular burning of the land and planting different trees. However, the ESA statutory scheme makes clear that FWS has no authority to force private landowners to maintain or improve the habitat existing on their land.[37] 77 Fed. Reg. 35118, 35121, 35128. FWS cannot and will not instruct the plaintiffs to burn their land, thus, the PCEs serve as nothing more than descriptors of ideal habitat. Plaintiffs invoke *Catron County Bd. Of Com'rs, New Mexico v. U.S. Fish and Wildlife Serv.,* 75 F.3d 1429, 1436–39 (10th

[37] The only "bite" to the statute is the consultation requirement, which simply requires that, when a private party's action has a federal nexus, the federal agency authorizing such action must first consult with the Secretary. 16 U.S.C. § 1536(a)(2). Activities such as timber management lack a federal nexus and are therefore exempt.

Cir. 1996). There, the Tenth Circuit determined that designation of critical habitat would harm the environment by limiting the county's ability to engage in flood control efforts. *Id.* Unlike the critical habitat designation in that case—where the environmental impact of the critical habitat designation "will be immediate and disastrous"—the critical habitat Rule designating Unit 1 does not effect changes to the physical environment.

Moreover, the Ninth Circuit has expressly held that NEPA does not apply to critical habitat designations. *Douglas County v. Babbitt,* 48 F.3d 1495, 1501–08 (9th Cir. 1995) (considering issue of first impression, and determining that NEPA does not apply to the Secretary's decision to designate critical habitat under the ESA). In so holding, the Ninth Circuit articulated three reasons why critical habitat designations are not subject to NEPA: (1) the ESA displaced the procedural requirements of NEPA with respect to critical habitat designation; (2) NEPA does not apply to actions that do not alter the physical environment; and (3) critical habitat designation serves the purposes of NEPA by protecting the environment from harm due to human impacts. *Id.* Three logical reasons. The Fifth Circuit agrees that NEPA itself provides, in no uncertain terms, that alteration of the physical environment is a prerequisite for NEPA application and the need to prepare an EIS.[38] *See*

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[38] The Fifth Circuit has not directly addressed whether NEPA applies to critical habitat designations. Based on competing authority within the Fifth Circuit, one district court has applied the arbitrary and capricious standard to decisions not to prepare EISs. *See Center for Biological Diversity v. U.S. Fish and Wildlife Service,* 202 F. Supp. 2d 594, 646–48 (W.D. Tex. 2002) (citations omitted).

Sabine River Authority v. U.S. Dept. of Interior, 951 F.2d 669, 679 (5th Cir. 1992) ("[T]he acquisition of the [negative conservation] easement by [FWS] did not effectuate any change to the environment which would otherwise trigger the need to prepare an EIS."); *see also City of Dallas v. Hall,* 562 F.3d 712, 721–23 (5th Cir. 2009) (setting an acquisition boundary for a wildlife refuge did not alter the physical environment and therefore did not require the preparation of an EIS). For all of these reasons, the Court finds that the Secretary was not required to prepare an EIS before designating Unit 1 as critical habitat.[39]

* * *

Accordingly, IT IS ORDERED: that the defendants' motions to strike extra-record evidence are GRANTED; the defendants' motions for summary judgment are DENIED in part (insofar as they challenge the plaintiffs' standing) and GRANTED in part (insofar as the Rule including Unit 1 in its critical habitat designation is not arbitrary); and the plaintiffs' cross-motions are GRANTED in part (plaintiffs have standing) and DENIED in part (the Rule is sustained).[40]

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[39] As defendants acknowledge, there is nothing to preclude preparation of an EIS if or when changes to the physical environment become required, if consultation is triggered.

[40] The Court is compelled to remark on the extraordinary scope of the ESA, the Court's limited scope of review on the matters presented, and the reality that what plaintiffs truly ask of the Court is to embrace or countenance a broad substantive policy: they effectively ask the Court to endorse—contrary to the express terms and scope of the statute—a private landowner exemption from unoccupied critical habitat designations. This, the Third Branch, is the wrong audience for addressing this matter of policy.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14-31008

MARKLE INTERESTS, L.L.C.; P&F Lumber Company 2000, L.L.C.; PF Monroe Properties, L.L.C.,
Plaintiffs–Appellants,

v.

UNITED STATES FISH AND WILDLIFE SERVICE; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; United States Department of Interior; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees
Weyerhaeuser Company,
Plaintiff–Appellant
v.

United States Fish and Wildlife Service; Daniel M. Ashe, Director of United States Fish & Wildlife Service, in his official capacity; Sally Jewell, in her official capacity as Secretary of the Department of Interior,
Defendants–Appellees
Center for Biological Diversity; Gulf Restoration Network,
Intervenor Defendants–Appellees

Cons. w/14-31021

February 13, 2017
Appeals from the United States District Court for the Eastern District of Louisiana, New Orleans, Martin L.C. Feldman, U.S. District Judge

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ON PETITION FOR REHEARING EN BANC
(Opinion June 30, 2016)

Before REAVLEY, OWEN, and HIGGINSON, *Circuit Judges*.

Opinion

STEPHEN A. HIGGINSON, *Circuit Judge*:

The court having been polled at the request of one of its members, and a majority of the judges who are in regular active service and not disqualified not having voted in favor (Fed. R. App. P. 35 and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED. In the en banc poll, six judges voted in favor of rehearing (Judges Jolly, Jones, Smith, Clement, Owen, and Elrod) and eight judges voted against rehearing (Chief Judge Stewart and Judges Dennis, Prado, Southwick, Haynes, Graves, Higginson, and Costa). Judge Jones, joined by Judges Jolly, Smith, Clement, Owen, and Elrod, dissents from the court's denial of rehearing en banc, and her dissent is attached.

JONES, *Circuit Judge*, joined by JOLLY, SMITH, CLEMENT, OWEN, and ELROD, *Circuit Judges*, dissenting from Denial of Rehearing En Banc:

The protagonist in this Endangered Species Act (ESA) case—the dusky gopher frog—is rumored to "play dead," "cover its eyes," "peak [sic] at you[,] and then pretend to be dead again." *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 458 n.2 (5th Cir. 2016). The panel majority regrettably followed the same strategy in judicial review—play dead, cover their eyes, peek, and play dead again. Even more regrettably, the court refused to rehear this decision en banc. I respectfully dissent.

The panel opinion, over Judge Owen's cogent dissent, *id.* at 480–94, approved an unauthorized extension of ESA restrictions to a 1,500 acre-plus Louisiana land tract that is neither occupied by nor suitable for occupation by nor connected in any way to the "shy frog." The frogs currently live upon or can inhabit eleven other uncontested critical habitat tracts in Mississippi. No conservation benefits accrue to them, but this designation costs the Louisiana landowners $34 million in future development opportunities. Properly construed, the ESA does not authorize this wholly unprecedented regulatory action.

The panel majority upheld the designation of the tract as "unoccupied critical habitat." *See* 16 U.S.C. § 1532(5)(A)(ii). Relying on administrative deference, the majority reasoned that (1) the ESA and its implementing regulations have no "habitability requirement"; (2) the (unoccupied) Louisiana land is "essential for the conservation of" the frog even though it contains just one of three features critical to dusky gopher frog habitat; and (3) the Fish and Wildlife Service's decision not to exclude this tract from critical-habitat designation is discretionary and thus not judicially reviewable. I respectfully submit that all of these conclusions are wrong.

Each issue turns essentially on statutory construction, not on deference to administrative discretion or scientific factfinding. The panel majority opinion obscures the necessity for careful statutory exposition. More troublingly, the majority opinion fails to distinguish relevant precedent that recognized Congress's prescribed limit to designations of unoccupied critical habitat. Further, in declaring the decision not to exclude this tract as beyond judicial review, the panel did not notice *Bennett v. Spear,* 520 U.S. 154, 117 S. Ct. 1154 (1997), which upholds judicial review for this exact statute, and the panel majority ignored recent Supreme Court precedents that have reined in attempts to prevent judicial review of agency action.

Despite the majority's disclaimers and attempt to cabin their rationale, the ramifications of this decision for national land use regulation and for judicial review of agency action cannot be underestimated. Fifteen states appear as *amici* urging rehearing en banc. For reasons explained herewith and by Judge Owen's dissent, I would have granted rehearing en banc.

I. Background

The U.S. Fish and Wildlife Service (the Service) is one of two agencies tasked with implementing the ESA. The ESA requires the identification and listing of endangered and threatened species. When a particular species is listed, the Service must designate the species' "critical habitat." In particular, the Service

> to the maximum extent prudent and determinable . . . shall . . . designate any habitat of such species which is then considered to be

> critical habitat . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii).

"Critical habitat" is defined in an earlier provision as:

> (i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; ["occupied critical habitat"] and
>
> (ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species. ["unoccupied critical habitat"]

Id. § 1532(5)(A)(i)–(ii).

Finally, the Service shall designate critical habitat "after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat," but it may exclude any area from such designation if "the benefits of such exclusion outweigh the benefits of specifying such area" as critical habitat. *Id.* § 1533(b)(2).

Critical-habitat designation is consequential. "Designation of private property as critical habitat can impose significant costs on landowners because federal agencies may not authorize, fund, or carry out actions that are likely to 'result in the destruction or adverse modification' of critical habitat." *Otay Mesa Prop., L.P. v. U.S. Dep't of Interior*, 646 F.3d 914, 915 (D.C. Cir. 2011) (quoting 16 U.S.C. § 1536(a)(2)).

The Service listed the dusky gopher frog as endangered in 2001. Final Rule to List the Mississippi Gopher Frog Distinct Population Segment of Dusky Gopher Frog As Endangered, 66 Fed. Reg. 62,993 (Dec. 4, 2001). Goaded by a lawsuit, and after notice and comment, the Service published a final rule designating critical habitat in 2012. Designation of Critical Habitat for Dusky Gopher Frog, 77 Fed. Reg. 35,118 (June 12, 2012) [hereinafter Final Designation]. The critical-habitat designation included units spanning several thousand acres in Mississippi, and, as relevant here, Unit 1—consisting of 1,544 acres in Louisiana, which are not occupied by the dusky gopher frog. *Id.* The Service was thus required to show that Unit 1—the "specific area"—is "essential for the conservation of the [dusky gopher frog]." 16 U.S.C. § 1532(5)(A)(ii).

Unlike all of the Mississippi units, Unit 1 is uninhabitable by the shy frog. Final Designation, 77 Fed. Reg. at 35,131. Unit 1, in fact, contains only one of the three "physical and biological features" deemed necessary to dusky gopher frog habitat—five ephemeral ponds that could support the frog's reproduction. *Id.* at 35,123, 35,132. Worse still, "[a]pproximately ninety percent of [Unit 1] is currently covered with closed canopy loblolly pine plan-

tations," and the two remaining features essential for the frog's conservation require an *open*-canopied longleaf pine ecosystem. *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 827 F.3d 452, 482 (5th Cir. 2016) (Owen, J., dissenting); Final Designation, 77 Fed. Reg. at 35,131. In the Service's own words, "the surrounding uplands are poor-quality terrestrial habitat for dusky gopher frogs." Final Designation, 77 Fed. Reg. at 35,133. The Service admitted that without "prescribed burning" and creating a "forested habitat (preferably longleaf pine)," among other measures, Unit 1 is "unsuitable as habitat for dusky gopher frogs." *Id.* at 35,129, 35,132.

Designating Unit 1 as critical habitat also portends significant economic losses to the landowners in Unit 1. The Service acknowledged that critical-habitat designation could result in economic impacts of up to $34 million, stemming from lost development opportunities. *Id.* at 35,140.

Despite Unit 1's flaws, however, the Service asserted that "the presence of the PCEs [the physical and biological features essential for the frog's conservation] is not a necessary element in [the unoccupied critical habitat] determination." *Id.* at 35,123. The Service expressed its "hope to work with the landowners to develop a strategy that will allow them to achieve their objectives for the property and protect the isolated, ephemeral ponds that exist there." *Id.* But of course, the Service's preferred "tools and programs are voluntary, and actions such as habitat management through prescribed burning, or frog translocations to the site, cannot be implemented without the cooperation and permission of the landowner." *Id.* In addition, the Service stated that its "economic analysis did not identify any dispropor-

tionate costs that are likely to result from the designation." *Id*. at 35,141. Therefore, the Service included Unit 1 as unoccupied critical habitat.

The appellants in this case are landowners of Unit 1 involved in timber operations and commercial development. Their suit alleges that because Unit 1 is uninhabitable by the dusky gopher frog, it is not "essential for the conservation of" the frog as required for unoccupied critical habitat. They also allege that the Service never compared the costs and benefits of designating Unit 1 as critical habitat to support its conclusion that designation would cause no "disproportionate" impacts. The district court granted summary judgment in the Service's favor.

The panel majority affirmed the district court. The panel majority first rejected any notion that the ESA requires critical habitat to be habitable, characterizing such a requirement as an "extra-textual limit." *Markle Interests*, 827 F.3d at 468 (majority opinion). Second, turning to whether Unit 1 met the definition of unoccupied critical habitat, the panel majority held that "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature—the ephemeral ponds—. . . justified [the Service's] finding that Unit 1 was essential for the conservation of the dusky gopher frog." *Id.* at 471. According to the panel majority, "if the ponds are essential, then Unit 1, which contains the ponds, is essential for the conservation of the dusky gopher frog."[1] *Id.* at 472 n.20. Finally, the panel majority

[1] On this issue, Judge Owen dissented, arguing that the panel majority opinion "re-writes the Endangered Species Act" because "[n]either the words 'a critical feature' nor such a concept appear in the Act." *Id.* at 488 (Owen, J., dissenting). "The

held that the Service's decision not to exclude Unit 1 from critical habitat on the basis of economic impact was unreviewable because that decision is committed to the Service's discretion. *Id.* at 473–75. All three holdings are incorrect.

II. Contrary to the Panel Majority's Holding, the ESA Contains a Clear Habitability Requirement

No one disputes that the dusky gopher frog cannot inhabit Unit 1. The panel majority find that fact irrelevant, however, because looking only at the statute's definitional section, the ESA does not appear to require that a species actually be able to inhabit its "unoccupied critical habitat." They dismiss habitability as an "extra-textual limit" that cannot be found in either "the text of the ESA or the implementing regulations." *Markle Interests*, 827 F.3d at 468 (majority opinion). Read in context, however, the ESA makes clear that a species' critical habitat must be a subset of that species' habitat. The ESA's implementing regulations are consistent with this subset arrangement. Further, when Congress got around to clarifying critical-habitat regulation in 1978, the contemporary understanding of critical habitat, shared alike by the most fervent proponents and opponents of wildlife and habitat protection, was that it meant a part of the species' actual habitat.

Unfortunately, the parties here failed to undertake holistic statutory interpretation. Misled by the

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touchstone chosen by Congress was 'essential,'" and "[t]he existence of a single, even if rare, physical characteristic does not render an area 'essential' when the area cannot support the species because of the lack of other necessary physical characteristics." *Id.*

parties' briefing, the panel also neglected this effort. Another difficulty is the Ninth Circuit's adoption of a similar, non-habitat interpretation of "unoccupied critical habitat." *See Bear Valley Mut. Water Co. v. Jewell*, 790 F.3d 977, 993–94 (9th Cir. 2015). Nevertheless, given the significance of this case and the fact that the law is clear beyond dispute, it was our court's duty to "state what the law is."

A. A Species' Critical Habitat Must Be a Subset of the Species' Habitat

The ESA states that the Service

> *shall*, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, *designate any habitat of such species which is then considered to be critical habitat* . . . and . . . may, from time-to-time thereafter as appropriate, revise such designation.

16 U.S.C. § 1533(a)(3)(A)(i)–(ii) (emphases added). Whatever is "critical habitat," according to this operative provision, must first be "any habitat of such species." The fact that the statutory definition of "critical habitat," on which the entirety of the panel opinion relies, includes areas within and without those presently "occupied" by the species does not alter the larger fact that all such areas must be within the "habitat of such species."

This is not the only time Congress drew this distinction. For example, the ESA requires federal agencies to consult with the Service to ensure that their activities are "not likely" to result in various adverse impacts on listed species and their critical habitats. *See id.* § 1536(a)(2). Such consultation is

required, *inter alia*, where agency activities would be likely to "result in the destruction or adverse modification of *habitat of such [endangered or threatened] species which is determined by the Secretary*, after consultation as appropriate with affected States, *to be critical*[.]" *Id.* (emphases added). There, too, Congress separated out the "critical" portion of the habitat from the general "habitat of such species." In other provisions, Congress reiterated its focus on species' habitats. *See, e.g.*, *id.* § 1533(a)(1)(A) (listing "curtailment of [a species'] habitat" as a factor in determining whether the species is endangered or threatened); *id.* § 1537(b)(3) (requiring the Service to encourage foreign persons to develop and carry out "conservation practices designed to enhance such fish or wildlife or plants and their habitat"); *id.* § 1537a(e)(2)(B) (requiring the Service to cooperate with foreign nations in "identification of those species of birds that migrate between the United States and other contracting parties, and the habitats upon which those species depend").

The ESA's implementing regulations also distinguish between the designations of "critical habitat" and "habitat."[2] For instance, section 402 begins by explaining its "scope" in terms of critical habitat: it "interprets and implements" section 7 of the ESA, which "imposes requirements upon Federal agencies regarding endangered or threatened species . . . and habitat of such species that has been designated as

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[2] Other regulations reflecting on the consultation provisions make the distinction as well. *See, e.g.*, 32 C.F.R. § 643.32 (emphasizing the ESA requires agencies to ensure that their actions are not likely to result in the destruction or modification of "habitat of such species which is determined . . . to be critical"); 7 C.F.R. § 650.22(a)(3) (same); 33 C.F.R. § 320.3(i) (same).

critical ('critical habitat')." 50 C.F.R. § 402.01(a). Section 402.01 goes on to list what measures are required to guard against "the destruction or adverse modification of ['habitat of such species that has been designated as critical']." *Id.* The consistent focus on species' "habitat" demonstrates, by its use in these passages, that it is a broader concept than "critical habitat." *See, e.g.*, *id.* § 402.02 (referring to "actions intended to conserve listed species or their habitat"); *id.* § 402.05(b) (in the context of emergency consultation, referring to "impacts to endangered or threatened species and their habitats").

The bottom line is that the ESA's text and implementing regulations unequivocally establish that only "habitat of such species" may be designated as critical habitat. Thus, for example, if white-tailed deer were listed as an endangered species, their habitat would include, at a minimum, virtually all of Texas, but their "critical habitat" would be limited to those portions of their habitat that meet the definition of "critical habitat."

The Service's first task is accordingly to determine whether the land under consideration for critical-habitat designation is "habitat of such species." "Habitat" is defined as "the place where a plant or animal species naturally lives and grows." Webster's Third New International Dictionary 1017 (1961). *See also* The Random House Dictionary of the English Language 634 (1969) ("[T]he kind of place that is natural for the life and growth of an animal or plant [.]"); *Habitat*, *Black's Law Dictionary* (10th ed. 2014) ("The place where a particular species of animal or plant is normally found."). The question thus becomes whether the land under consideration for critical-habitat designation is where the species at issue

naturally lives and grows or would naturally live and grow. Only after the Service has answered that question affirmatively can it assess whether the species' habitat meets the statutory definition of "*critical* habitat."

B. The Evolution of the ESA Confirms that Limiting a Species' Critical Habitat to the Species' Habitat Was Intentional

Congress's limitation of critical-habitat designations to the "habitat of such species" was no accident. This limitation can be traced back to the original text of the ESA, which in 1973 contained only two sentences on section 7 consultation, one of which briefly mentioned critical habitat:

> *All other Federal departments and agencies shall*, in consultation with and with the assistance of the Secretary, *utilize their authorities* in furtherance of the purposes of this Act by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 4 of this Act and *by taking such action necessary to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of such endangered species and threatened species or result in the destruction or modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with the affected States, to be critical.*

Endangered Species Act of 1973, Pub. L. No. 93-205, § 7, 87 Stat. 884, 892 (1973) (emphases added). This predecessor provision, like the current consultation requirements, refers to the destruction or modifica-

tion of "habitat of such species which is determined by the Secretary . . . to be critical."[3] From the very beginning, Congress rooted the concept of critical habitat in the relevant species' actual habitat.

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[3] Preservation of species' habitat was an early goal of various interest groups. *See, e.g.*, *Endangered Species: Hearings on* H.R. 37, H.R. 470, H.R. 471, H.R. 1461, H.R. 1511, H.R. 2669, H.R. 2735, H.R. 3310, H.R. 3696, H.R. 3795, H.R. 4755, H.R. 2169, *and* H.R. 4758 *Before the Subcomm. on Fisheries and Wildlife Conservation and the Environment of the H. Comm. on Merchant Marine and Fisheries*, 93d Cong. 241 (1973) (statement of A. Gene Gazlay, Director, Michigan Department of Natural Resources: "[Proposed legislation] should affirm the well-known fact that while legal protection and law enforcement are needed, the maintenance of suitable habitat is vital to the restoration of threatened wildlife."); *id.* at 258 (statement of Society for Animal Protective Legislation: "Rare and endangered animals should be protected in their natural habitat to the greatest extent possible."); *id.* at 271 (statement of Howard S. Irwin, President, New York Botanical Garden: "[T]he most serious aspect of the preservation of endangered species of plants is the preservation of their habitats."); *id.* at 299, 301 (statement of Tom Garrett, Wildlife Director, Friends of the Earth: "It should be obvious to any of us that if we do not preserve the habitat of species, and the integrity of biotic communities, whether or not plants or animals are protected from deliberate molestation becomes, eventually, academic. . .. I would like to emphasize again that it is ultimately immaterial whether or not an animal is deliberately molested if its habitat is not preserved."); *id.* at 326 (statement of Milt Stenlund, Supervisor of Game, Minnesota Department of Natural Resources: "[M]ore importance should be placed on the habitat of the endangered species. . .. While we may be concerned about the animal and greatly concerned about man's effect on the animal, I am convinced that we should be more concerned about the country, the habitat, in which the wolf lives. . .. In any endangered species program, I would like the committee to consider the fact that the habitat in which the endangered species live could be far more important than protection of the animal itself.").

Controversial decisions including *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1978), prompted Congress in 1978 to revisit the definition of critical habitat and the role of consultation.[4] As relevant here, Congress amended section 1533 to require the Service at the time of listing an endangered or threatened species to "specify any habitat of such species which is then considered to be critical habitat." Endangered Species Act Amendments of 1978, Pub. L. No. 95-632, § 11, 92 Stat. 3751, 3764 (1978). Congress's reference to the "habitat of such species" as a prerequisite to a (usually) narrower critical-habitat designation was, in fact, not new at all. It had been in the ESA since its inception and had become widely accepted as a bedrock principle. That principle—plain from both text and history—is that the Service may only designate a species' habitat as critical habitat.

Further, this distinction is embodied in the operative provision, which tells the Service what to do: it "*shall*, concurrently with [determining to list a species as endangered or threatened], *designate any habitat of such species which is then considered to be critical habitat*[.]" 16 U.S.C. § 1533(a)(3)(A)(i) (emphases added). The *definition* of critical habitat, in contrast, pertains only to one term in this provision. Critical habitat is not necessarily *all* habitat, but its irreducible minimum is that it *be habitat*. A diagram explains this statutory plan:

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[4] Our research on the committee hearings, floor debates, and congressional reports leading up to the 1978 amendments indicates uniform awareness in Congress that a species' critical habitat was a subset of the species' habitat.

C. By Holding that "Critical Habitat" Has No Habitability Requirement, the Panel Majority Contradict the ESA's Plain Language

What went awry with the panel majority opinion? The majority overlook section 1533(a)(3)(A)(i) completely. This unfortunate oversight was no doubt abetted by the facts that the Service's Final Designation fails to quote that operative provision, and the parties, for differing tactical reasons, did not call this obvious matter of statutory interpretation to the panel's attention. Consequently, the majority's construction of the law derives solely from the definition of "critical habitat" and results in the following incorrect view of the ESA:

> The ESA sets out the following path for the critical-habitat designation process: (1) determine whether the land in question is the species' habitat; (2) if so, determine whether any portion of that land meets the definition of critical habitat; and (3) if so, designate that portion of the species' habitat as its critical habitat. Erroneously, the panel majority begin and end with the definition of critical habitat, asking only whether the land in question—even if uninhabitable by the species—satisfies the definition. That reasoning is fundamentally at odds with the ESA's text, properly read, and its regulations. The panel majority wound up sanctioning the oxymoron of uninhabitable critical habitat based on an incorrect view of the statute.

Two objections may be made to correcting this error. First, because the landowners didn't proffer this exact textual analysis in their habitability arguments, they waived it. Second, adopting this interpretation would conflict with a Ninth Circuit deci-

sion. Neither of these objections should be persuasive.

The first objection—that this textualist argument was waived—is easily disposed of. Throughout this litigation, the habitability issue, and the landowners' argument that the ESA requires a species' critical habitat to be habitable by that species, is well documented. Indeed, the best indication that the habitability issue is squarely presented is the panel majority's forceful rejection of any "habitability requirement" in the ESA. This court traditionally declines to address an issue only if it is not "adequately" briefed. *See, e.g.*, *United States v. Copeland*, 820 F.3d 809, 811 n.2 (5th Cir. 2016). Given the record, briefing, and panel majority's sweeping dismissal of a habitability requirement, the landowners' preservation of the habitability issue is anything but inadequate. Second, the logical consequence of accepting the objection would be that litigants could force courts to interpret statutory provisions in isolation by briefing arguments related only to those provisions. That result would conflict with our duty to consider statutory text in light of the statutory context. *See, e.g.*, *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 450–51 (5th Cir. 2013) ("[T]he meaning of statutory language, plain or not, depends on context." (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991))); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) ("The text must be construed as a whole."). Finally, relying on waiver would create a nonsensical world where the panel majority could cite statutory context and related regulations to say no habitability requirement ex-

ists,[5] but a reviewing court could not cite the same context and related regulations to say a habitability requirement does in fact exist. This objection is meritless.

The second objection—that accepting this statutory argument would conflict with the Ninth Circuit's view—is simply a consequence of a more precise textual interpretation. In *Bear Valley Mutual Water Co. v. Jewell*, 790 F.3d 977 (9th Cir. 2015), the Service designated unoccupied areas around the Santa Ana River as critical habitat for the Santa Ana sucker, a small fish. *Id.* at 993–94. Those areas were deemed essential to the sucker's conservation not because they are its habitat, but because they are "the primary sources of high quality coarse sediment for the downstream occupied portions of the Santa Ana River," and the sediment enhances the sucker's downstream habitat. *Id.* The court rejected the plaintiffs' argument that the areas did not qualify as critical habitat because they are uninhabitable. *Id.* The court believed that "[t]here is no support for this contention in the text of the ESA or the implementing regulation, which requires the Service to show that the area is 'essential,' without further defining that term as 'habitable.'" *Id.*

Two thoughts in response. First, as explained above, the "no support in the text of the ESA or implementing regulations for a habitability requirement" line is plainly wrong.

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[5] *Markle Interests*, 827 F.3d at 468 ("There is no habitability requirement in the text of the ESA or the implementing regulations.").

Second, enforcing the ESA's habitat provisions as written would not diminish the statute's protection of life-sustaining features that lie outside a species' critical habitat. The Ninth Circuit appeared to assume that critical-habitat designation of those unoccupied, uninhabitable areas was the only means of protecting the life-sustaining features. That is incorrect. Section 7 consultation is required to ensure that "any action authorized, funded, or carried out by" a federal agency is "not likely" to "result in the destruction or adverse modification of habitat of [endangered or threatened] species which is determined . . . to be critical." 16 U.S.C. § 1536(a)(2). Note that the "action" targeted by section 7 does not have to occur *on* designated critical habitat to trigger section 7 consultation; it only has to have the potential to *affect* critical habitat. Thus, if a landowner requested a permit to develop the unoccupied areas in *Jewell* in a way that might be likely to result in the destruction or adverse modification of the sucker's critical habitat downstream, an agency could not issue that permit without first going through section 7 consultation, regardless whether the unoccupied areas are designated as critical habitat. Consequently, the life-sustaining features would have nonetheless remained protected under the section 7 consultation requirements. Thus, the law protects critical habitat without the need to designate territory unoccupied by an endangered species as critical habitat.

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For these reasons, the panel majority were wrong to say that the ESA contains no habitability requirement. Correcting this error requires only three simple statements: (1) the ESA requires that land proposed to be designated as a species' critical habi-

tat actually be the species' habitat—a place where the species naturally lives and grows or could naturally live or grow; (2) all parties agree that the dusky gopher frog cannot inhabit—that is, naturally live and grow in—Unit 1; therefore, (3) Unit 1 cannot be designated as the frog's critical habitat.

III. Even Assuming No Habitability Requirement Exists, the Panel Majority Decision Is Wrong on the Standard for Unoccupied Critical Habitat

Let us assume *arguendo* that the panel, like the parties, adequately examined the "critical habitat" definitions in section 1532(5)(A)(i)–(ii) without reference to the necessity of "habitability." Is the panel majority's interpretation correct? I submit that it is not for two reasons. First, the panel majority's test for unoccupied critical habitat is *less* stringent than the test for occupied critical habitat. That less stringent test conflicts with the ESA's text, drafting history, and precedent; together, these confirm the commonsense notion that the test for unoccupied critical habitat is designed to be *more* stringent than the test for occupied critical habitat. Second, although the majority opinion appears to recognize the dangerous breadth of its oxymoronic holding, it fails to offer any real limiting principles. The Service itself has actually rejected one suggested limitation, and the others are inapposite and toothless. Judge Owen's dissent well dissected these problems, but I add somewhat to her reasoning.

A. The Test for Unoccupied Critical Habitat Is Supposed to Be More Demanding than the Test for Occupied Critical Habitat

Suppose a dusky gopher frog camped out, by chance, on Unit 1. Maybe he got there after hiding from some inquisitive biologists on another property. Despite his fortuitous presence, Unit 1 could not be designated as critical habitat because, as the panel acknowledges, "occupied habitat must contain all of the relevant physical or biological features" essential to the frog's conservation. *Markle Interests*, 827 F.3d at 468 (quoting *Markle Interests, L.L.C. v. U.S. Fish & Wildlife Serv.*, 40 F. Supp. 3d 744, 761 (E.D. La. 2014)). Unit 1 lacks several of these essential features.

According to the panel majority, however, Unit 1 *is* "critical habitat" despite being *unoccupied* by the frog. Focusing solely on the presence of a single allegedly essential feature (the "ephemeral ponds"), the panel majority make it *easier* to designate as critical habitat the land on which the species cannot survive than that which is occupied by the species. If correct, that remarkable and counterintuitive reading signals a huge potential expansion of the Service's power effectively to regulate privately- or State-owned land. Tested against the ESA's text, drafting history, and precedent, however, that reading is incorrect.

1. The ESA's Text

The ESA's text dictates that the unoccupied critical habitat designation is different and more demanding than occupied critical habitat designation. Occupied critical habitats are "specific areas . . . on which are found those physical or biological *features*

. . . essential to the conservation of the species[.]" 16 U.S.C. § 1532(5)(A)(i) (emphasis added). Unoccupied critical habitats, in contrast, are "specific *areas* . . . [that] are essential for the conservation of the species." *Id.* § 1532(5)(A)(ii) (emphasis added). Congress deliberately distinguished between the two. For occupied habitat, the relevant specific areas contain physical or biological *features* essential to the conservation of a species. For unoccupied habitat, the specific *areas themselves* must be essential for the species' conservation.

Flowing from the difference in terminology between "features" and "areas," the burdens underlying the two types of designation are also different. A "feature" is defined as "a marked element of something" or a "characteristic."[6] "Area" is defined as "a clear or open space of land" or "a definitely bounded piece of ground set aside for a specific use or purpose."[7] Given the narrower scope of "feature" than "area," it should be easier to prove two or three specific features are essential to a species' conservation (the occupied habitat standard) than an entire area (the unoccupied habitat standard). Suppose a eucalyptus tree is located in my yard. Whether the tree—a feature of my homestead—is essential to koala bear conservation would require an analysis of the tree's attributes only. But whether my homestead—a specific "area"—is "essential" to the species' conserva-

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[6] Webster's Third New International Dictionary 832 (1986). *See also* The Random House Dictionary of the English Language 520 (1969) ("a prominent or conspicuous part or characteristic").

[7] Webster's Third New International Dictionary 115 (1986). *See also* The Random House Dictionary of the English Language 79 (1969) ("any particular extent of surface; geographic region; tract" or "any section reserved for a specific function").

tion would be a more substantial undertaking. That analysis would assess not only the tree's attributes, but also the attributes of every constituent part—essential to the species' conservation or not—of my homestead. The analysis of an entire (unoccupied) area thus entails a broader and more complex investigation than an analysis of two or three features present in an area already occupied by the species. This is what the ESA requires.

2. The ESA's Drafting History

Before 1978, the ESA did not define critical habitat, but a regulation stepped in to define critical habitat as

> any air, land, or water area (exclusive of those existing man-made structures or settlements which are not necessary to the survival and recovery of a listed species) and constituent elements thereof, the loss of which would appreciably decrease the likelihood of the survival and recovery of a listed species or a distinct segment of its population. The constituent elements of critical habitat include, but are not limited to: physical structures and topography, biota, climate, human activity, and the quality and chemical content of land, water, and air. Critical habitat may represent any portion of the present habitat of a listed species *and may include additional areas for reasonable population expansion*.

Interagency Cooperation, 43 Fed. Reg. 870, 874–75 (Jan. 4, 1978) (emphasis added). The last sentence of that definition was the genesis of the occupied-unoccupied dichotomy.

When Congress took up the critical habitat issue in 1978, members of both Houses expressed concerns about the Service's broad definition and its potential to expand federal regulation well beyond occupied habitat.[8] Not only did House and Senate members criticize the regulation, but Congress's final definition took a narrower approach to unoccupied habitat, severing unoccupied from occupied critical habitat and placing the respective definitions in separate

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[8] For those who find legislative history relevant, the committees charged with reviewing ESA legislation in both the House and Senate expressed these concerns. On the House side, the Committee on Merchant Marine and Fisheries reported H.R. 14104, which defined critical habitat largely according to the Service's regulation. *See* H.R. 14104, 95th Cong., at 23 (1978) (as reported by H.R. Comm. on Merchant Marine & Fisheries, Sept. 25, 1978). But it conspicuously excluded any reference to "additional areas for reasonable population expansion." *See id.* The committee report explains the deliberate exclusion by instructing "the Secretary [to] be exceedingly circumspect in the designation of critical habitat outside of the presently occupied area of the species." H.R. Rep. No. 95-1625, at 18 (1978).

On the Senate side, the Committee on Environment and Public Works complained that the "Service is now using the *same criteria* for designating and protecting areas to extend the range of an endangered species as are being used in designation and protection of those areas which are truly critical to the continued existence of a species." S. Rep. No. 95-874, at 9–10 (1978) (emphasis added). The committee thought that "[t]here seems to be little or no reason to give exactly the same status" to unoccupied critical habitat as to occupied critical habitat. *Id.* at 10. The danger of this parity, in the committee's view, was the resulting proliferation of critical habitats, which "increases proportionately the area that is subject to the regulations and prohibitions which apply to critical habitats." *Id.* Consequently, the committee directed the Service to reevaluate its designation processes. *Id.*

provisions.[9] Mirroring the respective Houses' proposals,[10] Congress defined occupied critical habitat in terms of essential physical and biological *features*, and unoccupied critical habitat in terms of essential specific *areas*.[11] In so doing, Congress intentionally curtailed unoccupied critical habitat designation.

3. Precedent

The Ninth Circuit has twice confirmed that unoccupied critical habitat is a narrower concept than occupied critical habitat. In *Arizona Cattle Growers' Ass'n v. Salazar*, 606 F.3d 1160 (9th Cir. 2010), the Ninth Circuit considered whether the Service "unlawfully designated areas containing no [Mexican spotted] owls as 'occupied' habitat" instead of unoccupied habitat. *Id.* at 1161. While the court ultimately rejected this argument on the ground that the habitat in question was in fact occupied, the Ninth Circuit *agreed* that the distinction between critical habitat designation of occupied and unoccupied land is significant:

> The statute thus differentiates between "occupied" and "unoccupied" areas, imposing a more onerous procedure on the designation of unoccupied areas by requiring the Secretary

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[9] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

[10] *See* 124 Cong. Rec. 38,154, 38,159–60 (1978) (amendment of Representative Duncan to the definition of "critical habitat" immediately prior to the House vote); 124 Cong. Rec. 21,603 (1978) (text and passage of Senate Bill 2899).

[11] *See* Endangered Species Act Amendments of 1978, Pub. L. No. 85-632, 92 Stat. 3751, 3751 (1978) (codified at 16 U.S.C. § 1532).

> to make a showing that unoccupied areas are essential for the conservation of the species.

Id. at 1163.

Two months later, in *Home Builders Ass'n of Northern California v. United States Fish & Wildlife Service*, 616 F.3d 983 (9th Cir. 2010), *cert. denied* 562 U.S. 1217 (2011), the Ninth Circuit reiterated that the unoccupied critical habitat standard is "a *more demanding* standard than that of occupied critical habitat." *Id.* (emphasis added). As a result, the court concluded that the Service's "basing the designation [of critical habitat] on meeting the *more demanding* standard [for unoccupied critical habitat] poses no problem." *Id.* (emphasis added).

District courts have consistently echoed this dichotomy. *See Ctr. for Biological Diversity v. Kelly*, 93 F. Supp. 3d 1193, 1202 (D. Idaho 2015) ("The standard for designating unoccupied habitat is more demanding than that of occupied habitat."); *All. for Wild Rockies v. Lyder*, 728 F. Supp. 2d 1126, 1138 (D. Mont. 2010) ("Compared to occupied areas, the ESA imposes 'a more onerous procedure on the designation of unoccupied areas by requiring the Secretary to make a showing that unoccupied areas are essential for the conservation of the species.'" (quoting *Ariz. Cattle Growers' Ass'n*, 606 F.3d at 1163)); *see also Am. Forest Res. Council v. Ashe*, 946 F. Supp. 2d 1, 44 (D.D.C. 2013) (referencing "the more demanding standard for unoccupied habitat"); *Cape Hatteras Access Pres. All. v. U.S. Dep't of Interior*, 344 F. Supp. 2d 108, 119 (D.D.C. 2004) ("Thus, both occupied and unoccupied areas may become critical habitat, but, with unoccupied areas, it is not enough that

the area's features be essential to conservation, the area itself must be essential.").

In sum, we know from the ESA's text, drafting history, and precedent that an unoccupied critical habitat designation was intended to be *different* from and *more demanding* than an occupied critical habitat designation.

Against this backdrop, the panel majority misconstrue the statute and create a conflict with *all* relevant precedent. First, the panel majority read the word "areas" out of the definition of unoccupied critical habitat—"specific areas . . . [that] are essential for the conservation of the species." 16 U.S.C. § 1532(5)(A)(ii). The majority conclude that if *one feature* essential to a species' conservation is present in a specific area, then that specific area is "essential" for the conservation of the species. *Markle Interests*, 827 F.3d at 472 n.20. Congress, however, addressed *features* only with respect to occupied habitat. *See* 16 U.S.C. § 1532(5)(A)(i). With respect to unoccupied habitat, Congress adopted the far more expansive term "area." The panel majority's test—the existence of one essential feature renders the area on which the feature exists essential to a species' conservation—collapses the definitions together by smuggling "feature" into the definition of unoccupied critical habitat.

Second, the panel majority's statutory interpretation not only disserves the Congressional purpose and relevant precedent—it is the opposite of what Congress declared. The majority say in one breath that proper designation of *occupied* critical habitat requires the existence of *all* physical and biological features essential to a species' conservation, but in the next breath they say that proper designation of

unoccupied critical habitat requires only the existence of a single such feature. *See Markle Interests*, 827 F.3d at 468, 472 n.20. This kind of misinterpretation is, frankly, execrable, and contrary to the Supreme Court's Scalia-inspired and rather consistent adoption of careful textualist statutory exposition. (As Justice Kagan has recently declared, "We are all textualists now.")

Perhaps the most troubling aspect of this interpretive issue is that the panel majority refused to address it. The landowners argued in their principal and reply briefs that by statute, the critical habitat designation for unoccupied areas is more onerous than for occupied areas, and the *amici* dedicated their first argument to this point. Despite these forceful presentations, the panel majority still did not address the problem. Understandably, both the landowners and the 15 States reurge the question of statutory interpretation in rehearing petitions. For purposes of fundamental fairness and giving due consideration to the landowners' argument, the landowners deserve the answer they have not yet been given.

B. There Are No Limiting Principles in the Panel Opinion

But even if we, too, ignored that according to the statute, unoccupied critical habitat must be defined more narrowly, substantial problems would remain. In particular, if critical habitat designation of unoccupied areas depends only on the existence of one feature essential to a species' conservation, then, as Judge Owen aptly points out, the Service has free rein to regulate any land that contains any single feature essential to some species' conservation. The panel majority appear to recognize this serious con-

cern and respond by proffering a few limiting principles, but none of them is effective.

1. An Inadequacy Determination

The panel majority initially emphasize that "the Service had to find that the species's occupied habitat was inadequate before it could even consider designating unoccupied habitat as critical." *Markle Interests*, 827 F.3d at 470. Accordingly, this inadequacy requirement "provided a limit to the term 'essential' as it relates to unoccupied areas." *Id. See* 50 C.F.R. § 424.12(e) (2012) ("The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to its present range would be inadequate to ensure the conservation of the species."). This is true, but misleading.

What the majority opinion does not acknowledge is that as of March 14, 2016, the Service intentionally eliminated the inadequacy requirement from its regulations. *See* Implementing Changes to the Regulations for Designating Critical Habitat, 81 Fed. Reg. 7414, 7434 (Feb. 11, 2016) (codified at 50 C.F.R. § 424.12 (2016)). The Service found that requirement "unnecessary and unintentionally limiting." *Id.* Whatever limiting effect the inadequacy requirement may have had in *this* case, that effect no longer remains.

2. Future "Undesignation" of Critical Habitat

A second alleged limiting principle is that "the ESA limits critical-habitat designations on the back end as well, because successful conservation through critical-habitat designation ultimately works towards undesignation." *Markle Interests*, 827 F.3d at 472

n.21. In other words, it is perfectly permissible for the Service to designate areas unoccupied (and not capable of being occupied) by a species as critical habitat because it is possible the areas may sometime thereafter be "undesignated."

That reasoning essentially approves the Service's strong-arming private landowners into a catch-22. With their land saddled by a critical-habitat designation, private landowners have two choices: (1) refuse to cooperate with federal authorities but suffer the consequences by not being allowed to develop their land when federal permits are required, or (2) acquiesce in federal activity on their land to further the Service's interests. That it is theoretically possible for the critical habitat designation to be removed sometime in the future simply ignores the landowners' core concern that Unit 1 should have never been designated as critical habitat *in the first place*. This proposed limiting principle limits only the landowners and utterly misses the point.

3. "Scientific Consensus As to the Presence and Rarity of a Critical (and Difficult to Reproduce) Feature"

The panel majority proffer "rarity" as their third limiting principle. The panel majority "hold[ ] only" that property unoccupied by and unsuitable for the species may nevertheless be designated as critical habitat where there exists "a scientific consensus as to the presence and rarity of a critical (and difficult to reproduce) feature" that is "essential for the conservation of the dusky gopher frog." *Markle Interests*, 827 F.3d at 471. The panel majority insist that they create no "generalized [one-feature] rule" and focus only on the facts "*in this case*" which concern a critical "rare" feature. *Id.* at 472 n.20. This attempt to ar-

ticulate a limiting principle is ungrounded and illusory.

To begin with, the roots of this limiting principle are dubious. If this were truly a limiting principle, one would expect it to play an important role in the panel majority's analysis. Yet the words "rare" and "rarity" appear only five times in the panel majority opinion. Even that number is deceptive because one of the appearances is in the sentence quoted above that claims rarity as a limiting principle,[12] and the remaining four appearances merely reference the Service's statements[13]—leaving zero instances where the panel majority expressly builds its analysis on "rarity." Limiting principles should arise not from factual recitations, but instead from considered, original analysis of how a decision turns on the presence and absence of these facts. Therefore, without any analysis as to how a feature's rarity is critical to the panel majority's holding (and how lack of rarity would have made a difference), it is unclear how the scope of this opinion could be limited to cases involving rare, difficult-to-reproduce features.

This purported limiting principle is more dubious still. For all of the panel majority's dismissals of the

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[12] *Markle Interests*, 827 F.3d at 471.

[13] *Id.* at 466 ("[The Service] explained it prioritized ephemeral ponds because of their rarity and great importance for breeding, and because they are very difficult to replicate artificially."); *id.* (quoting the Service's description of the ponds as "rare" and "a limiting factor in dusky gopher frog recovery"); *id.* at 467 (quoting the Service's conclusion that Unit 1 provides "[b]reeding habitat for the dusky gopher frog in a landscape where the rarity of that habitat is a primary threat to the species[.]"); *id.* at 472 n.20 (referring to the Service's "summarizing [of] the scientific consensus [on] the rarity of" the ponds).

landowners' and Judge Owen's arguments for their alleged lack of a textual basis in the ESA,[14] one would expect to find the panel majority's limiting principle grounded in the ESA's text. Wrong again. As with the word "feature," the words "consensus," "rare," "rarity," "difficult," and "reproduce" appear nowhere in the unoccupied critical habitat definition. *See* 16 U.S.C. § 1532(5)(A)(ii). One must question the validity of a purported limiting principle that is unmoored from the ESA's text.

But even if we were to assume these threshold problems do not exist, the panel majority's limiting principle would still be illusory. When is a necessary feature rare *enough*? When is a necessary feature difficult *enough* to reproduce? What is a sufficient "scientific consensus"? Judges are ill-suited to decide such questions, especially when they arise from a test not rooted in statutory text. So long as the Service claims "scientific expertise" and offers "scientific support" using "the best scientific data available," *Markle Interests*, 827 F.3d at 472 (quoting 16 U.S.C.

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[14] *See, e.g.*, *id.* at 468 ("The statute does not support this argument. There is no habitability requirement in the text of the ESA or the implementing regulations."); *id.* ("The Landowners' proposed extra-textual limit on the designation of unoccupied land—habitability—effectively conflates the standard for designating *unoccupied* land with the standard for designating *occupied* land."); *id.* ("Thus, the plain text of the ESA does not require Unit 1 to be habitable."); *id.* at 469 ("Like their proposed habitability requirement, the Landowners' proposed temporal requirement . . . also lacks legal support and is undermined by the ESA's text."); *id.* at 470 ("The Landowners' focus on private-party cooperation as part of the definition of 'essential' finds no support in the text of the ESA."); *id.* at 470 n.17 ("We find no basis in the text of the statute for the 'reasonable probability' test introduced by the dissent. . .").

§ 1533(b)(2)), it is easy to predict that judges will, like the panel majority, almost always defer to the Service's decisions. *See, e.g.*, *Medina Cty. Envtl. Action Ass'n v. Surface Transp. Bd.*, 602 F.3d 687, 699 (5th Cir. 2010) ("Where an agency's particular technical expertise is involved, we are at our most deferential in reviewing the agency's findings."). This limiting principle is likely nothing more than a hollow promise—a mirage of protection for landowners, but in reality a judicial rubber stamp on agency action.

Without some limiting principle that cabins the panel majority's one-feature-suffices standard, the Service's critical habitat designation power is virtually limitless. Here is a sample of physical and biological features that the Service has deemed essential to species' conservation: "[i]ndividual trees with potential nesting platforms,"[15] "forested areas within 0.5 mile (0.8 kilometer) of individual trees with potential nesting platforms,"[16] "aquatic breeding habitat,"[17] "upland areas,"[18] and "[a] natural light regime within the coastal dune ecosystem."[19] These are just a few of a myriad of commonplace "essential physical and biological features" that the Service routinely

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[15] Determination of Critical Habitat for the Marbled Murrelet, 81 Fed. Reg. 51,348, 51,356 (Aug. 4, 2016).

[16] *Id.*

[17] Designation of Critical Habitat for the Sierra Nevada Yellow-Legged Frog, the Northern DPS of the Mountain Yellow-Legged Frog, and the Yosemite Toad, 81 Fed. Reg. 59,046, 59,102 (Aug. 26, 2016).

[18] *Id.*

[19] Designation of Critical Habitat for the Perdido Key Beach Mouse, Choctawhatchee Beach Mouse, and St. Andrew Beach Mouse, 71 Fed. Reg. 60,238, 60,249 (Oct. 16, 2006).

lists in its critical habitat designations. With no real limiting principle to the panel majority's one-feature-suffices standard, there is no obstacle to the Service's claiming critical habitat wherever "forested areas" or "a natural light regime" exist. According to the majority opinion, the Service has the authority to designate as critical habitat any land unoccupied by and incapable of being occupied by a species simply because it contains one of those features.

In the end, none of the panel majority's proffered limiting principles is persuasive, and its opinion threatens to expand the Service's power in an "unprecedented and sweeping" way. *See Markle Interests*, 827 F.3d at 481 (Owen, J., dissenting). Paraphrasing Justice Scalia, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

IV. The Panel Majority Play Havoc with Administrative Law by Declaring the Service's Decision Not to Exclude Unit 1 Non–Judicially Reviewable

Agency action is presumptively judicially reviewable. Justice Kagan, writing for a unanimous Court two years ago, made precisely this point when she noted that "this Court has [ ] long applied a strong presumption favoring judicial review of administrative action." *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1653 (2015). The panel majority jettisoned that rule to find unreviewable the Service's decision not to exclude Unit 1 from critical habitat despite serious potential economic consequences. More confounding still, the panel majority contradict the Supreme Court's statement in *Bennett v. Spear*, 520 U.S. 154 (1997) that the Service's ultimate decision is review-

able for abuse of discretion. After providing background, I explain these problems.

A. Background

Before the Service may designate critical habitat, the Service is required to consider various impacts that would flow from critical-habitat designation:

> The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. *The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.*

16 U.S.C. § 1533(b)(2) (emphasis added).

In this case, the Service commissioned a report to fulfill its duty to consider economic impact.[20] Over the first 59 pages, the report explained its methodology and the serious potential economic impacts of

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[20] The report is available here: https://www.regulations.gov/document?D=FWS-R4-ES-2010-0024-0157. The page numbers cited above refer to the page numbers of the PDF.

critical-habitat designation. Report at 1–59. One shocking fact is that the landowners could suffer up to $34 million in economic impact. Report at 59. Another shocking fact is that there is virtually nothing on the other side of the economic ledger. The Final Designation emphasized that the report "discusses the potential economic benefits associated with the designation of critical habitat." Final Designation, 77 Fed. Reg. at 35,141. That discussion appears on all of about two pages in the report, and speculates that such benefits may come from "individuals' willingness to pay to protect endangered species" and "the public [ ] hold[ing] a value for habitat conservation." Report at 60–62. Other benefits, the report claimed, might include "open space," "[s]ocial welfare gains [ ] associated with enhanced aesthetic quality of habitat," and "[d]ecreased development." Report at 61. Given the weakness and speculative nature of these purported benefits, it is unsurprising that this discussion was relegated to the very end of the report. The report ends—abruptly with no weighing or comparison of costs or benefits, and no discussion of how designating Unit 1 as critical habitat would benefit the dusky gopher frog.

The Service recognized the problems in the report and attempted to remedy them in the Final Designation, as it explained that "the direct benefits of the designation [of critical habitat for the dusky gopher frog] are best expressed in biological terms." Final Designation, 77 Fed. Reg. at 35,141. The Service continued, "Our economic analysis did not identify any disproportionate costs that are likely to result from the designation. Consequently, the Secretary is not exercising his discretion to exclude any areas from this designation of critical habitat for the dusky gopher frog based on economic impacts." *Id.*

The landowners perceived two problems with those statements in the Final Designation. First, the Service said the direct benefits of designation are best expressed in biological terms, but the Service never explained "in biological terms" how designation of Unit 1 as critical habitat would directly benefit the dusky gopher frog. Second, the Service said there were no "disproportionate costs," but the Service never performed a comparison of the relevant costs. Yet the Service "[c]onsequently" based its decision not to exclude Unit 1 from critical habitat on those two statements. Final Designation, 77 Fed. Reg. at 35,141. "At the very least," the landowners thus argued, "a reviewing court could consider whether the Service 'offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise'" (quoting *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42 (1983)). The landowners summarized their argument on the Service's failure to provide adequate reasons as follows: "Because the Service failed to articulate reasons for its decision, the rule must be vacated as to Unit 1. As currently framed, the decision is plainly arbitrary."

The panel majority disposed of this issue by holding that "the Service's bottom-line conclusion not to exclude Unit 1 on the basis of [ ] economic impact" "is not reviewable." *Markle Interests*, 827 F.3d at 475. The panel majority reasoned that the ESA is "silent on a standard for reviewing the Service's decision to *not* exclude an area," and thus "[t]hat decision is committed to the agency's discretion and is not reviewable." *Id.* at 474.

B. Problems with the Panel Majority Opinion

The panel majority falter at the starting line by never recognizing or applying the—as Justice Kagan put it—"strong presumption favoring judicial review of administrative action." *Mach Mining, LLC*, 135 S. Ct. at 1653. This presumption "is not easily overcome," *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 235 (5th Cir. 2015), and it is certainly not overcome by the panel majority's nod to *Heckler v. Chaney*, 470 U.S. 821 (1985), which concerned the unique (and dissimilar) context of enforcement discretion.[21]

But more troubling still, the panel majority's holding places this court in tension with the Supreme Court, which has previously stated that the Service's ultimate decision is reviewable for abuse of discretion. In *Bennett v. Spear*, 520 U.S. 154, 172 (1997), the Court held that the Service's consideration of economic impact of critical-habitat designation is mandatory, not discretionary. The Service had based its argument in favor of discretion on the

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[21] The presumption is also not overcome by the panel majority's protests that there are no manageable standards by which we can review the Service's decision not to exclude Unit 1. After all, the Service's decision *not to exclude* Unit 1 is really part and parcel of the Service's decision *to include* Unit 1, and no one disputes—or can dispute—that the Service's decision to include Unit 1 as critical habitat is judicially reviewable. The entire provision should be interpreted holistically. The panel majority say the ESA "is silent on a standard for reviewing the Service's decision to *not* exclude an area," but there is plainly a standard for reviewing the Service's decision to *include* an area. It mandates consideration of economic impacts, national security impacts, and any other relevant impacts of critical-habitat designation. *See* 16 U.S.C. § 1533(b)(2). And the decision to exclude an area is based on cost-benefit analysis. *Id.*

ESA's permissive language: "[t]he Secretary *may* exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat." *Id.* (quoting 16 U.S.C. § 1533(b)(2)). The Court rejected that argument, stating that "the fact that the Secretary's ultimate decision is reviewable only for abuse of discretion does not alter the categorical *requirement* that, in arriving at his decision, he 'tak[e] into consideration the economic impact and any other relevant impact,' and use 'the best scientific data available.'" *Id.* (quoting 16 U.S.C. § 1533(b)(2)). In other words, regardless whether the Service properly considers economic impact, the Service's ultimate decision regarding designation of critical habitat is reviewable for abuse of discretion.

The panel majority opinion clashes with *Bennett*'s holding that the Service's "ultimate decision" is reviewable for abuse of discretion. Oddly (given the panel majority's numerous references to *Bennett*, *see Markle Interests*, 827 F.3d at 460, 462, 464, 474), the panel majority never confront, much less distinguish, *Bennett*. But it is telling that intervenors on the side of the Service—the Center for Biological Diversity and the Gulf Restoration Network—acknowledged, citing *Bennett*, that "[e]ven if the decision not to exclude could be reviewed, FWS's decision can be reversed only if it abused its discretion." The panel majority never engaged *Bennett*'s clear signal that the Service's decision is reviewable.

The landowners maintain that the Service's decision to include Unit 1 was procedurally flawed, and, pursuant to the presumption of judicial review and *Bennett*, that decision is judicially reviewable, if only under the narrow arbitrary and capricious standard.

The panel majority's refusal to conduct judicial review is insupportable and an abdication of our responsibility to oversee, according to the APA, agency action.

V. Conclusion

Each of the three issues highlighted in this dissent illustrates the importance of further review. The panel majority's non-textual interpretations of the ESA misconstrue Congress's efforts to prescribe limits on the designation of endangered species' habitats and encourage aggressive, tenuously based interference with property rights. The majority's disregard for the presumption of judicial review, effectuated in the ESA's text and by *Bennett*, deprives states and private landowners of needful protection by the federal courts.

For these reasons, I respectfully dissent.

APPENDIX D

16 U.S.C. § 1532. Definitions

For the purposes of this chapter—

* * * * *

(5)(A) The term "critical habitat" for a threatened or endangered species means—

(i) the specific areas within the geographical area occupied by the species, at the time it is listed in accordance with the provisions of section 1533 of this title, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection; and

(ii) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 1533 of this title, upon a determination by the Secretary that such areas are essential for the conservation of the species.

(B) Critical habitat may be established for those species now listed as threatened or endangered species for which no critical habitat has heretofore been established as set forth in subparagraph (A) of this paragraph.

(C) Except in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species.

* * * * *

16 U.S.C. § 1533. Determination of endangered species and threatened species

Effective: November 24, 2003

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(3)(A) The Secretary, by regulation promulgated in accordance with subsection (b) of this section and to the maximum extent prudent and determinable—

(i) shall, concurrently with making a determination under paragraph (1) that a species is an endangered species or a threatened species, designate any habitat of such species which is then considered to be critical habitat; and

(ii) may, from time-to-time thereafter as appropriate, revise such designation.

* * * * *

(b) Basis for determinations

(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) of this section on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat. The Secretary may exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned.

* * * * *

APPENDIX E

50 C.F.R. § 424.12 Criteria for designating critical habitat.

Effective: May 1, 2012

(a) Critical habitat shall be specified to the maximum extent prudent and determinable at the time a species is proposed for listing. If designation of critical habitat is not prudent or if critical habitat is not determinable, the reasons for not designating critical habitat will be stated in the publication of proposed and final rules listing a species. A final designation of critical habitat shall be made on the basis of the best scientific data available, after taking into consideration the probable economic and other impacts of making such a designation in accordance with § 424.19.

(1) A designation of critical habitat is not prudent when one or both of the following situations exist:

(i) The species is threatened by taking or other human activity, and identification of critical habitat can be expected to increase the degree of such threat to the species, or

(ii) Such designation of critical habitat would not be beneficial to the species.

(2) Critical habitat is not determinable when one or both of the following situations exist:

(i) Information sufficient to perform required analyses of the impacts of the designation is lacking, or

(ii) The biological needs of the species are not sufficiently well known to permit identification of an area as critical habitat.

(b) In determining what areas are critical habitat, the Secretary shall consider those physical and biological features that are essential to the conservation of a given species and that may require special management considerations or protection. Such requirements include, but are not limited to the following:

(1) Space for individual and population growth, and for normal behavior;

(2) Food, water, air, light, minerals, or other nutritional or physiological requirements;

(3) Cover or shelter;

(4) Sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and generally;

(5) Habitats that are protected from disturbance or are representative of the historic geographical and ecological distributions of a species.

When considering the designation of critical habitat, the Secretary shall focus on the principal biological or physical constituent elements within the defined area that are essential to the conservation of the species. Known primary constituent elements shall be listed with the critical habitat description. Primary constituent elements may include, but are not limited to, the following: roost sites, nesting grounds, spawning sites, feeding sites, seasonal wetland or dryland, water quality or quantity, host species or plant pollinator, geological formation, vegetation type, tide, and specific soil types.

(c) Each critical habitat area will be shown on a map, with more-detailed information discussed in the preamble of the rulemaking documents published in the Federal Register and made available from the lead field office of the Service responsible for such designation. Textual information may be included for purposes of clarifying or refining the location and boundaries of each area or to explain the exclusion of sites (e.g., paved roads, buildings) within the mapped area. Each area will be referenced to the State(s), county(ies), or other local government units within which all or part of the critical habitat is located. Unless otherwise indicated within the critical habitat descriptions, the names of the State(s) and county(ies) are provided for informational purposes only and do not constitute the boundaries of the area. Ephemeral reference points (e.g., trees, sand bars) shall not be used in any textual description used to clarify or refine the boundaries of critical habitat.

(d) When several habitats, each satisfying the requirements for designation as critical habitat, are located in proximity to one another, an inclusive area may be designated as critical habitat.

Example: Several dozen or more small ponds, lakes, and springs are found in a small local area. The entire area could be designated critical habitat if it were concluded that the upland areas were essential to the conservation of an aquatic species located in the ponds and lakes.

(e) The Secretary shall designate as critical habitat areas outside the geographical area presently occupied by a species only when a designation limited to

its present range would be inadequate to ensure the conservation of the species.

(f) Critical habitat may be designated for those species listed as threatened or endangered but for which no critical habitat has been previously designated.

(g) Existing critical habitat may be revised according to procedures in this section as new data become available to the Secretary.

(h) Critical habitat shall not be designated within foreign countries or in other areas outside of United States jurisdiction.

* * * * *

§ 424.19 Final rules—impact analysis of critical habitat.

The Secretary shall identify any significant activities that would either affect an area considered for designation as critical habitat or be likely to be affected by the designation, and shall, after proposing designation of such an area, consider the probable economic and other impacts of the designation upon proposed or ongoing activities. The Secretary may exclude any portion of such an area from the critical habitat if the benefits of such exclusion outweigh the benefits of specifying the area as part of the critical habitat. The Secretary shall not exclude any such area if, based on the best scientific and commercial data available, he determines that the failure to designate that area as critical habitat will result in the extinction of the species concerned.

Nos. 17-71, 17-74

IN THE SUPREME COURT OF THE UNITED STATES

WEYERHAEUSER COMPANY, PETITIONER

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

MARKLE INTERESTS, L.L.C., ET AL., PETITIONERS

v.

UNITED STATES FISH & WILDLIFE SERVICE, ET AL.

ON PETITIONS FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Counsel of Record

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To: Daniel Jorjani[daniel.jorjani@sol.doi.gov]
From: Navaro, Ann
Sent: 2017-10-12T12:33:45-04:00
Importance: Normal
Subject: Fwd: Draft Social Cost of Carbon Memo
Received: 2017-10-12T12:34:17-04:00
2017.09.25 CLEAN Draft Social Cost of Carbon Memo.docx
2017.09.25 Draft Social Cost of Carbon Memo (DMR +RMR+AN+Alaska+DLR) (1).docx

Ann Navaro
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202-510-4271 (cell)

---------- Forwarded message ----------
From: **Haugrud, Kevin** <jack.haugrud@sol.doi.gov>
Date: Thu, Sep 28, 2017 at 3:38 PM
Subject: Fwd: Draft Social Cost of Carbon Memo
To: Ann Navaro <ann.navaro@sol.doi.gov>

---------- Forwarded message ----------
From: **Hawbecker, Karen** <karen.hawbecker@sol.doi.gov>
Date: Mon, Sep 25, 2017 at 4:23 PM
Subject: Draft Social Cost of Carbon Memo
To: Jack Haugrud <jack.haugrud@sol.doi.gov>
Cc: "Bachtel, Lauren" <lauren.bachtel@sol.doi.gov>, Richard McNeer <Richard.McNeer@sol.doi.gov>

Jack, I've attached both a clean draft of the social cost of carbon memo and the most recent redline version that shows the combined edits and comments from DMR (Lauren, Richard, Pedro, Stephen, me), DLR (Aaron Moody, Greg Russell, Vonnie Larvie), RMR (Phil Lowe, Kristen Guerriero), Alaska Region (Mike Gieryic). Let us know if you need anything further from us on this. Thanks. --Karen

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INTERNAL SOL DRAFT

MEMORANDUM
FOR THE DEPUTY SECRETARY

DATE: September xx, 2017

TO:

THROUGH:

FROM:

SUBJECT: Social Cost of Carbon (SCC) Case Law and Legal Issues

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I. Background

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LB: Done.

Commented [BL22]: SRV: I haven't read the EA itself, but judging from the focus in the decision on the "substitution" argument, I'd have guessed that BLM's analysis didn't include the costs of carbon emissions because BLM concluded that there wasn't a difference in GHG emissions between the proposed action and the no action. If I'm right, is it a fair summary to present this as two separate flaws (i.e., failure to quantify socioeconomic costs and the illogical substitution argument) or is it really all about the substitution argument?

LB: It could be treated as two, but the opinion reads as if the court treated it as one.

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INTERNAL SOL DRAFT

MEMORANDUM
FOR THE DEPUTY SECRETARY

DATE: September xx, 2017

TO:

THROUGH:

FROM:

SUBJECT: Social Cost of Carbon (SCC) Case Law and Legal Issues

[redacted]
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I. Background

[redacted]
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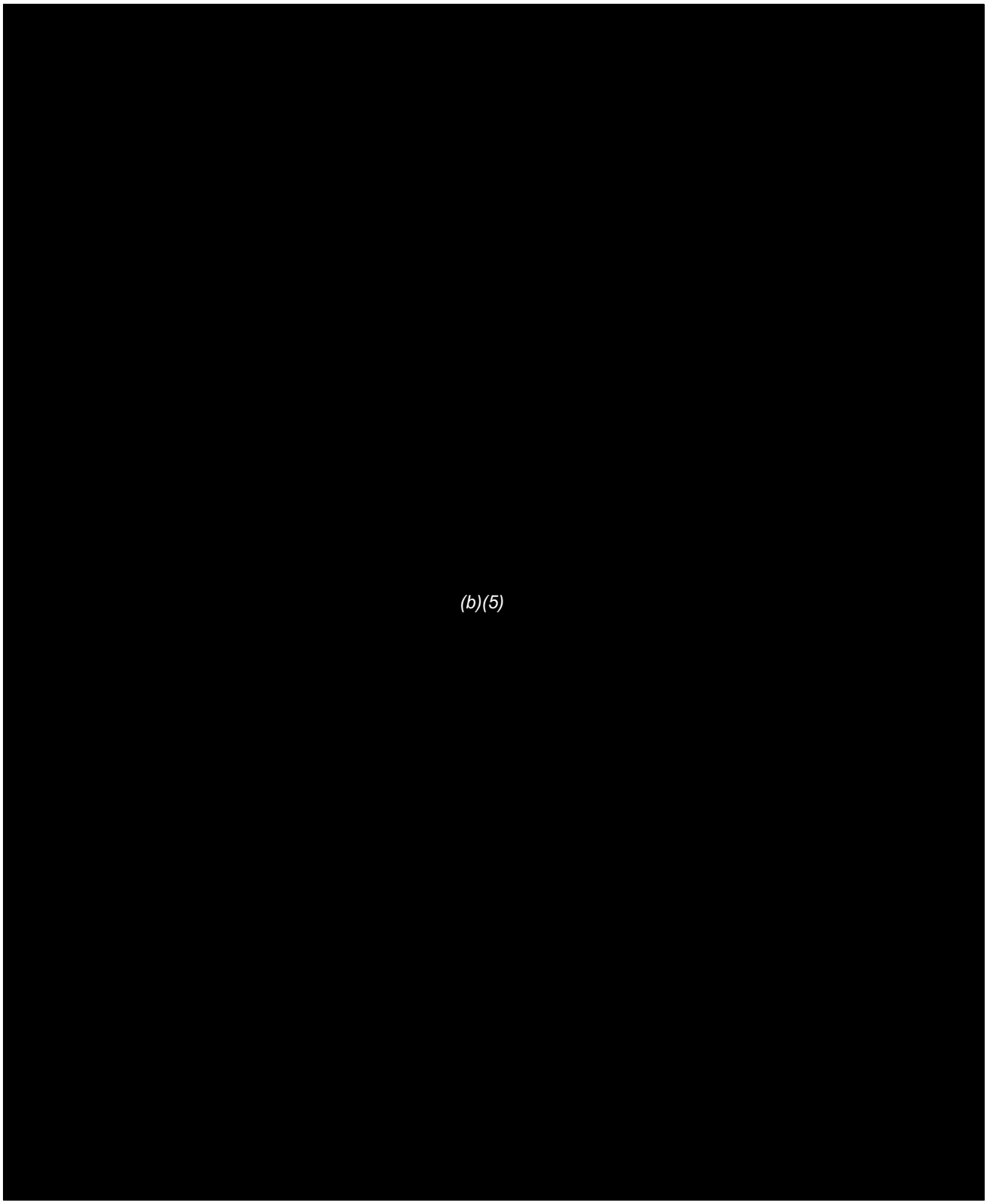
Attorney-Client Communications
DRAFT – DO NOT DISCLOSE



Attorney-Client Communications
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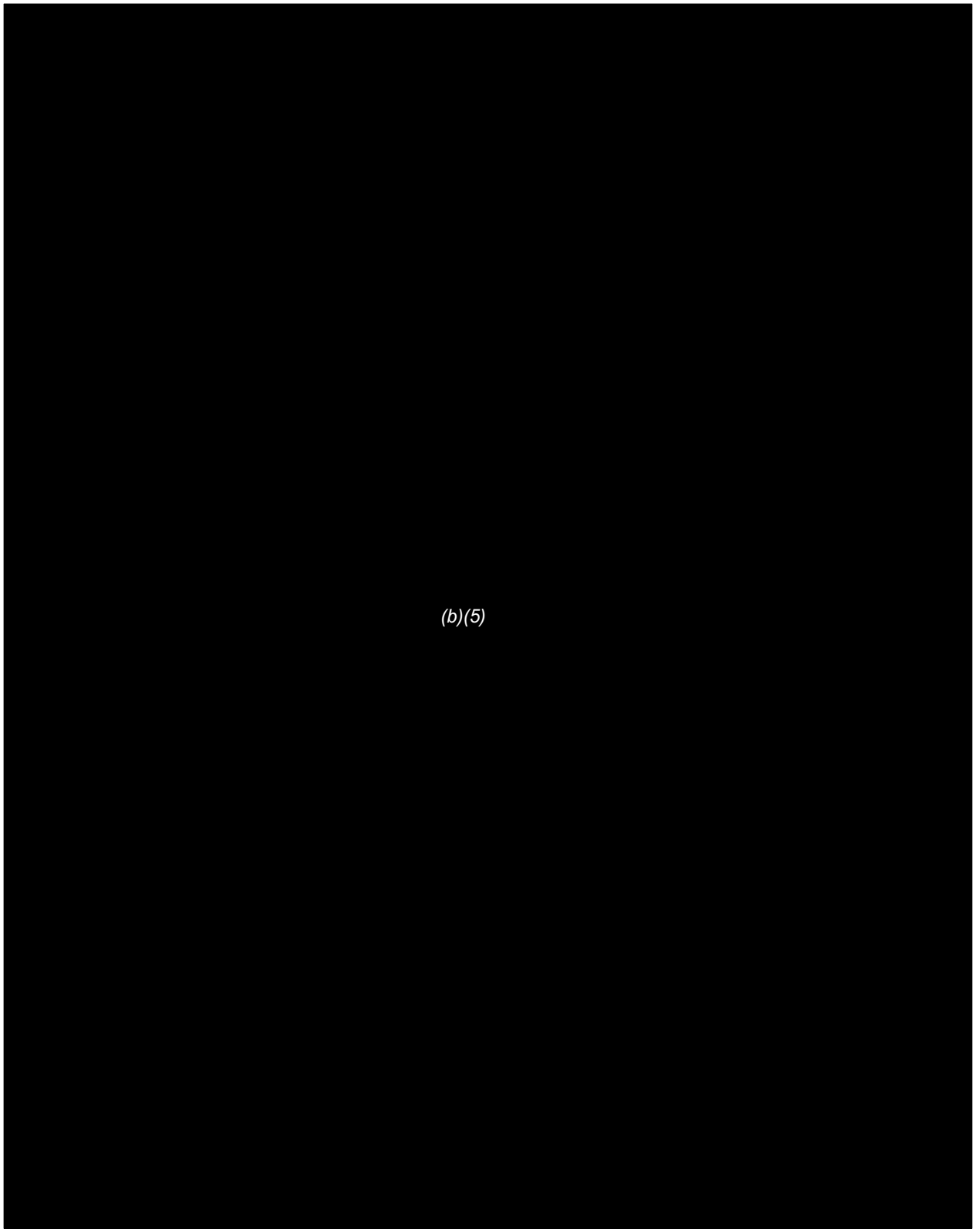

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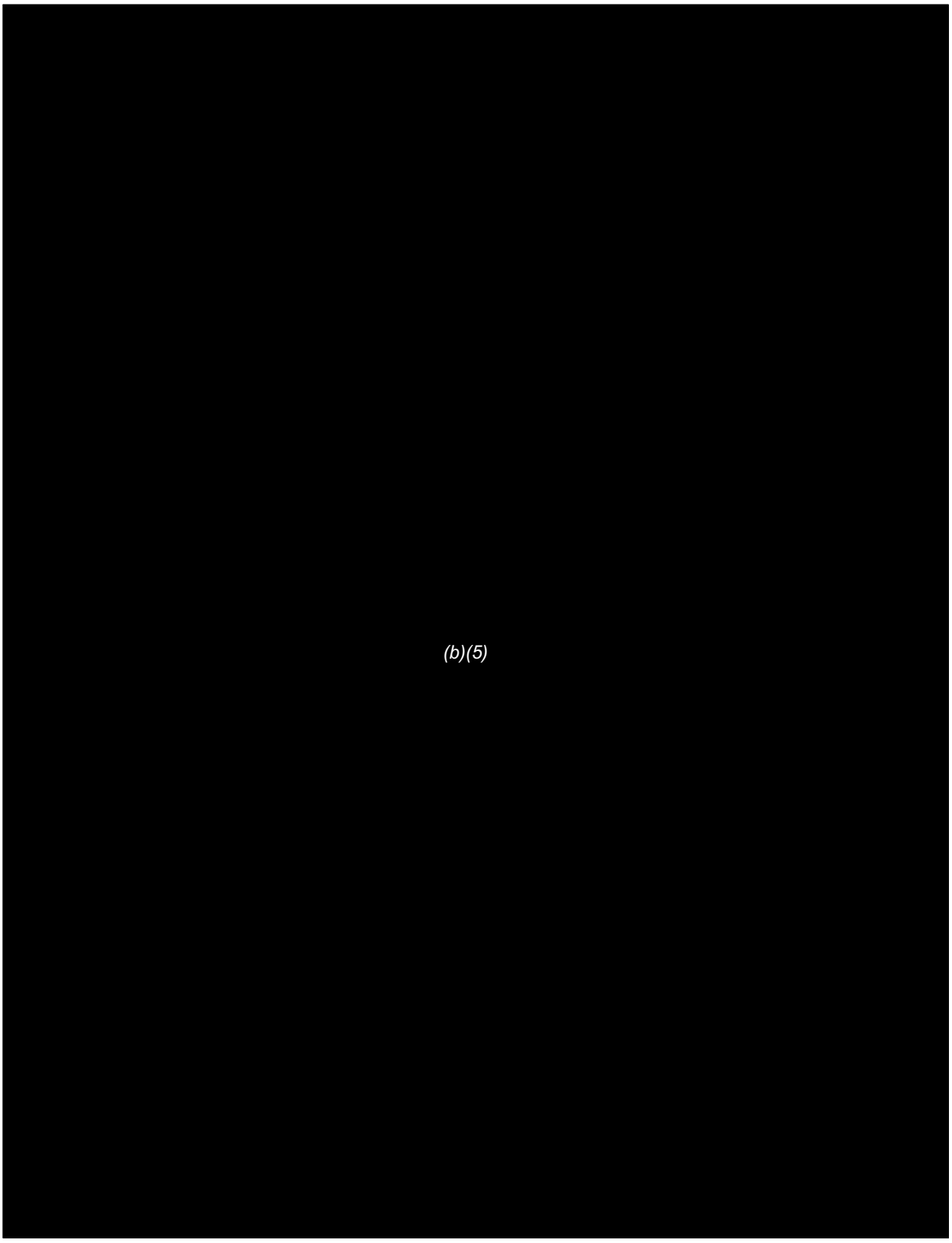

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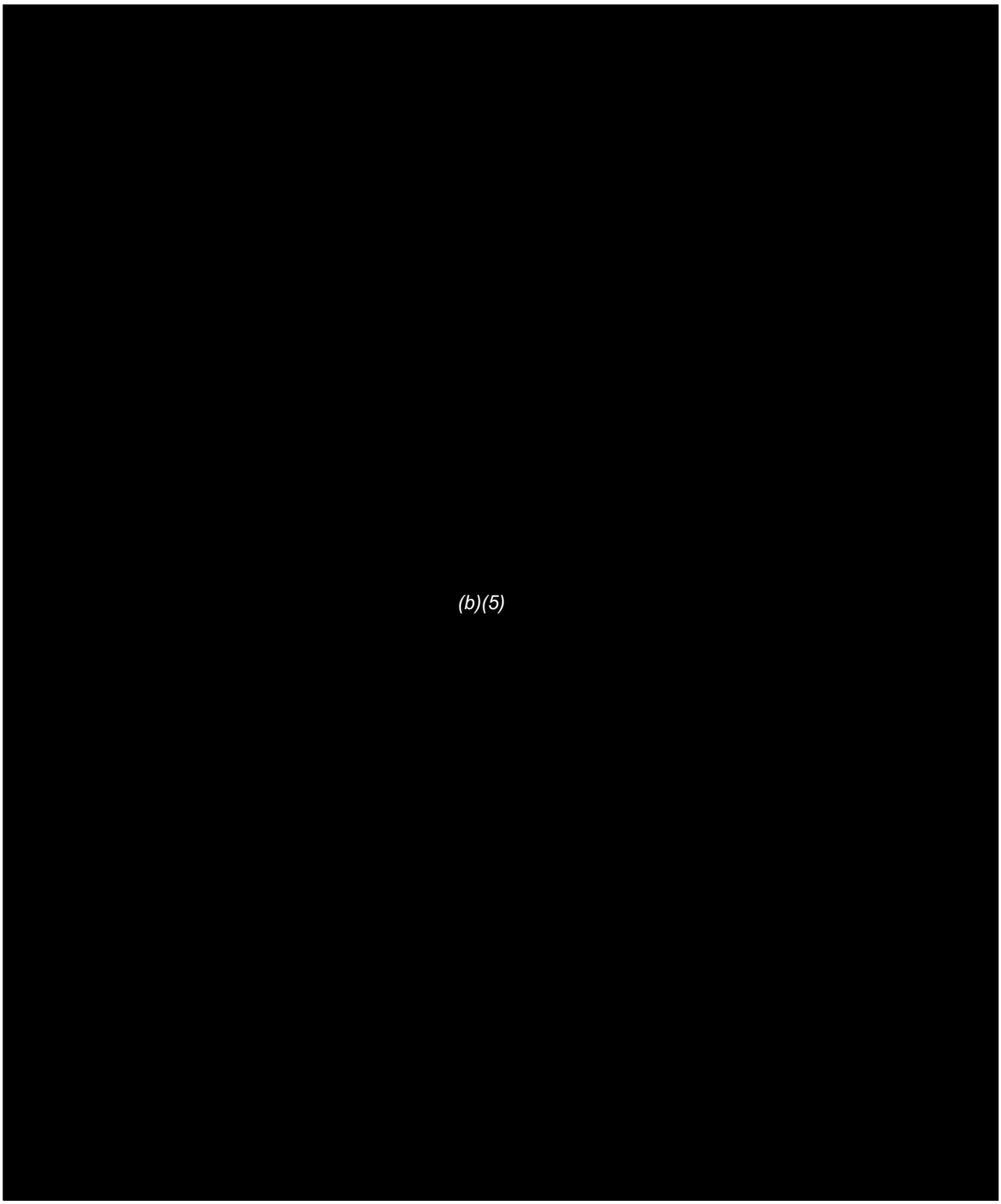

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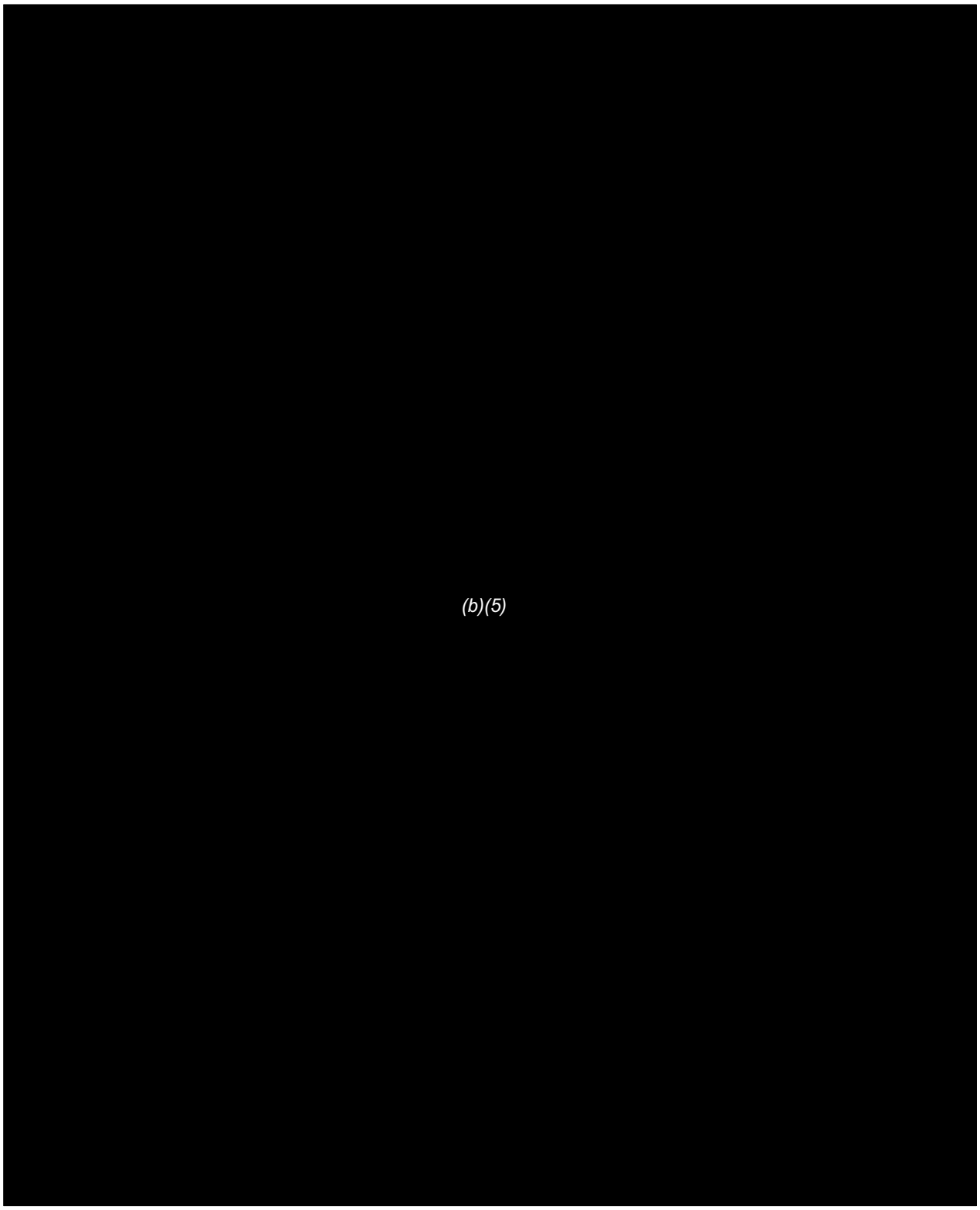

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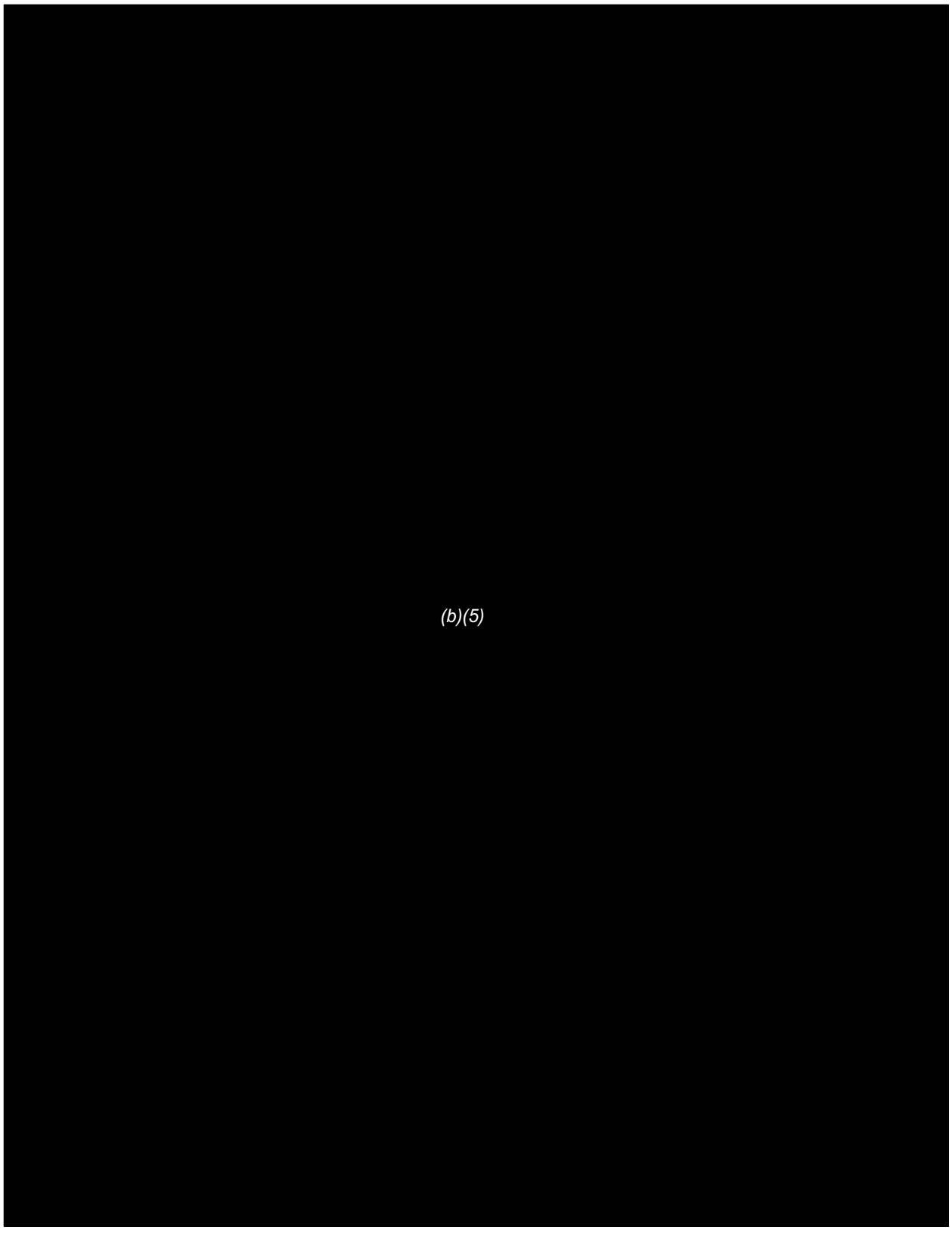

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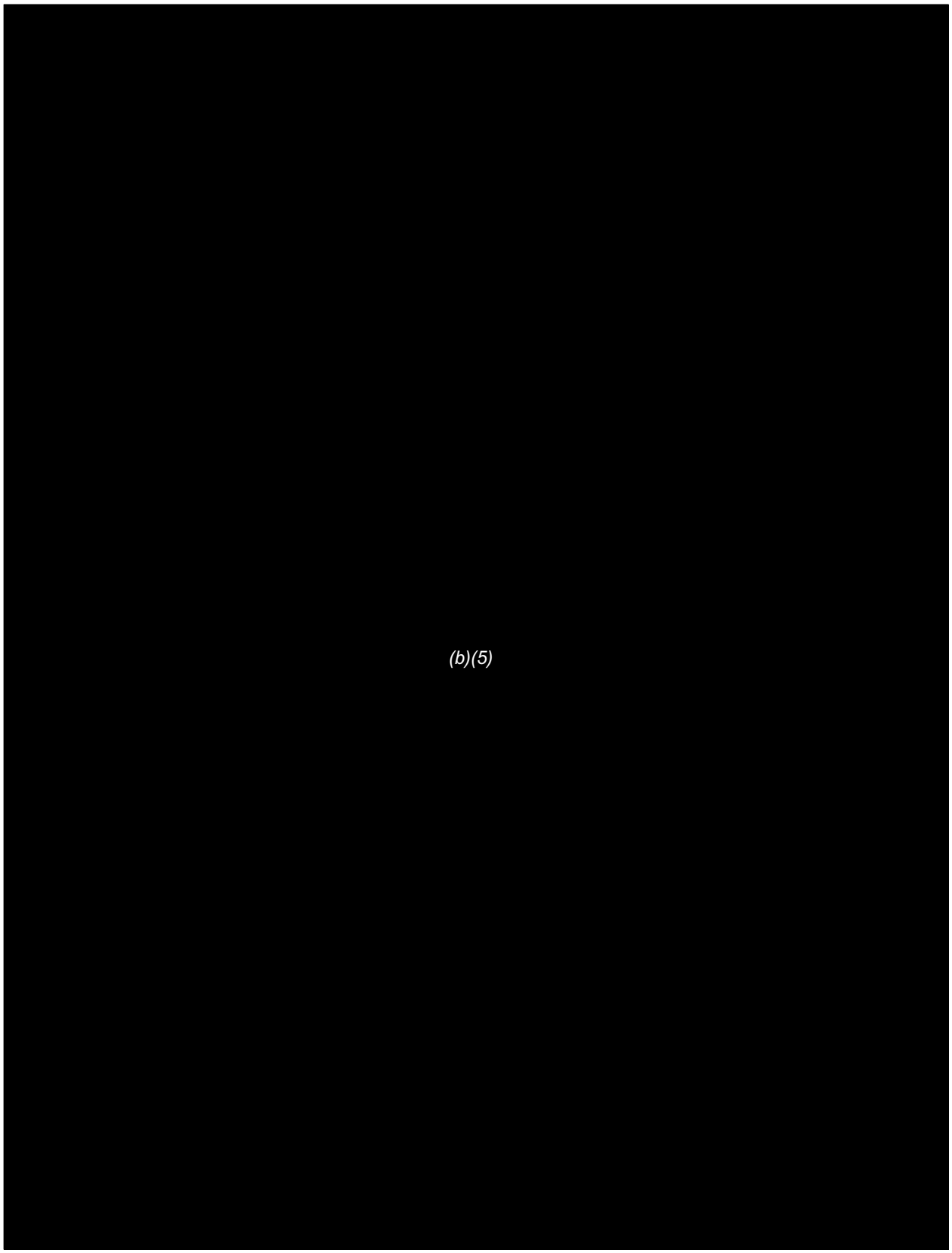

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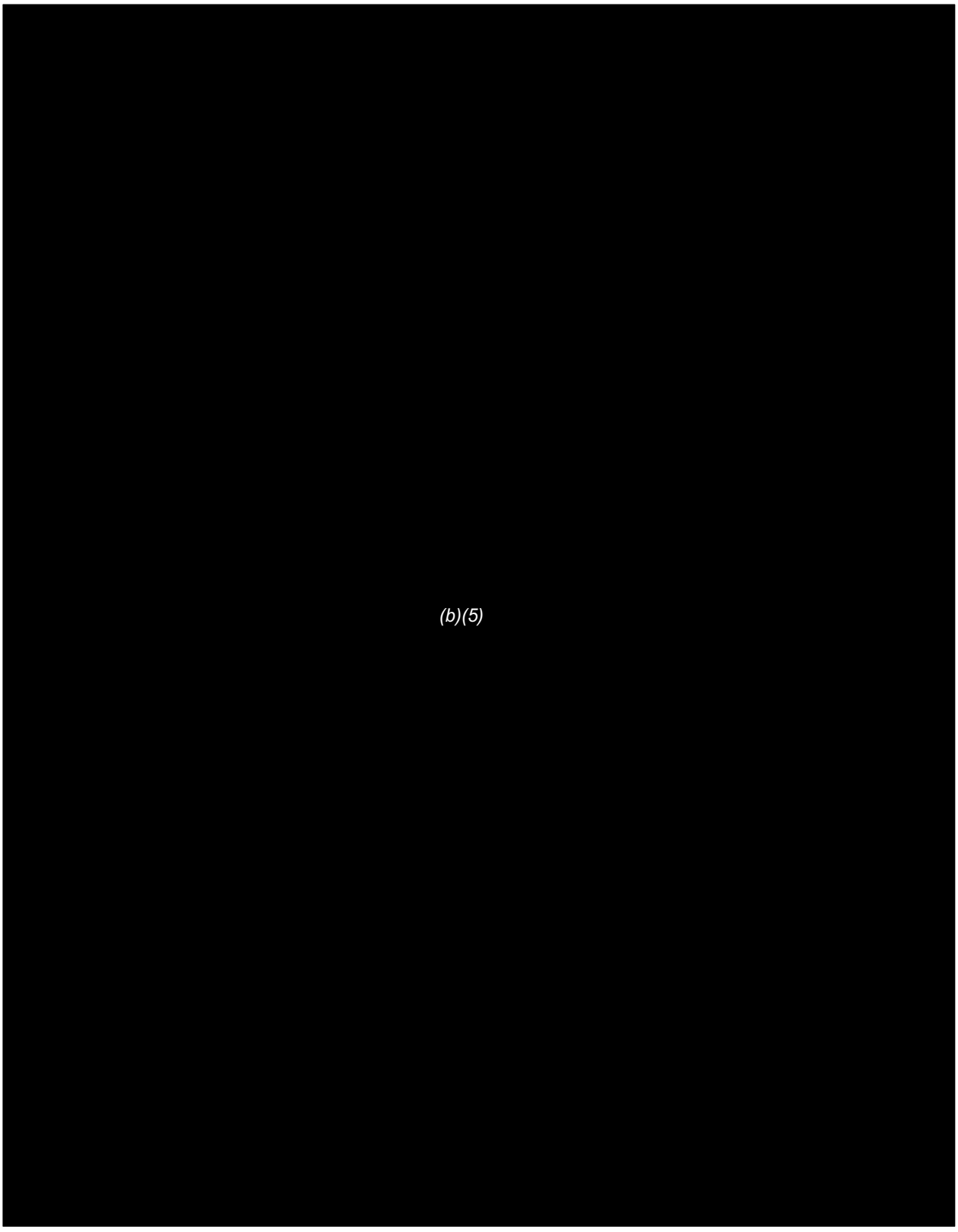

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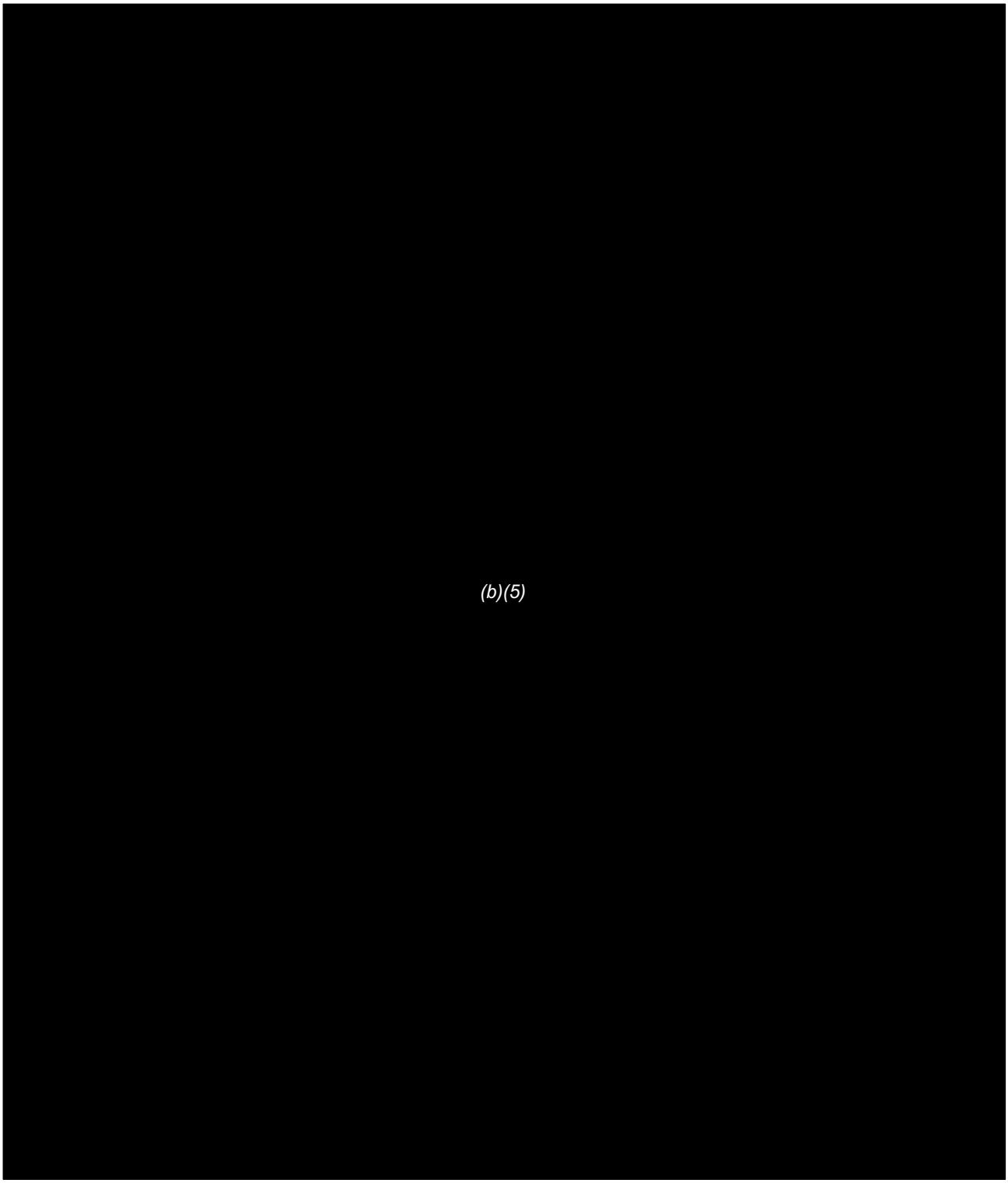

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